



Brussels, 10 February 2016
(OR. en)

6013/16

LIMITE

JUR 70
FISC 19

**Interinstitutional File:
2013/0045 (CNS)**

OPINION OF THE LEGAL SERVICE¹

Subject: Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax (FTT)

- Possibility for withdrawal from enhanced cooperation after adoption of the authorising decision but before adoption of the act establishing enhanced cooperation
- Procedure to follow

I. INTRODUCTION

1. On 28 September 2011, the Commission tabled a proposal for a Council Directive on a common system of financial transaction tax (FTT) and amending Directive 2008/7/EC². At the Council meetings of 22 June and 10 July 2012 and at the European Council meeting on 28/29 June 2012, it was ascertained that essential differences in opinion remained as regards the need to establish a common system of FTT at EU level and that the proposal would not receive unanimous support within the Council in the foreseeable future.

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² ST 14942/11, COM (2011) 594 final of 28.09.2011.

2. Against that background, eleven Member States (Austria, Belgium, Estonia, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain) addressed requests to the Commission indicating their wish to establish enhanced cooperation between themselves in the area of FTT³. The Commission submitted a proposal to that effect and, with the consent of the European Parliament, the Council adopted Council Decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax (hereinafter referred to as the "authorising decision")⁴. Following that authorisation, the Commission submitted on 14 February 2013 a proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax (hereinafter referred to as the "Commission proposal")⁵. Ever since, no agreement has been reached for adopting the Directive and therefore, enhanced cooperation has not been established yet.
3. During the Council (Ecofin) meeting of 8 December 2015, the possibility was mentioned that a Member State having initially indicated its wish to participate in the enhanced cooperation might wish to withdraw. This unprecedented situation raises a number of legal questions that the Council Legal Service considers necessary to address in this opinion. In particular, the following two questions will be examined:
- Whether it is legally possible for a Member State to withdraw from an authorised enhanced cooperation before it has become effective through the adoption of an act establishing it;
 - In the affirmative, what is the appropriate procedure to follow.

³ With regard to the Treaty requirements for authorising enhanced cooperation, see CLS opinion of 30 November 2010, doc 17220/10.

⁴ OJ L 22, 25.1.2013, p. 11.

⁵ ST 6442/13, COM(2013) 71 final of 14.02.2013.

II. TREATY PROVISIONS

Article 20 of the Treaty on the European Union (TEU):

“1. Member States which wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties, (...).”

Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States, in accordance with Article 328 of the Treaty on the Functioning of the European Union.

(...).

4. Acts adopted in the framework of enhanced cooperation shall bind only participating Member States (...).”

Article 328 of the Treaty on the Functioning of the European Union (TFEU):

“1. When enhanced cooperation is being established, it shall be open to all Member States, subject to compliance with any conditions of participation laid down by the authorising decision. It shall also be open to them at any other time, subject to compliance with the acts already adopted within that framework, in addition to those conditions.

The Commission and the Member States participating in enhanced cooperation shall ensure that they promote participation by as many Member States as possible.

2. ...”

Article 329 TFEU:

"1. Member States which wish to establish enhanced cooperation between themselves in one of the areas covered by the Treaties, (...) shall address a request to the Commission, specifying the scope and objectives of the enhanced cooperation proposed. The Commission may submit a proposal to the Council to that effect. (...)

Authorisation to proceed with the enhanced cooperation referred to in the first subparagraph shall be granted by the Council, on a proposal from the Commission and after obtaining the consent of the European Parliament (...)."

Article 331 TFEU:

"1. Any Member State which wishes to participate in enhanced cooperation in progress in one of the areas referred to in Article 329(1) shall notify its intention to the Council and the Commission.

The Commission shall, within four months of the date of receipt of the notification, confirm the participation of the Member State concerned. It shall note where necessary that the conditions of participation have been fulfilled and shall adopt any transitional measures necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation (...)."

