

Good morning.

This is Dewald van Rensburg from the amaBhungane Centre for Investigative Journalism. We have gained access to a large number of documents relating to the investigation by German authorities into the so-called cum-ex scandal.

Among other things, these documents reveal Investec's varied roles in the scandal over several years. It is apparent that, from at least 2008 onwards, Investec's Dublin office was an active participant in cum-ex transactions as a prime broker, lender custodian and clearing bank.

In this regard, we ask that you address the following questions and observations:

Investec's delegation of authority

A prosecutor's report dated 4 June 2018 names no less than eleven Investec staff in the bank's Dublin office as being suspected of tax evasion via cum-ex transactions, including Investec Europe CEO Michael Cullen. According to the report traders and back office personnel "were consistently aware that the trades in question were cum / ex deals...and everyone understood the trade".

1. Who would Cullen have reported to within the Investec group at the time? We note Investec Europe is 100% controlled by Investec Bank PLC.
2. We also note that Stephen Koseff served as a director of Investec's Irish holding company until 16 October 2009, while Bernard Kantor and Alan Tapnack remained on the board until 2013 and 2016 respectively.

The two Investec employees most deeply implicated are Loman Gallagher and Michael Byrne.

3. Who would they have reported to?
4. Do either of them still work for Investec?
5. If one or the other left, when did they leave and was it related in any way to the internal and/or external investigations into their role in cum-ex transactions?
6. Is Investec providing legal support to either of Cullen, Byrne or Gallagher?

Transactions detailed in the documents include the provision of a EUR250-million facility to Duet Asset Management for use in cum-ex transactions to the benefit of the Varengold Caerus II Equity Fund in 2010. Among the leaked documents there are emails between Gallagher and Aneil Anand of Duet indicating that Cullen personally

participated in preparations for the funding of the Varengold transactions by travelling to Hamburg to meet Varenburg executives on 26 March that year. This was less than two weeks before Investec started funding Varengold's cum-ex transactions.

7. Do you deny that Cullen met with Varengold executives to discuss cum-ex transactions?
8. Would a senior divisional head normally personally meet clients this way?
9. If so, did Cullen meet with Avana Invest, another client implicated in cum-ex trading around the same time and also funded by Investec?

Apart from providing significant levels of funding up to EUR250-million to Varengold and Avana, other transactions detailed in the documents include the provision of EUR340-million to a single group of traders in 2008.

10. Would Investec's delegation of authority system have permitted the Dublin office, specifically the team led by Loman Gallagher, to conclude transactions up to EUR250-million or EUR340-million without either the knowledge of or approval from the UK head office **and/or** Johannesburg headquarters of Investec Ltd?
11. If not, up to what level of transaction value could Dublin have concluded without the express notification of and/or authorisation by Investec in South Africa and/or London?
12. Would Investec's legal team and/or advisors have been involved in vetting or approving the transactions – and if so what were the particulars?

The evidence suggests that the Dublin office in fact had little or no autonomy with regards to these activities. In an email dated 24 February Gallagher told Aneil Anand of Duet Asset Management the following:

"I believe that we could offer a soft-limit of €250mm of funding and we are willing to apply for this quickly. If you could provide the following information (for us to include in our committee presentations) and any other information you believe would further the application's credibility as soon as possible, this would ease the process and generate an appealing proposition for the Board:-"

The only reasonable conclusion to draw from the above is that the provision of the funding required the authorisation of an investment committee and the **board**.

13. Is there another conclusion to draw from this, other than that the transaction required the explicit approval of **the Investec board** as well as a committee presumably based in the UK and/or Johannesburg office?

14. Alternatively, can you indicate which Investec structure Gallagher would have been referring to from which he would have needed to get authorisation in order to provide EUR250-million in leverage for cum-ex trades? Please indicate the details of the structure and its members during the relevant period.
15. Does Investec deny that the Dublin office communicated with, and took instruction from any other structure within Investec in South Africa or the UK regarding these transactions?

2008 alleged cum-ex transaction in BMW shares

On 14 January 2014 the Darmstadt tax office wrote to Commerzbank on instruction from the public prosecutor in Cologne demanding Investec's bank records in relation to a series of transactions in BMW shares in May 2008. In this letter the tax office cited "suspicion that your customer [Investec] was involved ... in the transactions that led to an evasion of capital gains tax and solidarity surcharge in the amount of €2,012,940.00".

16. Are you aware of this request for your bank records held at Commerzbank?
17. Can Investec confirm whether the records were provided as requested?

