CASE STUDY: THE CUM-CUM AND CUM-EX SCHEMES

COFFERS D4.5
SEPTEMBER 2019

Duncan Wigan
Copenhagen Business School
The Cum-cum and Cum-Ex Schemes

Executive Summary

This COFFERS case study explores the biggest tax robbery in history. The Cum-Cum and Cum-Ex schemes cost European treasuries a combined sum over €50 billion. The case outlines a range of transaction types involved. These sit on a spectrum between the legal, which transgresses the spirit of the law, and the outright criminal. With a focus on Germany and Denmark, the case explores both the conditions of possibility for the trades prolonged persistence without regulatory intervention, and regulatory reactions to it. A key conclusion is the transactions themselves were not overly complex and indecipherable. Rather, elementary weaknesses in Europe’s and member state regulatory apparatus are at fault. Integration across financial and fiscal regulation, greater levels of international information exchange and cooperation, and higher levels of capacity in regulatory authorities are in consequence required. The Cum-Cum and Cum-Ex schemes also make the case for a pan-European economic crimes unit.

Introduction

The Cum-Cum and Cum-Ex scandals provide a rare glimpse into a largescale ‘tax-extraction market’ and the interface between financial market and tax regulation. The Cum-Cum and Cum-Ex transactions enabled perpetrators to claim and receive one or multiple tax dividend rebates when none was strictly due. ‘Tax extraction’ is the appropriation of fiscal resources using tax laws in both legal ways, that transgress the spirit of the law, and illegal ways, that break the law. The means of extraction is an adaptive ‘master plan’ incorporating a long transaction chain, multiple inter-linked corporate entities, a multitude of market actors, and the allocation specific tasks within the chain on the basis of jurisdictional location, divergent national rules governing share ownership and tax rebates, and organizational and professional expertise.

There is a sharp delineation of tasks within the chain. The tax extraction market blends and strategically integrates disparate fields of knowledge and professional expertise. This strategic integration and expertise stands in stark contrast to regulatory authorities. Regulatory traction
is hampered by insufficient cooperation both across and within borders. At the same time, information asymmetries between perpetrators and regulatory authorities are extenuated by decreasing capacity and expertise within authorities (on regulatory traction and information asymmetries in global wealth chains see Seabrooke and Wigan 2017). Expertise and strategically integration permitted perpetrators to exploit operational silo structures that are tasked with monitoring and enforcement. Organizational incoherence and incapacity is key to how the tax extraction schemes persisted over an extended period without decisive intervention from regulators.

In October 2018, news of the biggest tax fraud in history broke in Denmark and across much of Europe. The disclosure of the scandal came from the work of a consortium of investigative journalists in a large-scale European media collaboration coordinated by the German non-profit investigative reporting centre, CORRECTIV\(^1\). The concerted and integrated efforts of this consortium serve to highlight deficiencies hampering regulatory capacity. In the context of the COFFERS project, it is notable that the consortium is one of many examples, including the now infamous Panama Papers and Luxleaks, of cooperative journalistic work impacting dramatically on the tax landscape. Analysts have in consequence noted the rise and proliferation of what Oei and Ring call ‘leak-driven law’ (2018; Christensen and Hearson 2019). The consortiums of investigative journalists providing these leaks are in COFFERS’ terms, ‘Darwinian Devils’; radical elements that enter a sedimented social ecosystem and catalyze its disturbance and rearrangement. International taxation until the global financial crisis was best characterized as a highly sedimented system, with experts schooled in its esoteric knowledge base and socialized in its norms steering developments (Picciotto 2015; Seabrooke and Wigan 2013). Events since the crisis have opened up this system to greater contestation and provided fertile ground for radical intervention. In the case here, the intervention of the consortium has led to prosecutions and legal change curtailing, although perhaps not eliminating, an established practice previously proceeding under the radar of authorities.

\(^1\) The resulting reportage and considerable information on the case is available on the website of CORRECTIV and can be accessed directly here: [https://cumex-files.com/en/](https://cumex-files.com/en/).
Long before the disclosure of the scandals, elements of the schemes were known to German authorities, with the schemes an ongoing concern for the German Bundestag from as early as 2007 (Bundestag 2017). While precursors of the Cum-Cum schemes have existed for several decades, there was an escalation in the use of these schemes in Germany from the early 2000s, and again following the global financial crisis in 2008. In Denmark, Cum-Ex deals were executed primarily from 2012 to 2015 against the backdrop of Germany closing loopholes in national law.

