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By PwC Deutschland | 08. Mai 2026

Closing the “Cum-Ex loophole” – Bundesrat (Federal Council) seeks to make it easier to confiscate illegal profits

It should be possible to confiscate profits from complex illegal transactions, such as Cum-Ex short selling, more consistently. On 8 May 2026, the Bundesrat agreed to table a corresponding bill in the German Bundestag.

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Not only “through the act”, but also “for the act”

The draft provides for an amendment to the Criminal Code whereby, in criminal proceedings, proceeds held by third parties can also be confiscated if they received them “for the act” (“für die Tat”). Until now, this has only applied to proceeds obtained “through the act" (“durch die Tat”). The proposed provision states that the new regulation would apply to cases which are still at the investigative stage and which are not statute barred.

Legislative oversight

The Bundesrat considered the current legal situation unsatisfactory, as proceeds cannot be confiscated, particularly with respect to short sellers involved in cum-ex transactions who received payments from the nominal buyer at a very early stage. In these cases, the third party’s remuneration/benefit does not derive from proceeds obtained “through the offence”, as the criminal act, namely the filing of the tax return and the receipt of the tax refund, only occurred at a later date. The short seller, on the other hand, is paid in advance of the criminal act.

In 2025, the Federal Court of Justice ruled that this was an oversight on the part of the legislature and that a divergent treatment between proceeds obtained “through” and “for” the transaction was not intended. The Bundesrat therefore argues that it is now up to the legislature to rectify this error.

Next steps in the legislative process

The Federal Government can now comment on the draft bill from the Federal States. Then it is the turn of the German Bundestag. It will decide for itself when to place the draft bill on the agenda.

Note:

In its case law the Federal Court of Justice has distinguished between proceeds obtained “through the act” and “for the act”:

“Through the act” (proceeds): Direct financial gain from the criminal act (e.g. the unjustified tax refund received).

“For the act” (consideration): Benefits received by a participant as consideration/remuneration for their involvement in unlawful conduct but which are not based on the actual commission of the offence (i.e. the filing of the tax returns and the refund claim.

Source:

Bundesrat Kompakt

Schlagwörter

Fraud, confiscation, cum-ex