The relevant transactions in BMW shares involved Investec selling shares to a broker Icap and from there to a known cum-ex practitioner and buying them back the next day. The inference drawn by investigators was that this was a classic cum-ex transaction involving three parties in collusion.

18. Is there any other reasonable motivation for these transactions, given that Investec simply sold and bought the same number of shares in a company the day before and day after the declaration of a dividend?

The 2010 "dividend season"

In the 2010 German "dividend season" between April and June Investec provided EUR250-million "per name" for cum-ex trades to a single client, the Caerus Fund, established by Varengold. This equals more than 5% of Investec Bank Plc's cash and near cash at the time. Given that the bank was also funding other funds at the same time it is reasonable to assume at least 10% of Investec Bank's readily available resources were committed to the cum-ex trade at the time.

19. Do you dispute that this is a valid measure of the extent of resource commitment?
20. Is/was it normal for Investec to commit this level of liquidity to a single client?

Investec funded transactions by the Caerus fund for three months starting 8 April 2010. As mentioned above, Investec Europe CEO Michael Cullen met with the managers of the fund shortly before this. In this period there were however a number of other interactions between Investec and Varengold. In particular a number of contracts were signed in quick succession to govern the relationship before trading commenced.

On a single day, the 29th of March, Michael Byrne and Tony Morland signed five different agreements with Varenfold:

- * A “Custody (Futures) and Settlement Agreement”.
- * A pledge agreement
- * An overseas securities lending agreement
- * An ISDA Master Agreement
- * A “side letter” indemnifying Investec against certain risks in the imminent cum-ex deals.

These agreements were followed the very next day by a legal opinion addressed to Investec from Hanno Berger’s firm Dewey & LeBoeuf dated 30 March 2010. Berger himself was, with Investec’s knowledge, involved in the Varengold fund.

Among other things the opinion claims that Varengold performing its obligations under the contracts cited above “does not contravene any provision of the German Investment Act”.

21. The set of agreements signed on 29 March are seemingly meant to prepare the way for cum-ex transactions. The timing also indicates that this is the case. Is there any reason not to draw this conclusion?
22. The commissioning of a legal opinion from the very firm (and in fact a partner) involved in setting up the Varengold fund seems like a remarkably transparent instance of “opinion shopping”. Why was this clearly conflicted law firm asked to provide an opinion?
23. Is there any innocent reason for these agreements to have been signed right between Cullen’s visit to Varengold and the beginning of cum-ex trading by Varengold?

Emails among the leaked documents show that Gallagher and Byrne met with representatives of Zeta Financial Partners (ZFP) at the Dublin offices on 14 July 2010 to discuss cum-ex trading in Spain. Investec allegedly indicated it could provide EUR250-million or more to facilitate trades in that country.

24. Do you deny that Investec participated in cum-ex trading (either as a funder, broker, custodian bank or any other function) in Spain or any other country apart from Germany?

According to witness testimony given to German prosecutors Investec's fee for funding cum-ex transactions in 2010 was 4,5% of the gross dividend in question. A request for a higher 5% fee is also recorded in email correspondence. The profit from a cum-ex scheme is equal to the withholding tax being claimed (twice), which in Germany was 26,375% at the time. It follows that Investec's fee would in fact amount to as much as 17% of the total illicit proceeds of the trade. (I.e. 4,5% of the gross dividend over the "profit" is 4,5/0,26375).

25. Can you comment on, confirm or fault this calculation?

The 2011 US pension fund transactions

During 2011 Investec was allegedly involved in cum-ex transactions using pension funds in the US to claim fraudulent duplicate tax rebates from Germany. Among the leaked files are voluminous "credit advice" certificates issued by Investec, acting as custodian bank of the pension funds, which were used to make the applications for refunds.

These were allegedly false certifications that these pension funds did in fact receive dividends, paid dividend withholding tax and were consequently entitled to refunds. None of this was true, investigators have determined.

26. Does Investec deny that it issued these certificates knowing they contained false information?

27. In 2006 and 2007 Investec signed a number of agreements echoing those signed with Varengold cited above with at least five of the indicted pension funds:

- American Investment Group of New York L.P Pension Plan
- Kamco Investments Inc. Pension plan
- Kamco L.P. Profit Sharing Pension Plan,
- Linden Associates Defined Benefit Plan
- Riverside Associates Defined Benefit Plan

Each of these funds have been accused of cum-ex fraud. In addition, all of them are respondents in civil proceedings brought by the Danish government in New York related to alleged tax fraud using additional mechanisms for claiming unearned tax refunds. All of them, as well as others implicated in cum-ex fraud were using Investec paperwork for refund applications. Their trustees and administrators are subject to criminal proceedings in Germany and it appears they were exclusively set up for the purpose of committing financial crimes.