Due to non-disclosure by some national authorities and the only recent disclosure of the scandal, it is difficult to assess precisely how many countries have been targeted, and on what scale. However, the consortium of investigative journalists identified, and gathered evidence from, a number of the countries that have been victim to the fraud. On the basis of information in possession of the consortium, it is estimated that the Cum-Cum and Cum-Ex schemes have cost national treasuries more than €50 billion and have been on-going over the last 15 years in an escalating fashion (National Law Review 2019). Christoph Spengel, a tax expert at the University of Mannheim, calculated that German tax authorities lost almost €32 billion (US$ 36 billion) between 2001 and 2016. Spengel describes this as, ‘the biggest robbery in European history’ (Deutsche Welle 2018). In some cases, national authorities have made official statements on losses incurred. In others, the national scale of lost revenue is estimated from the forensic analysis of specific transactions and public records from tax authorities. The consortium estimates that up to 80 percent of the money lost arises from Cum-Cum transactions. At least 11 European countries have been targeted. A number of countries have been unwilling to make public the impact of the schemes in their jurisdictions. These countries include Sweden, Holland, Italy, Spain, Finland, France, USA, Canada, Japan, and Australia. Denmark and Germany have been most vocal on the Cum-Ex and Cum-Cum scandals.

There are multiple reasons why specific countries have been targeted. These include; the volume of business quoted on, and the liquidity of, the stock exchange, the efficiency and capacity of tax authorities, the day on which dividends are paid out, the time between the sale and settlement of share sales, mismatches within and between national financial and tax
regulation, interactions between different jurisdictions law, and whether the buyer of shares is considered to be the legal owner of the shares on the trade day or the settlement day.

Long term developments in financial markets provide the preconditions for the tax extraction market addressed here. Over four decades, European and global financial markets have expanded rapidly both in terms of size and scope. The liberalization of markets and the removal of national controls on capital flows has recast finance and the relationship between the financial sector and the nation state (Helleiner 1994; Ryner 2015). This process of liberalization, expansion and transcendence has been accompanied by accelerated innovation (Bryan and Rafferty 2006; Wigan 2009). Innovation in turn has led to the treatment of assets as de- and re-composable (Miller 1991) with the effect that finance trades ‘aspect of assets’ (Das 2005). As such, equity is treated as a bundle of rights, subject to decomposition. ‘Equity decoupling involves unbundling of economic, voting, and sometimes other rights customarily associated with shares, often in ways that may permit avoidance of disclosure and other obligations’ (Hu and Black 2008: 663). This established concept of capital in finance lays the groundwork for a shared epistemic culture in which the Cum-Ex and Cum-Cum trades are able to flourish. Not unrelatedly, the management of corporate form is embedded in the same episteme with the corporation ‘decentred’ (Desai 2008) and the unity of both the capital and the state no longer given. Capital confronts the state as disaggregated components or assets, engaging partially to optimize via ‘targeted touchdown’ (Biggins 2012; Wai 2002). A ‘financialized’ episteme lies behind the Cum-Cum and Cum-Ex tax extraction markets. Evolution in the nature and management of capital and capital assets are the grounds on which billions of Euros have been extracted from national treasuries, increasing inequalities and decreasing fiscal capacity across Europe.

**Structure and Intent**

The case study is organized as follows. Methods deployed in data collection and synthesis are outlined. A description of a range of implicated cases is then provided. These transactions have been specifically associated with Denmark and Germany. They are more broadly representative. The case study subsequently maps the organizational and professional
population implicated, providing insight on the particular forms of expertise and knowledge applied in the transactions. The institutional architecture and capacity, professional expertise and work practices of regulatory authorities is then discussed. This part of the case study focuses on separations between German regulatory institutions, international problems with effective and timely information exchange, and changes in the knowledge base and expertise of the Danish tax authority. The case raises a series of possible explanations for the success of the Cum-Ex and Cum-Cum transactions, considering the lessons that might be learned.

Given the recent public disclosure of the case and that the majority of legal proceedings are on-going and consequently to date remain confidential, data on the case is sparse and fragmented. CORRECTIV have provided public information but have not made public the 180,000 pages of evidence gathered. Confidential interviews with consortium journalists have substantially informed the case and evidence provided to the researcher has been shared on the basis that it remains confidential. These interviews and meetings have been complimented with confidential interviews with academics, regulators and activists. Regulators in Denmark have emphasized that limited information provided is for background purposes and is not attributable. On-going investigations explain this emphasis. Case description is based on synthesis and the piecing together of disparate sources. Precaution should be applied in the confidence level applicable to the information provided in the case study. Available and utilized data sources include news articles, hearings in the European Parliament’s special committee on financial crimes, tax evasion and tax avoidance (TAX3), hearings in the German Bundestag, confidential interviews, rulings from completed court cases, financial and tax regulations, and the investigation of developments in the Danish tax authority. Gratitude is noted for the provision by interviewees of a limited number of confidential documents pertaining to the cases. This research is on-going and as public information sources proliferate over time greater confidence levels will be appropriate. A snowball search method has been applied to data collection. For instance, interviewees furnished new data sources and information which was pursued and triangulated with information held by the researcher and informants.

---

2 A list of interviews is provided in appendix.
A case study is an exploratory and a descriptive exercise that investigates a phenomenon within its real-life context. The emphasis in case studies is consequently empirical and the intention is to generate on the basis of the case broader theoretical insights. The case study presented here is preliminary and represents a call for further concerted research on the Cum-Ex and Cum-Cum tax extraction markets.

