

# Tax/Litigation/Regulatory Webinar

## Cum/Ex Trades – Investigate and Counter the Risks

Dr. Ingo Kleutgens  
Dr. Jan Kraayvanger  
Dr. Alexander Behrens

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# Cum/Ex Trades – Tax Analysis

- Official investigations are still carrying on
  - Estimated EUR 12bn of tax losses suffered by the Government
  - Maple Bank under administration
- Main Elements of trades
  - Short sales/stock lending
  - Hedging of market risk
  - Obtaining liquidity
  - Keeping costs low

# Cum/Ex Trades – Tax Analysis

- Providers of beneficial tax position
  - German Banks with tax credit entitlement
  - Often U.S. Pension Funds
- Beneficial tax opinions gave comfort to participants
  - Opinion providers relied on 1999 Federal Fiscal Court decision
  - Follow up ruling were dealing with cases which were not representative (FG Hamburg, FG Hessen)
  - Criminal courts gave clearer guidance
  - Beneficial ownership by short buyer long time open

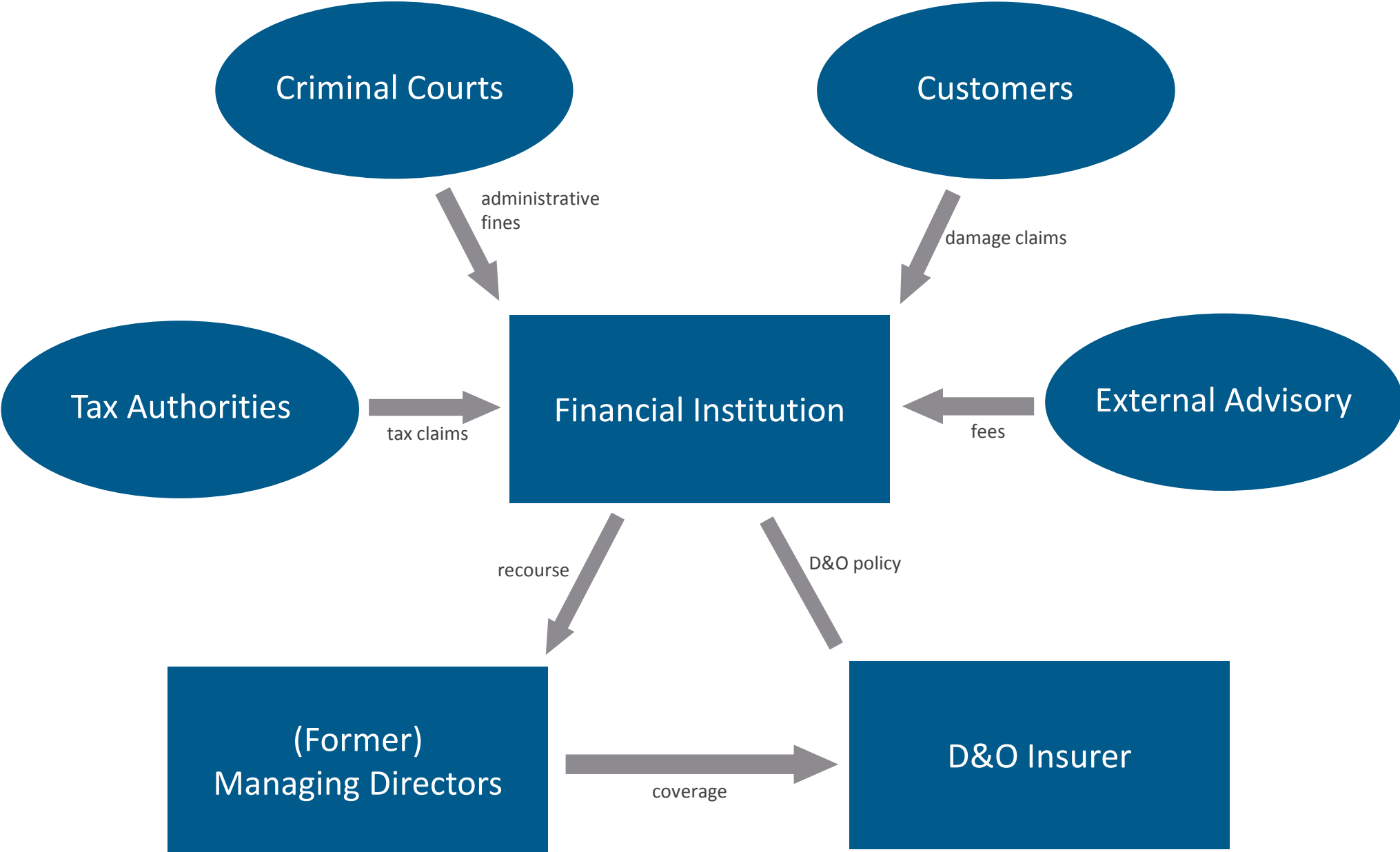
# Cum/Ex Trades – Tax Analysis

- Tax authorities challenged the trades from a formal perspective
  - No accurate voucher filed
  - Burden of proof with the applicant
  - Long questionnaires caused delays of the refund process
- Recent decision of Fiscal Cour of Hestia
  - No economic ownership in case of OTC trades
  - Burden of prove with applicant even in case a tax voucher was furnished

# Cum/Ex Trades – Tax Analysis

- Strategy to be defined
  - Internal review on poisoned trades
  - Sorting out of unsuspecting deals
  - Defense strategy to consider shifting of burden of prove
- Investigation committee set up by the Parliament

# Management liability and D&O insurance coverage



# Management liability and D&O insurance coverage

- Supervisory board is obliged to pursue management liability claims if they have merit
- Settlement of Company with (former) management only permissible
  - after three years damage claim has come into existence
  - if consent by majority of shareholders
  - if no objection of minority of 10 percent of the share capital

# Management liability and D&O insurance coverage

- Burden of proof
  - Company:
    - Causation
    - Damage
  - (Former) Managing Directors
    - No breach of duty
    - No fault



# Management liability and D&O insurance coverage

- The Managing Directors' duties of care in case of business decisions based on uncertain legal grounds
  - MD has to engage independent professional advisors
  - MD has to inform advisors about all relevant facts
  - MD has to scrutinize the professionals' advice
  - MD has to balance the risks
