FEDERAL MINISTRY OF FINANCE REACTS TO THE RULING OF THE FISCAL COURT OF HESSE ON CUM/CUM TRADES

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Legal Briefings

The German Federal Ministry of Finance has now reacted to the ruling regarding cum/cum-trades of the Fiscal Court of Hesse dated 28 January 2020 by way of two decrees (dated 9 July 2021 which were published today), and amended the previous decrees of 2017 on the "Tax Treatment of Cum/Cum Transactions" and of 2016 on the "Beneficial ownership in stock transactions". It now takes a significantly harsher approach, in brief:

- Going forward, it appears to be necessary to analyze the transfer of beneficial ownership in each individual case of stock loans, repos and comparable trades. This makes it incredibly hard to manage in particular for mass transactions. A so-called "positive pre-tax return" which previously had been accepted as an argument in favor of the transfer of the economic ownership to the stock borrower is no longer relevant.

- While the term cum/cum-trade is defined only vaguely, the Federal Ministry of Finance now generally assumes for all cum/cum-trades that the beneficial ownership does not pass to the stock borrower.

- Just like the Fiscal Court of Hesse stated, the Federal Ministry of Finance now applies economic ownership rules (sec. 39 of the German tax code (GTC)) as well as the general anti-avoidance rules (sec. 42 GTC) to cum/cum-trades and generally assumes an abusive arrangement. In addition and contrary to its previous view, the Federal Ministry of Finance no longer recognizes the so-called "non-tax induced" part of the transaction (i.e.

it denies German resident stock borrowers a tax refund even in the amount of the tax refund that could have been claimed by the non-resident stock lender if the cum/cum-trade had not taken place).

- As a result, the negative consequences of the Federal Ministry of Finance's view appear to solely affect the (resident) stock borrower and largely spare the (non-resident) stock lender. This might prompt borrowers and lenders to consider if they have (or may face) civil law recourse claims.
- A newly inserted reference to the disclosure obligation pursuant to sec. 153 GTC puts market participants under additional pressure, since the tax authorities in this way essentially demand immediate disclosure of affected cum/cum-trades and as violations of sec. 153 GTC may constitute a criminal offense.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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