**Cum-Ex and Cum-Cum Transactions**

Cum-Cum transactions are very similar in most countries. Cum-Ex transactions share a basic structure and the goal of extracting dividend tax rebates additional to those intended by law, but the transactions have been adapted to exploit the various legal frameworks and tax practices of different jurisdictions.

There are two court cases in process regarding the Cum-Cum and Cum-Ex schemes. These are in Bonn and Frankfurt (Oltermann 2019; The Teller Report 2019). A special commission has been established by the Danish tax authority to identify the nature and causes of the loss and determine where prosecution might be apposite. As late as 2017 the UK’s Financial Conduct Authority issued a report stating that dividend arbitrage is permitted as long as the intention is the legal ‘minimizing of withholding taxes’ (FCA 2017: 1). Although to date there have been no conclusive court decisions as to the legality of any of the transactions, the notion of a legal risk spectrum is helpful (see Quentin 2017 on ‘risk mining the public exchequer’)⁴. Former UK Chancellor of the Exchequer, Dennis Healey, when asked the difference between tax avoidance and tax evasion quipped that difference is the thickness of a prison wall. Healey’s deployment of metaphor is instructive.

---

³ Dividend tax rebates are provided in law to encourage the long term share holding from institutional investors such as pension funds and insurance companies.

⁴ The Bonn court case proceeds at the time of writing and will determine if the transactions exploited a legal tax law loophole or violated the law at the time of the transactions. The Justice Minister of North-Rhine Westphalia said, ‘The Cologne investigations have now reached a point that prosecutors say that cum-ex wasn’t a legal tax-driven trading strategy, but organized white-collar crime of unimaginable magnitude’ (Oltermann 2019a).
While no legal verdict had been reached at time of writing, Cum-Cum and Cum-Ex transactions lie somewhere on a spectrum between tax avoidance, denoting the strictly legal avoidance of tax due in a way that transgresses the intention of the law, and outright fraud. The lending and temporary sale of shares, and consequent transfers of rights associated with ownership, including rights to rebates or tax credits, is a positive function of legislation. However, it seems that in all cases the relationship of the transactions to underlying financial and economic relationships of substance is tenuous, or more often non-existent. The majority of German Cum-Ex schemes involve a legal owner with a recognized right to the dividend payment and any rebate associated with that payment. These schemes are about ownership transfer to exploit ambiguities in the determination of ownership in a given period. Where ownership seems entirely fabricated as seems in some Danish cases, it is difficult to envision a court ultimately determining anything other than criminal fraud. In Germany, one key informant of the CORRECTIV coordinated consortium, pseudonymously ‘Bruno Frey’, is reported to have switched role from perpetrator to informant in the face of a hefty prison sentence. The following sections present and describe three transactions. First, the more generic Cum-Cum transaction. Second, a German version of the Cum-Ex transaction. Last, an example of a Cum-Ex transaction in Denmark.

**Cum-Cum**

A Cum-Cum transaction takes advantage of gaps in national tax regulation and mismatches between different jurisdiction’s tax laws. Executed internationally, the transaction exploits the lending of shares (temporary sale with an agreement to buy back and return), double-tax agreements, and the shifting of share ownership across borders. This Cum-Cum transaction amounts to a workaround of the fact that a foreign owner or retail investor is not entitled to a tax rebate on withholding taxes applied to a dividend payment unless that owner is located in a country that has entered into a double tax agreement that specifies this entitlement with the country of the share issuer. Therefore, to access the tax rebate, the foreign entity or retail investor lends shares to a domestic company entitled to the dividend tax rebate or a company

---

5 The interview conducted by CORRECTIV with this informant is available in full here: https://www.youtube.com/watch?v=J1XA320LiUk.
located in a country with an appropriate double tax agreement just before the dividend payout day. The price of the loan or temporary sale is €10m. The borrower then collects the dividend (€1m) and receives a rebate on the withheld tax on the dividend (€250,000), not available to the original owner. The buyer transfers the shares back to the original owner at the ex-dividend price (€9m) and receives a compensation from the original and ultimate owner. The original owner has received the same return (less the compensation payment) as an owner entitled to a dividend tax rebate. The series of transactions are independently technically legal as the ownership of shares is transferred to the buyer. However, the transaction is executed on the basis of a strategic intention to avoid the cost of tax liabilities and accrue tax benefits available, but not intended, in law. Stock exchanges provide public lists of dividend dates.

Figure 1: A Cum-Cum transaction

Company A holds shares in a company located in Country X. Company A is a foreign company located in a jurisdiction with no double-tax agreement with country X and, therefore, has no legal right to claim and receive a rebate on dividend tax paid. Prior to the dividend date, Company A lends or sells with an agreement to buy back, the shares to company B. Company B is located in country X or a jurisdiction with a double tax agreement with country X. Company B receives the dividend from the share issuer. Company B then
claims a rebate on the withheld tax on the dividend from country X. After the dividend pay-out day company B transfers back the shares to company A at the lower price that accounts for that the dividend is paid. The tax rebate obtained by company B is split between companies A and B via compensation to B.

