

The cum-ex affair and the limits of custody

*Dr Alexander Ressos, TEP
Attorney-at-Law (Switzerland), Solicitor (Hong Kong),
Solicitor (England & Wales)*

The cum-ex affair, which shook the German financial system in the 2010s, reached Basel through the involvement of Swiss banks and investors. Cum-ex transactions were trades in shares around the dividend date, structured so that the German tax authorities refunded withholding tax on dividends that had been paid only once, sometimes several times. Exploiting a weakness in the German system of withholding tax refunds, the transactions cost the German treasury billions of euros before the loophole was closed in 2012. German courts later held that such transactions were tax evasion and could be criminal.¹

Several Swiss banks and investors were involved in cum-ex transactions as investors, as financiers or as custodian banks of funds that conducted them. Wealthy Swiss and German investors invested in funds that promised high returns from such transactions and lost their investments when the German tax authorities refused the refunds. Some of them sued the banks that had recommended the investments, arguing that they had not been informed of the tax and legal risks. The Swiss courts examined the liability of the banks for their advice, including in a case involving the Basel bank Sarasin, which reached the Federal Supreme Court.

The cum-ex affair is relevant to the practice of a lawyer who advises on tax criminal law and financial services, as the author does. The affair shows how the tax and legal risks of complex transactions can turn into criminal liability, how custody and advisory relationships can create liability for banks, and how cross-border cooperation between tax and criminal authorities has become routine. A Swiss bank that participates in a transaction designed to obtain tax refunds abroad must assess the legality of the transaction under Swiss law as well as its treatment under the law of the country whose treasury bears the cost.

1 Notes

1. On the cum-ex transactions and the decision of the German Federal Court of Justice (BGH) of 28 July 2021 (1 StR 519/20) confirming that cum-ex transactions constitute tax evasion, see the published decision and the literature. To be verified. ↩

For general information only. This article does not constitute legal or tax advice, does not replace advice on an individual case and creates no lawyer-client relationship. It reflects the legal position as of September 2026.

Online version: helveticaregister.com/basel-the-cum-ex-affair-and-the-limits-of-custody