III. LEGAL ANALYSIS

A. Preliminary remarks

4. The Treaties are silent regarding the possibility and the procedure for a Member State to withdraw its wish to participate in enhanced cooperation during the period after adoption of the authorising decision and before adoption of the act establishing enhanced cooperation. In the absence of any express provision, recourse must be had to the interpretation of the relevant Treaty provisions on enhanced cooperation, bearing in mind its objectives and two fundamental attributes that govern its functioning: first, the voluntary character of participation in it; second, its openness and flexibility.

a) *Voluntary character of enhanced cooperation*

5. According to Articles 20(1) TEU and 329 (1) TFEU, Member States which wish to establish enhanced cooperation between themselves shall address a request to the Commission. The decision as to whether or not to take part in enhanced cooperation is for the Member States alone, on the basis of their own wishes⁶. The basis of enhanced cooperation is thus a voluntary act of each Member State. The expression of the wish to participate in enhanced cooperation and the subsequent withdrawal of such a wish is an act of free will of the Member States⁷, whose voluntary character only ceases to exist at the moment of adoption of the act establishing enhanced cooperation⁸.
6. The authorising decision determines that the conditions for having recourse to enhanced cooperation are fulfilled, thus enabling the willing Member States to proceed with it. However, that decision does not create an obligation to do so.

⁶ European Convention document on enhanced cooperation, 14 May 2003, CONV 723/03, page 6.

⁷ For instance, in the case of the enhanced cooperation in the area of the law applicable to divorce and legal separation, Greece initially addressed a request to the Commission pursuant to Article 329(1) TFEU, but later withdrew its request, see Council Decision 2010/405/EU of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 189, 22.7.2010, p. 12, recital (5).

⁸ This is explicitly stated in Article 20(4) TEU that stresses the binding character upon participating Member States of the “*acts adopted in the framework of enhanced cooperation*”.

b) *Openness and flexibility of enhanced cooperation*

7. Enhanced cooperation is conceived as a flexible instrument open to the participation of all Member States, before and after it has been established. The Treaties contain a number of provisions concerning the opening of enhanced cooperation to "*as many Member States as possible*" "*when it is being established*" and "*at any time*" (Article 328 (1) TFEU). Openness and flexibility are a corollary of the voluntary character of enhanced cooperation reflected under point a). The procedures for allowing further participation in enhanced cooperation respond to this idea of flexibility and are hence characterised by their simplicity. Article 331(1) TFEU lays down a procedure for participation in enhanced cooperation in progress without requiring a modification of the authorising decision. Before the enhanced cooperation is in progress, no similar provision exists, which must be interpreted as meaning that new intentions to participate are to be accepted without specific procedural requirements.

B. Whether it is legally possible for a Member State to withdraw at the current stage of the FTT enhanced cooperation

8. As mentioned above in point 5, it derives from Article 20(4) TEU that a Member State may not withdraw from enhanced cooperation once it is established. Once established, enhanced cooperation binds participating Member States as any other applicable legal act adopted by the Union. Before that point in time - during the period from the date of adoption of the authorising decision to the establishment of enhanced cooperation - and bearing in mind the voluntary, open and flexible character of enhanced cooperation, a Member State is entitled to withdraw its stated intention to participate.

9. The fact that a Member State appears in the list of Member States willing to establish enhanced cooperation, as laid down in the authorising decision, does not put into question the above conclusion. Under Article 329(1) TFEU, the authorising decision merely determines the scope and objectives of the enhanced cooperation. It does not definitively establish the content thereof⁹. If the Member States concerned remain free to decide not to establish enhanced cooperation in the end, they must, by the same token, be able to stop their participation in the establishment of enhanced cooperation¹⁰.
10. Not allowing unilateral withdrawal at this stage could have the effect of discouraging Member States from proceeding with enhanced cooperation before knowing its precise and definitive content, running thus counter the objective of "*promot[ing] participation by as many Member States as possible*" (Article 328(1) second subparagraph TFEU).
11. At the same time, in an area like the one at issue where unanimity is required for the adoption of any act, an unwilling Member State would not allow the others to adopt among themselves the act establishing enhanced cooperation. However, once enhanced cooperation is established, it is possible that more Member States (including the one that withdrew) decide to join¹¹. This interpretation is supported by the aims of enhanced cooperation that are, according to the second subparagraph of Article 20 (1) TEU, "*to further the objectives of the Union, protect its interests and reinforce its integration process*".¹²

⁹ See the reasoning of the Court in Case C-209/13, *United Kingdom/Council*, EU:C:2014:283, paragraphs 33 et seq; and in Cases C-274/11 and C-295/11, *Spain and Italy/ Council*, EU:C:2013:240, paragraphs 76-77.

¹⁰ This interpretation is confirmed by the wording of Article 329 (1), second subparagraph TFEU referring to "*authorisation to proceed with enhanced cooperation*" and not "*authorisation establishing enhanced cooperation*"(emphasis added).