**Cum-Ex**

The Cum-Ex transactions do not, as the Cum-Cum transactions, have the effect of the avoidance of tax payments on dividends. Cum-Ex transactions extract two, or more, dividend tax rebates, where only one dividend tax rebate is, in the spirit of the law, due. The transaction achieves these ends by taking advantage of an ambiguity in ownership, or legal title, within narrow time windows around the dividend date. Cum-Cum transactions take advantage of international opportunities provided by laws and regulations that are not complementary. Cum-Ex transactions often exploit regulatory and legal fault lines and frictions in a country.

**Cum-Ex, Germany**

There are multiple and often conflicting understandings of the transactions. Two factors may lay behind this variation in accounts of the transactional set-up. There are multiple versions in play. The transactions are of sufficient complexity to make it difficult to comprehend them, given available information. This case study suggests the complexity of transactions in and of themselves is not extenuated. This is a point of interest in the case. On the other hand, the long chain of entities deployed in the transaction coupled with the large number of actors involved is a source of obscurity and an obstacle to certain comprehension.

In a generic German Cum-Ex transaction, Investor A owns share worth €20mn in company X. Separately and just prior to the dividend date, Investor B buys shares worth €20mn in Company X from Investor C ‘cum dividend’. Investor C does not own the shares and promises future delivery. On the dividend date, Investor A receives €750,000 and a rebate certificate for €250,000. Investor A’s shares are now (ex-dividend) worth €19mn. Investor A sells these shares to Investor C who delivers them to Investor B with a dividend compensation of €750,000. Investor B’s bank provides Investor B with documentation for a €250,000 dividend tax rebate. Investor B sells the shares back to Investor A. The circular movement
results in the three investors ending in the same economic position they started at, but with an additional €250,000 rebate shared between them (European Parliament 2018).

The next section describes two commonly discussed versions of Cum-Ex transactions executed in and from Germany.

**Version 1**

The first, and most prominent, version of the Cum-Ex transaction exploits a three-day gap between the share sale and settlement day and produces ‘manufactured dividends’ in evidence of ownership. Here, the owner of the shares sells the shares (short-sale or sale with a future in place) to a buyer immediately prior to the dividend date. The sale is made with a commitment that the buyer will receive the dividend. However, because the sale is not settled on the sales day, the seller remains the legal owner and receives the (actual) dividend from the share issuer and the admissible tax rebate from the tax authorities. In lieu of the buyer receiving the dividend, the buyer receives a dividend compensation (also called a ‘manufactured dividend’). The compensation is set at the exact same amount of the actual dividend. The buyer’s custodian bank is, in theory, not positioned to assess whether the dividend received is actual or manufactured and, therefore, treats the dividend compensation as an actual dividend. On this basis the custodian bank (on behalf of the buyer) can claim a dividend tax rebate from the tax authorities. The buyer then transfers the shares back to the seller after the dividend day. Although there is ambiguity surrounding the ownership of the share around the dividend day, only the seller receives the actual dividend and pays tax on the dividend.

Figure 2: A Cum-Ex Transaction, Germany
Company A holds shares in company Y located in country X. Company A is located in a jurisdiction with a double tax agreement with country X. Company A sells shares to Company B immediately prior to the dividend date. Company B is either located in country X or in a jurisdiction with a double-tax agreement with country X. Company B buys the shares with the right to receive the dividend. However, because of the three-day gap between the sales and settlement day, company A remains the legal owner of the shares and receives the dividend from company Y. Company A, therefore, has a claim to a tax rebate on dividend tax paid. Because company B is in possession of a commitment to receive the dividend, but has not received it, company B receives a payment corresponding to the dividend payment from company A. This is the dividend compensation or ‘manufactured dividend’. With the manufactured dividend company B claims a tax rebate through the custodian bank. The custodian bank cannot assess whether this claim is based on an actual dividend or a manufactured dividend and, therefore, claims the tax rebate from the tax authorities in country X and pays it to company B. In this way, both company A and company B receive a tax rebate, while only company A pays a dividend tax.

**Version 2**

A second version of Cum-Ex transactions in Germany is based on the execution of rapid sales on the dividend date, in a process known as ‘looping’. In this version company A holds shares
in company Y located in country X. Company A is located in a jurisdiction with a double tax agreement with country X. On the dividend date, company A sells the shares to company B. Company B is also located in either country X or in a jurisdiction with an apposite double tax agreement with country X. Because the sale happens on the dividend date, both company A and company B are considered and stand as owners of the shares. As the owner of the shares on the dividend date, both company A and company B claim the rebate on withheld tax. That is, because the sale happens on the dividend date, both companies are the registered owner on that day. The registration can then be used to claim dividend tax rebates from tax authorities. This version of the transaction can be executed multiple times on the dividend date.

**Cum-Ex, Denmark**

Cum-Ex in Denmark differs from that in Germany, with transactions tailor-made to exploit national legal frameworks and institutions. Two versions of the Cum-Ex transactions are prominent in the Danish case. Both make possible the claim of several dividend rebates on one share ownership, or even the claim of dividend tax rebates on fabricated share ownership. The following sections present the two versions. The first version is based on an actual transaction-chain and the presentation contains some names of companies involved. The names of the companies are derived from the work of Niels Fastrup and Thomas Svaneborg (2019), interviews and triangulation with media reports.