28. Did Investec maintain a commercial relationship with any of these pension funds after 2011?

29. If not, when and why was the relationship terminated?

30. Considering that these funds seemingly did little except commit tax fraud, how can the relationship over several years be interpreted as anything but complicity in that fraud?

In April 2008 Alan Tapnack, on behalf of Investec, signed a power of attorney agreement with Globe Tax Services empowering Globe to “sign any and all applications, requests, or claims for refunds, reduction, repayment, and credit of, or exemption or relief from, any withholding or similar taxes in any jurisdiction whether in or outside of the United States and to file or deliver the same, with any exhibits or accompanying documentation that may be necessary in connection therewith”.

Globe in turn processed the applications for fraudulent German tax refunds on behalf of the US pension funds mentioned above using the allegedly false Investec credit advices. The timing of Investec’s signing of the agreement seems to coincide with the start of alleged cum-ex trading by these funds. It also followed shortly after 2007 legislative changes in Germany that inadvertently made cum-ex transactions possible via foreign custodian banks.

31. What motivated the agreement with Globe Tax Services at precisely the time it was entered into, if not the new opportunity that had arisen for cum-ex trading in Germany?

32. Did Investec previously have similar arrangements with other service providers?

33. Did Investec make use of Global Tax Services in relation to clients **other** than:

- American Investment Group of New York L.P Pension Plan
- Kamco Investments Inc. Pension plan
- Kamco L.P. Profit Sharing Pension Plan,
- D W Construction Inc. Pension plan
- Moira Associates LLC 401K Plan
- Linden Associates Defined Benefit Plan
- Riverside Associates Defined Benefit Plan
- Newsong Fellowship Church 401 (k) plan
- Zichron Yaakov Institute
- Sander Gerber Pension Plan

34. If so please provide details.

35. Did Investec ever make use of Globe Tax Services for tax relief or refund applications such as those contemplated in the power of attorney that **did not** involve refunds from the German tax authorities, irrespective of whether this was on behalf of clients in the US or elsewhere?

The administrator of the funds cited above was ACER Investment Group, the representatives of which are also facing criminal charges in Germany. According to the

testimony of one deal structurer involved in the 2011 cum-ex transactions by the funds Investec had a “pre-existing relationship” with ACER.

36. Did Investec have any commercial relationship with ACER prior (or subsequent) to 2011?

37. What was the nature of this relationship?

According to the same witness Investec initially committed to providing EUR50-million in leverage to the ACER-administered funds for the 2011 cum-ex trades. This was subsequently negotiated upward to EUR200-million.

38. Do you deny that Investec provided this funding to the ACER-administered pension funds in 2011 for the cum-ex trade in German securities?

German tax authorities made several efforts to curb the cum-ex trade between 2009 and 2011. These efforts were circumvented by the fact that entities on the sell side of a transaction (or a provider of leverage) were exempt from new rules. Foreign entities like Investec could also evade regulations targeting German taxpayers making false refund applications. Witness testimony in the leaks show that banks very actively commissioned legal advice to determine what legal and reputational damage they might face due to these efforts by the government.

39. Did Investec at any point **before 2012** seek and/or receive legal advice on cum-ex transactions?

40. If so, was Investec advised that its participation was in fact safe as far as liability is concerned? If so, please provide details concerning the advice and who provided it.

41. We note that the recent judgment of the German Federal appeal court relating to trades carried out between 2007 and 2011 involving the M.M.Warburg bank noted, “At the time of the commission of the offenses, the law already provided for a clear regulation in the relevant provisions, which the parties involved violated according to the legally correct findings of the regional court,” and further that the targeted CumEx transactions were not “the mere exploitation of a loophole in the law because the legal regulation was clear. It was much more a matter of getting a smooth grip on the till, which all taxpayers normally pay into, as is the case with normal sales tax fraud”. In other words, these transactions were self-evidently deliberate frauds on the tax authorities. Please comment.

Legislative interventions seemingly made cum-ex trading impossible in Germany from 1 January 2012 onwards. German authorities have however expressed concern that traders may have started using “pre-release” American Depository Receipts (ADRs) as an alternative mechanism for making fraudulent tax refund claims. Among the leaked documents are two credit advice letters issued to the Newsong Fellowship Church as

well as the Zichron Yaakov Institute, both dated 20 December 2011. These certified the receipt of dividends on **ADRs** linked to underlying German equities.

