

REGULATORY INTELLIGENCE

Cum-ex trading files and extradition from the UK: what next?

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A German court recently convicted two former London-based investment bankers in respect of the "cum-ex" trades. Their convictions were the first of their kind in Germany in respect of this type of controversial financial fraud under the German article 370 of the German Fiscal Code – tax evasion. This type of trading was accepted as a common practice by sophisticated equities traders up until 2012 and there is much controversy because the German authorities allowed the practice to continue for many years and are not alleging all the actions were dishonest.

This case shines a spotlight on a wider issue that companies need to be aware of so that they can be considering what processes and measures to adopt ahead of the UK's withdrawal from the EU. Despite the tax evasion in this case being to the sum of several million euros, the two now convicted traders managed to avoid prison sentences. The cum-ex scheme operated in numerous European countries and the investigations taking place involve hundreds of suspects.

In Germany some 900 people are being investigated, which is expected to lead to a large number of prosecutions not only in Germany but also elsewhere in Europe, including the UK. The UK's financial sector should be aware that we can expect this to give rise to an increase in related extradition requests; there are allegedly several hundred potential suspects located in the UK.

This is because in multi-jurisdictional cases such as this one, there is an important question mark over whether an individual conducting the corporate crime in the UK should face prosecution over here rather than be extradited back to their home country. This is a ground upon which a challenge to extradition can be made. The UK's exit from the Brexit transition agreement on December 31 means this may all change soon.

This is not unfamiliar territory in that the UK courts have dealt with many such extradition cases before, involving cross-border financial crime but the European Arrest Warrant (EAW) is, as things stand, in its last year of operation. This will make it difficult to investigate cross-border financial crime (such as cum-ex) in the UK. The new proposed procedures are not speedy and efficient and the sharing of data and cooperation in investigations will make communication between law enforcement cumbersome and difficult. For instance, the European Investigation Order which allows for speedy cooperation between law enforcement will no longer be in force; to achieve cooperation, much slower diplomatic channels will have to be used. As a result, the extradition arrangements will become more complex and lengthy as cooperation will no longer be on a judicial basis.

As part of the withdrawal plans under Brexit, the UK government is planning not to opt back into the EAW scheme. Similarly, other mechanisms used to combat crime, such as the European Investigation Order and membership of Europol and Eurojust, are only available to full EU members and the UK may not benefit from this following withdrawal. The failure to properly negotiate a package of cooperation in criminal matters in extradition and cross-border assistance may well severely hamper law enforcement efforts, as it will decide whether or not criminal charges such as these are brought about in the UK or not.

It will be interesting to see if the new system retains the same protections as the present EAW system. There has been plenty of criticism of the EAW but its gradual reforms in the UK have meant there are some additional protections available to defendants that are not available in non-EU cases, such as the proportionality bar, which only applies to EU territories and obliges the UK courts to balance the European Human Rights Convention on the rights of a requested person against the nature of the alleged offending party, and to consider whether less-coercive measures are available.

Further, the use of Section 12A of the Extradition Act 2003 the "charge or try" bar, is only relevant to EAWs. This prevents extradition where the prosecuting authority has not reached a decision to charge or try an individual but is merely investigating. Many EAWs are issued before a decision has been made and are essentially used by jurisdictions as an investigatory tool and not for the proper purpose of extradition.

Shoot first, ask questions later

The German authorities in particular have a tendency to issue EAWs before a proper decision has been made. In a multi-handed allegation of revenue fraud issued by German prosecutors in 2018, a series of EAWs were issued, leading to arrests of dozens of UK-based individuals and extradition litigation followed. Challenges were brought against the German authorities in respect of charges that were substantially modified during the course of the proceedings.

In *Malik and Others v Public Prosecutors Office in Augsburg, Germany* [2018] EWHC 3479 (Admin) Germany requested extradition in relation to a series of allegations of complex Missing Trader Intra Community (MTIC) frauds. Many of the cases were issued before the



decision to prosecute had been made and Germany had to rectify the position as the case progressed over a series of years. Many of those defendants returned voluntarily to Germany to discover they were not wanted for prosecution and were back in the UK the following week.

While it is difficult to resist extradition to Germany, it is by no means impossible. Its failure to adequately draft the allegations means there is often plenty of further information provided by Germany to illustrate the conduct alleged. In multi-jurisdictional cases such as cum-ex, whether under the EAW scheme or under a newly negotiated arrangement, these inadequacies are likely to continue, particularly where the request has been issued before the investigation has progressed sufficiently.

Germany does not extradite its own nationals outside of the EAW scheme. It is one of the EU states that has said it will not extradite its nationals to the UK under any replacement extradition scheme; the UK, however, will extradite to Germany. Other EU member states, including Austria and Slovenia, have suggested they will not extradite their own nationals to the UK, following our withdrawal.

The German court's conviction of the two former London-based cum-ex traders reminds us there are hundreds of individuals within the financial sector who are being investigated for fraud, and questions remain as to where their trials should be heard and in which jurisdiction they should be convicted. The UK's financial sector must remain alert as to how extradition arrangements are negotiated, as they will provide an instrumental role in proper regulation of its financial sector post-Brexit.

Unfortunately, with a significantly reduced time for negotiation due to the COVID 19 pandemic, the UK risks the prospect of a poorly negotiated extradition arrangement. Members of the Lords EU security and justice sub-committee have [raised fears](#) of this leading to the UK being left with inadequate intelligence-sharing tools.

Considering these limitations, the UK faces the prospect of becoming isolated from international cooperation making the UK banking sector's position to combat financial crime precarious. The Director of Public Prosecutions has gone on [record](#) to highlight the concerns of UK law enforcement about the lack of planning. If it replaces the existing simple processes of speedy law enforcement and intelligence cooperation agreements with cumbersome diplomatic channels, the UK risks adding many layers to the process of regulation and investigation of financial crime.

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