**Version 1**

The first version centers on the automated provision of American Depositary Receipts (ADR) and the use of these as proof of ownership in order to claim a dividend tax rebate.

Figure 3: Cum-Ex, A Danish Case

---

6 An ADR is also known as a credit advice. It is a note from a bank informing a customer of a deposit added to their bank account.
In this case, a number of US pension funds were established with the sole purpose of executing Cum-Ex transactions in Denmark. The US pension funds held Danish shares. The pension funds deposited shares in different accounts in a small German bank in Mainz, North Channel Bank. Within North Channel Bank the shares were sold and bought between the different accounts around dividend day. Every time a share was bought, North Channels Bank’s IT system, created a credit advice and, thereby, a claim to ownership.

North Channel Bank forwarded these claims to Indigo for processing. Indigo forwarded tax vouchers to the US pension funds. The US pension funds used Barclays in London as reclaim agent. Barclays ensured that the credit advices were in order and could be used as dividend tax vouchers. Barclays requested rebates on dividend tax from the Danish authorities on

7 Despite in the wake of the global financial crisis closing the Structured Capital Markets division which had contributed more than €1bn a year to Barclays profits on the basis of selling tax arbitrage products, Barclays has been a key actor in the dividend arbitrage tax extraction market since (Griffin and Spataazzi 2019).
behalf of the US pension funds. The tax rebates received were sent to Solo Capital (owned by Sanjay Shah). Solo Capital transfer a proportion of the tax rebates back to the US pension funds and make a deposit in Bank Varengold in Germany (the bank is under investigation for money laundering). It is reported that Varengold eventually transferred money to Sanjay Shah, possibly in Dubai.

**Version 2**

Another version involves entirely fabricated ownership claims. This scheme is based on companies claiming to have shares from which they have received dividends. They fabricate fictitious documentation as proof of ownership and the dividend pay-out and send them to the Danish tax authorities to claim the dividend tax rebate. Since no actual shares or dividends are involved this can be repeated. This would obviously be construed as outright fraud.

**Organizational and Professional Population**

The Cum-Cum and Cum-Ex transactions involve a myriad of actors and organizations ranging across the financial sector. It is difficult to assess precisely which organizations knew about the entire transaction-chain. Each discrete transaction chain may include a variety of organizations, some vital to the transactions, others more peripheral. There are also differences in the cases in Denmark and Germany.

In Germany implicated organization types included investors, investment funds or equity departments of large banks, custodian banks, brokers, banks and insurance companies providing leverage to the buyer, and limited corporations working as buyers. Leverage is provided in the form of share loans. Insurance companies hold large portfolios of shares which may be lent in return for a fee. In the Danish case, banks and investment funds play less of a role because schemes involved fabricated share transactions. This nullified the need for leverage and large numbers of shares. Instead the significant organizational types include, small US pension funds, custodian banks, reclaim agents, and strings of corporate entities that money travelled through subsequent to the dividend tax rebate pay-out by the Danish authorities.

Besides these organizations in the direct transaction-chain are a broader set of people and organizations advising and informing these central organizations. These include advisory
firms ‘selling’ the idea and schemes, traders setting up the transactions, and lawyers commissioned to provide legal advice on the tax schemes so as internal approvals proceeded without hindrance. These organizations are critical in both countries. Importantly, the schemes required and were orchestrated within a thickly populated organizational landscape. The transactions implicated a large part of the financial sector.

At different points in the Cum-Cum and Cum-Ex transactions different types of specialized knowledge and expertise are required. The four main forms of expertise central to the schemes are in finance, international and national tax law, legal compliance, and back office functions necessary to execute the rebate claim.

Especially in the German case, there is a need for leverage and financial products such as futures. Key professionals at this point in the transaction-chain are the people working at the trading desks of large banks and investment funds. These have access to capital providers, broker dealers and institutions holding and willing to lend large volumes of shares. The banks and investment funds require an internal approval process to allocate money to the transactions. Lawyers provide an opinion on the legal implications of the transaction. An opinion that deems the transactions legal is a pre-requisite for any claim as to having applied due diligence, and may ultimately furnish grounds for plausible deniability.

At the heart of both types of transaction is tax law. In the case of Cum-Cum, knowledge of discrepancies and ambiguities in and between national tax laws is required. This concerns among other things double tax agreements. With regard to Cum-Ex, the ‘master’ structure requires adaptation to a variety of national regulations on determination of ownership and institutions charged with tax voucher issuance and processing tax rebate claims.

In some cases, there is less need for expertise in finance and more for expertise on tax reclaim procedures and the production of documentation demonstrating share ownership. Fraudulently claiming dividend tax rebates in Denmark requires getting the formulas right, with the right information submitted in the correct form at the right time. The use of recognized reclaim agents ensures this.