42. Has Investec participated in any capacity in the trading of pre-release ADRs tied to German equities over dividend record dates?

Investec's disclosures

In its 2021 annual report Investec made a contingent liability disclosure related to the cum-ex investigation in Germany. Elements of it are vague and seemingly at odds with details that have emerged from the leaked documentation. Could you please clarify the following:

The disclosure reads: "Investec Bank plc ('Investec') has been notified by the Office of the Public Prosecutor in Cologne, Germany, that it and certain of its current and former employees may be involved in possible charges relating to historical involvement in German dividend tax arbitrage transactions (known as cum-ex transactions).

43. The formulation whereby Investec and employees "may" be "involved" in "possible" charges is exceedingly vague. What precisely has happened? Has the prosecutor subpoenaed Investec for information or taken any preliminary steps against the bank or its employees?

The disclosure continues: "Investigations are ongoing and no formal proceeding have been issued against Investec by the Office of the Public Prosecutor."

This is seemingly contradicted by an interim report from the office for criminal tax matters and tax investigations in Wuppertal dated 13 December 2019 which indicates that Investec employee Michael Byrne was criminally charged on 23 March 2018 while Investec became a secondary accused on the same date in keeping with the German system where a company cannot be directly criminally accused.

44. Was Investec for some reason unaware of the charges of March 2018?

45. Alternatively, do you deny that Investec and its employee were charged on 23 March 2018?

As far as I have been able to ascertain Investec's first notification to shareholders that it faced a potential liability due to the cum-ex investigations was in 2019.

46. If Investec was presumably aware of a potential criminal prosecution at the very latest March 2018 why did it take so long to notify the market?

The disclosure continues: “Investec is cooperating with the German authorities and is conducting its own internal investigation into the matters in question.”

47. Who is conducting the internal investigation?
48. Why has Investec not commissioned an independent investigation?
49. What are the terms of reference of the internal investigation?
50. Who has been questioned in the internal investigation?
51. Have the relevant electronic and other records been obtained and preserved?
52. Have any employees been disciplined or suspended?
53. In what way is Investec cooperating with the authorities?
54. Have the relevant electronic and other records been made available to the German authorities?

The disclosure continues: “There are factual issues to be resolved which may have legal consequences including financial penalties.”

55. What are the main “factual issues” in that need to be resolved?

The disclosure continues: “Investec has received third party notices in relation to two civil proceedings in Germany and may elect to join the proceedings as a third party participant.”

56. Who are the other parties in these proceedings and have there been developments in any of the three matters since the publication of the annual report?

The disclosure continues: “Investec has itself served third party notices on various participants to these historic transactions in order to preserve statute of limitation on any potential future claims that Investec may seek to bring against those parties, should Investec incur any liability in the future.”

57. Who are these participants?
58. Do they include Zeta Financial Partners, Duet Asset Management, Varengold or any of Hanno Berger’s legal practices?
36. Do they include Ballance Capital, any American pension fund or Globe Tax Services?

Likely consequences

59. Are we correct in understanding that the maximum administrative penalty Investec could suffer in Germany is a fine totaling all its income from the offence in question which is to say all the money it made from cum-ex transactions?

Whatever profits Investec derived from the cum-ex trade would have been in Euro. Given the depreciation of the rand since the high tide of cum-ex activity around 2010 and 2011 it seems fair to assume that Investec might (in rand terms) actually pay far more than the profit it made.

60. Is that a fair interpretation?

Considering that transactions were apparently authorized by investment committees and the board, it appears safe to assume that criminal liability could apply to line managers within Investec starting with Byrne and Gallagher and reaching all the way up to the board.

61. Is that a fair assessment of the potential risk to senior personnel within Investec, including members of the board?

Investec's CEO at the time, Stephen Koseff, has repeatedly taken a strong public stance against corruption and done so in his capacity as the bank's co-founder and leader. This sits uncomfortably with Investec's disingenuous approach to its own involvement in the cum-ex scandal. It has by and large relegated it to a footnote in its annual reports.

62. Is it not fair to call this a double standard i.e. allegations of corruption get called out when committed by other people but not when you yourself are the suspect?

Please advise as soon as you receive this and please respond to the above questions by no later than CoB on Monday, 18 October.

Thanks and regards.