  - MD should document the steps described above

# Management liability and D&O insurance coverage

- The D&O Insurer's information rights
  - D&O Insurer is entitled to request all information it deems relevant to assess liability and coverage
  - No obligation of the Company to disclose facts the D&O Insurer has not asked for
  - If Company breaches information duty, D&O Insurer may deny or reduce coverage, as the case may be

# Management liability and D&O insurance coverage

- Reimbursable Damages

- All benefits the Company gained through cum/ex trade are to be deducted from damage claim
- Costs for external advisors reimbursable if necessary and reasonable
- Administrative fines: Reimbursability not finally decided by the courts

# Regulatory responsibilities - Overview

- Insolvency of Maple Bank has triggered actions of regulators
- Regulatory authorities
  - BaFin (Federal Financial Services Supervisory Authority – Bundesanstalt für Finanzdienstleistungsaufsicht) traditionally the key regulator for German banks
  - Since 4 November 2014: European Central Bank competent for "significant banks"
- Responsibility of regulatory authorities
  - Generally limited to stability of banks and conduct vis-à-vis clients, not for compliance with tax laws
  - However, certain interconnections and key risks exist

# Regulatory risks

## 1. Measures in case of risks for stability

- Tax claims may result in losses and reduce own funds
- Increased own funds requirements in case of "hidden risks"
- Further interventional powers in case of breach of capital ratios

## 2. Measures in case of inadequate risk management systems

- Requirement of banks to have robust risk management systems in place, including protection against criminal offences
- Non-compliance may result in doubts regarding the reliability of members of management board
- Potential criminal offence

# Regulatory risks

3. Breach of criminal laws may also cast doubts over reliability of members of management board
4. Investigation rights

# Thank you



**Dr. Ingo Kleutgens**

Tax

Partner, Frankfurt am Main  
ikleutgens@mayerbrown.com

T +49 69 7941 1591



**Dr. Jan Kraayvanger**

Litigation & Dispute Resolution

Partner, Frankfurt am Main  
jkraayvanger@mayerbrown.com

T +49 69 7941 2271



**Dr. Alexander Behrens, LLM (UCT)**

Banking & Finance

Partner, Frankfurt am Main  
abehrens@mayerbrown.com

T +49 69 7941 1133

# Contact

## **Frankfurt**

Friedrich-Ebert-Anlage 35-37

60327 Frankfurt am Main

T +49 69 7941 0

F +49 69 7941 100

## **Düsseldorf**

Königsallee 61

40215 Düsseldorf

T +49 211 86224 0

F +49 211 86224 100