Lawyer, Hanno Berger, and 12 traders are have played central roles in the Cum-Cum and Cum-Ex trades. Hanno Berger is reported to have created the Cum-Ex ‘master plan’. Berger
began his career at the financial supervisory authority in Hessen, Germany, where he worked as a tax inspector with responsibility for the banking sector (Fastrup and Svaneborg 2019). By the end of his career within the financial supervisory authority he held one of the highest-ranking positions within the field of tax supervision of the banking sector. In 1996 he moved to the private sector. Berger’s career trajectory has places him at the intersection between finance and tax as a broker able to synthesize knowledge between expert ecologies.

**Regulatory Capacity**

In contrast to the high levels of expertise and coordination deployed in the tax extraction market stand regulatory authorities. In the absence of regulatory network brokerage and expert capacity, issues of institutional knowledge, regulatory silos, and international cooperation and information exchange hindered the generation of regulatory purchase on the tax extraction market.

**Germany**

In Germany, the issue of knowledge sharing between national institutions rises to the fore. Information and knowledge deficits prolonged the period over which the transactions were executed, hindering an immediate and comprehensive response from authorities.

Proceedings into the Cum-Cum and Cum-Ex scandal in Germany revealed that BaFin, the German Federal Financial Supervisory Authority, took no responsibility for what was going on within German banks with regard to tax. Even when newspapers reported on Cum-Ex, the BaFin leadership took the view that they were not responsible, as they considered Cum-Ex to be a matter solely for the tax authorities. They argued that they were responsible exclusively for the solvency of financial institutions. This was their mandate from the German government. However, in 2015 a German resident bank, Maple Bank, a subsidiary of a Canadian bank, went bankrupt because tax authorities claimed back wrongfully refunded taxes. This consumed a large part of the capital of the bank. BaFin discovered harmful tax practices can be a source of financial instability.

The clear separation between these two institutions and their limited mandates are a function of decisions by policymakers. Experts within the specific field of finance inform political decisions concerning financial supervision and tax experts, on the other hand, inform policy
makers on tax. That is to say, the two expert jurisdictions operate in silo-structures with little cross-sectoral learning and information sharing. This hinders the stream of information from the top-down: Political probes and investigations in one area do not necessarily inform work in another.

Then member of the Bundestag and current Head of Finance Watch Deutschland, Gerhard Schick, explained in the European special committee, TAX3’s public hearing on Cum-Ex and Cum-Cum:

_We learned in our parliamentary probe that BaFin, the German supervisor, was not informed about various attempts by the German Ministry of Finance to stop cum-ex, hence they continued to authorise the establishment of investment funds that were set up for the sole purpose of undertaking cum-ex activities. If BaFin had been informed of the Ministry’s suspicions about cum-ex they could have prevented the establishment of those vehicles that were key in the later cum-ex deals._

_But my point goes beyond that: The fraud cases Cum-Ex are built upon two components: The laws that are violated are tax laws. But the instruments used are Financial Instruments and the persons who commit these crimes or allow them to be committed are those under the supervision of the banking supervisors._

(Schick 2018)

Not only jurisdictional friction within a country poses risk to national treasuries. Inadequate information sharing between countries is also a key feature of the Cum-Cum and Cum-Ex cases. Germany began taking steps towards closing implicated legal loopholes as early as 2007 and continued making regulatory changes in 2012. The German authorities, however, did not inform other countries of problems with rebates on dividend taxes. In consequence the scheme travelled, with perpetrators executing the same or similar transactions elsewhere. After the Bundestag implemented legal changes in 2012 some of market moved on to Denmark. When Danish authorities finally uncovered the fraud, they informed Norway.
Consequently, Norway was able to stop dividend tax pay-outs and impose stricter control over the tax rebate system. Norway ended up losing only approximately €50,000.

The Directive on Administrative Cooperation (DAC1 2011/16/EU) in direct taxation in addition to information on request and the spontaneous provision of information on tax evasion, now provides for the automatic exchange of tax information between member state competent authorities. The automatic exchange of information is applicable where a taxpayer is active in another country than the country of residence. While DAC2 (2014/107/EU) provides for the exchange of information on interests, dividends and other income generated by financial account, it is not clear that the international activities of the perpetrators of Cum-Cum would trigger a requirement for information exchange nor if financial market regulators would interact with competent authorities in the exchange of such information. The Directive has since been amended to incorporate the automatic exchange of information on advance cross border rulings and advance pricing agreements (2015), country by country reports (2016) and the provision of access to authorities to beneficial ownership information as collected under Anti Money Laundering (AML) rules (2016). The 2018 amendment incorporated mandatory disclosure rules for intermediaries and automatic information exchange on tax planning cross border arrangements⁸. These amendments promise greater regulatory traction but have not been operational. The capacity of competent authorities will be decisive in their effectiveness.

In Denmark, regulatory focus on tax control diminished as the mandate of the tax authorities shifted from one based in a view of the tax authority as a control unit to one based in the view of the tax authority as a service-oriented entity. These changes entailed significant budget reductions, leadership change, and altered hiring practices. Since 2005, there have been multiple rounds of restructuring of the Danish tax authority (SKAT), leading to budget constraints, new strategic focus areas and changes in the knowledge base of employees. Former SKAT employees report key work targets as increasing levels of customer trust and the processing of tax returns quickly and ‘efficiently’. This created a shift in the type of

---

⁸ For information the DAC and access to the Directives please see: https://ec.europa.eu/taxation_customs/business/tax-cooperation-control/administrative-cooperation/enhanced-administrative-cooperation-field-direct-taxation_en.
professionals SKAT hired, with less emphasis on specialization and tax law expertise. Increasingly new hires were generalists with backgrounds in service and management. Performance indicators measured speed of processing cases and tax claims. High staff turnover eroded institutional knowledge. On a leadership level there were also changes in the knowledge base. Leadership shifted from tax professionals to individuals with backgrounds in public management (Andersen et al. 2018). These changes occurred simultaneously with the execution of the Cum-Cum and Cum-Ex transactions from 2012 and onwards. The new strategic focus in SKAT was codified in results-based contracts reflecting the new priorities.

SKAT reduced costs by 40 percent from 2006 to 2012. By 2015 SKAT had successfully cut staffing levels to lower costs and streamline the organization. Boston Consulting Group provided a report to the Ministry of Tax in 2005 highlighting the potential for efficiencies through reorganization. The call for reorganization was repeated in an analysis by McKinsey commissioned by the Ministry of Tax when the original targets from 2006 had not been met (Andersen et al. 2018).

The scope and longevity of the tax extraction market in Germany and Denmark was preconditioned by a number of factors. First, institutional silos prevented effective communication within jurisdictions, with those charged with regulating the financial sector failing to cooperate with those charged with regulating the tax system. These silos replicate on the European level. Second, across impacted European countries timely cooperation and information exchange failed to occur. Third, while the tax extraction market operated at full pace the law on information exchange did not address the specifics of the transactions. Third, within national tax administrations reforms prosecuted in the name of efficiency left significant capacity deficits that opened the door to perpetrators of the fraud and ensured that door remained open over a prolonged period.

**National and international responses**
The EU has moved forward on laws regarding beneficial ownership (EU/2016/2258)
providing public authorities new tools to track wealth and identify ownership. ‘Beneficial
owners’ denotes individuals (natural persons) ultimately owning or controlling legal vehicles
such as companies, partnerships, trusts or foundations. Obstacles to the identification of
owners such as bearer shares deter regulatory intervention. The use of bearer shares and
private custodians shield the tax extraction market. Custodians located in foreign jurisdictions
hindered the flow of knowledge on beneficial owners and when ownership flows through long
chains of internationally dispersed entities, usually only the first tier of ownership is disclosed
to public authorities. The ultimate beneficial owner may be ‘black boxed’ and remain
unknown. Placing beneficial ownership in a tax haven or secrecy jurisdiction adds to opacity
as such jurisdictions often do not always engage fully, or at all, in information exchange
between national authorities

To track beneficial ownership it is necessary to move towards the registration of share
ownership so authorities are able to identify owners at any one time and track changes in
ownership over time. Effective and universal beneficial ownership registration would mitigate
against the use of chains of entities to obscure the ultimate ownership of an entity. A move
towards this has already begun in Europe and individual countries such as Denmark and the
United Kingdom.

In 2015, the European Union implemented the 4th Anti Money Laundering Directive requiring
EU member countries to establish central beneficial ownership registries for companies and
some trusts. In 2016 the United Kingdom established a publicly available register of
beneficial ownership of companies and limited liability partnerships. The EU subsequently
agreed to implement an updated Anti Money Laundering Directive and in 2018 the United
Kingdom parliament approved an amendment to the sanctions and money laundering bill
requiring British Overseas Territories to implement a public registry of beneficial ownership

---

9 The amendment to the Directive on Administrative Cooperation can be accessed here:

10 Work in COFFERS on the Global Legal Entity Identifier (LEI) suggests that an operational
and comprehensive LEI system would provide complete and real time information on
beneficial ownership. It is as yet not operational nor comprehensive (Millo et al. 2019).
by 2020 (Knobel et al. 2018). A ruling by the Court of Justice of the European Union (CJEU) on the 26th of February 2019 curtailed reliance on the Parent Subsidiary Directive to artificially avoid the payment of withholding taxes on dividends paid by Danish companies to companies in other member states (Ernst & Young 2019). The COFFERS and Tax Justice Network report on beneficial ownership regulation shows that of 112 jurisdictions surveyed, 34 already had beneficial ownership laws, 11 had committed to do so by 2020, and 67 did not (Knobel et al. 2018:12). In Europe, commitment to beneficial ownership is near universal. However, the report notes that loopholes remain in the laws of the 45 countries that have or have committed to laws on beneficial ownership. In this regard, out of the 112 jurisdictions assessed ‘bearer shares are not available or are properly immobilized in 62 jurisdictions. In 6 jurisdictions, the status of bearer shares is unknown (and thus considered a risk). In 44 jurisdictions bearer shares pose risks because they are either not immobilized by a government authority, or because those bearer shares that have failed to immobilize are not cancelled’ (Ibid.: 22).

As noted, one issue that made the Cum-Ex scheme so successful in Germany was the multiple institutions involved in the issuance of tax vouchers and dividends. To eliminate this problem German authorities centralized the tasks of paying out dividends and certifying ownership of assets in 2007. However, this did not fully close down the transactions. Regulatory change failed to address the movement of ownership from one country to another. In 2012, German authorities banned the classical Cum-Ex transactions and introduced rules designed to stop Cum-Cum transactions in 2016, leading to claims that the transactions in Germany have now been effectively stopped.

As a response to the scandal and earlier revelations such as the Panama papers and the various leaks and scandals that have increased the political salience of tax issues over the last six years, Denmark’s procedural practices and regulations are changing. Politicians and the tax authority have committed to control all incoming claims of dividend tax rebates and identify the beneficial ownership of shares. On July 1 2015, the Danish government passed a bill banning the issuance of bearer shares. Extant bearer shares would not be immobilized. It is now illegal for a company to pay out dividends if the beneficial owner is unknown. This in theory makes it easier for the tax authority to track beneficial ownership and verify the
legitimacy of tax rebate claims. However, concern that the tax authority does not maintain sufficient staffing levels or the necessary expertise to effectively control all claims remain.

Besides these changes the government has established a tax commission to investigate problems over the last 15 years in the Danish tax authority. The commission’s work to date is confidential. It is investigating how the Cum-Ex and Cum-Cum schemes happened and why it took so long for authorities to stop them. The Danish financial regulator is conducting an investigation of three banks that are possibly implicated (Teis and O’Donnel 2018). Other countries are following suit, with Austria and Belgium reported to have opened investigations (O’Donnell and Sims 2018).

**International**

On the international level and following the scandal, the European special committee TAX3 suggested the creation of a European ‘FBI’ able to investigate fraud across borders. Another suggestion, made by Gerhard Schick, has been to establish better conditions and regulations for protection of whistleblowers at the EU level. However, whistleblowers did come forward with concrete information on these transactions and these whistleblowers were dismissed by the companies involved as well as public authorities (Bundestag 2017: 458-464). Recently, the Danish media provided evidence that Danish authorities had ignored credible whistleblowers.

An anonymous lawyer held a meeting with an insider close to Sanjay Shah where he was provided detailed information about the Cum-Ex trades in Denmark. This included a list of companies involved and bank statements from several of the banks used. The lawyer contacted the Danish tax authorities on the June 16. The Danish tax authorities, however, failed to act on the information. On July 27, the British tax authority, which was investigating money laundering in the UK identified the transfer of substantial sums of money from Denmark through banks in London. Only on August 6 did the Danish tax authority stopped the payouts. It is estimated that the national treasury, in the 50-day time period between when the first whistleblower came forward and the time the authorities stopped the payouts lost 2,6 billion Danish krone.
The episode not only highlights problems with insufficient procedures in place in regard to whistleblowers, but also the necessity of effective and timely international information exchange.

**Conclusion**

The Cum-Cum and Cum-Ex cases are significant on a variety of levels. First, and most plainly the sums extracted from European exchequers are substantial. The appropriation of these funds constitutes a subtraction from funds available to government to furnish public goods. The COFFERS project explicitly sets as a goal the reduction of inequalities across Europe. Adequate and sustainable public finances are necessary to the realization of this goal. Second, the transactions involved are relatively simple and banal. Perpetrators were able to use long established opportunities provided by legislation to execute the transactions. Contrary to established perceptions, it seems, at least sometimes, largescale tax fraud does not rest on esoteric knowledge and a capacity to orchestrate impenetrable complexity. Third and given this, regulatory gaps that enabled the successful execution of the schemes are equally simple and banal. For instance, that Germany did not initially share information on its experience with fellow member state regulators confronts credulity. Remedy is readily available. Increased and timely information sharing, integratory bridges between contiguous regulatory spheres and adequate regulatory capacity will assist in efforts to prevent the recurrence of similar activities. Private networks of perpetrators were able to synthesize expertise across diverse areas and coordinate across organizations. Public networks of regulators must be enabled to do the same. Noting that financial liberalization and deregulation are foundational to the Cum-Ex and Cum-Cum schemes, European regulators and governments face a clear choice. Either, regulatory apparatus and capacity is upgraded or a structural contradiction between fiscal sustainability and financial market operations must be eliminated by the ‘taming of international finance’ (Eatwell and Taylor 2000). The former is within the immediate grasp of authorities, while the later requires a wholesale shift in perceptions of what is economically feasible and optimal.

**References**


List of Confidential Interviews

1. Tax Lawyer, Denmark, February 2019
2. Tax lawyer, Germany, March 2019
3. Tax Lawyer, Denmark, February 2019
4. Activist, Germany, April 2019
5. Journalist, Denmark, February, 2019
6. Journalist, Denmark, March 2019
7. Journalist, Denmark, April 2019
8. Tax authority manager, Denmark, February 2019