¹¹ See, for instance, the case of Greece as referred to in footnote 7, that initially withdrew from enhanced cooperation, but joined it after the adoption of the act establishing enhanced cooperation by virtue of Commission Decision [2014/39/EU](#) of 27 January 2014 confirming the participation of Greece in enhanced cooperation in the area of the law applicable to divorce and legal separation ([OJ L 23, 28.1.2014, p. 41](#)).

¹² The Council Legal Service took the same position regarding enhanced cooperation in the field of the unitary patent protection, see doc 6524/11 of 2 March 2011, point 15. See also Commission's statement entered in the Council minutes on the adoption of the authorising decision regarding the unitary patent protection where it acknowledged the possibility of withdrawal before the adoption of acts within the framework of enhanced cooperation, doc. 7729/11 ADD 1 of 3 May 2011, page 4.

C. Procedure for withdrawal from enhanced cooperation

12. The procedure to follow for such withdrawal should also be consistent with the voluntary, open and flexible character of enhanced cooperation.
13. In the view of the Council Legal Service, no modification of the authorising decision is required for the withdrawal of a Member State to take effect. In the absence of any formality required by the Treaties, a Member State wishing to withdraw from enhanced cooperation should simply notify its intention to the Council and to the Commission in written form or through a statement delivered at a Council meeting. No further act of the Council and/or of the Commission is necessary for the notification to take effect. As from the moment of such notification, the Member State concerned should no longer be considered as wishing to participate in the establishment of enhanced cooperation and therefore, should not take part in the vote for the adoption of the act establishing enhanced cooperation according to Article 330 TFEU. The remaining Member States will be free to adopt the act establishing enhanced cooperation without the Member State having withdrawn, to the extent they are still in sufficient number for the vote to be able to take place. If the number of Member States falls below the level of nine as required by Article 20 (2) TEU, the adoption of the act establishing enhanced cooperation cannot take place. However, if other Member States than those having initially signalled their intention to participate have notified the same intention, they will be counted among those able to participate in the vote.

14. A more formalistic approach requiring, for instance, a modification of the authorising decision would ignore the voluntary, open and flexible character of enhanced cooperation, since the interested Member State would not be able to withdraw on its free will, but would depend on the will of the Commission to propose an amending act of the authorising decision, of the Council to adopt the amended authorising decision and of the European Parliament to grant its consent¹³.¹⁴
15. The purpose of the authorising decision is to authorise the willing Member States to proceed with enhanced cooperation after verification that all the conditions laid down in Articles 20 TEU and 326-329 TFEU are fulfilled¹⁵. Those conditions are of an objective character and should not result in the Commission, the Council or the European Parliament selecting the individual Member States to be authorised to proceed with enhanced cooperation¹⁶. The specific composition - total number and identity - of the wishing Member States is not an essential element for granting authorisation according to the Treaties, as long as at least nine Member States have declared their intention to participate.¹⁷

¹³ The modification of the authorising decision could not follow any other procedure without violating Article 329 (1) TFEU.

¹⁴ It is recalled that Article 331 TFEU provides for a detailed procedure for Member States wishing to participate in enhanced cooperation. That case - increase in the number of participating Member States - is similar to the case of withdrawal - decrease in the number of the relevant Member States - to the extent that they both concern a change in the number of Member States following the adoption of the authorising decision. Nevertheless, Article 331 TFEU does not require a modification of the authorising decision. The absence of such requirement demonstrates that the Treaties do not impose an absolute correspondence of the number of Member States participating in enhanced cooperation to the number of Member States having been authorised to do so.

¹⁵ Namely, minimum nine Member States; non-exclusive competence of the Union; last resort; not undermining of the internal market or economic, social and territorial cohesion; no barrier or discrimination in trade; no distortion of competition; see for instance CLS opinion of 30 November 2010, doc 17220/10.

¹⁶ See European Convention document on enhanced cooperation, 14 May 2003, CONV 723/03, pages 6-7.

¹⁷ In this context, it is noteworthy that the European Parliament, in its legislative resolution on the proposal for authorising enhanced cooperation on FTT, gave its consent “*without prejudice to which Member States participate*”¹⁷, adhering thus to the view that the change in the number or identity of member states does not make such a difference in essence that would trigger the procedure for authorisation to start anew, see European Parliament legislative resolution of 12 December 2012 on the proposal for a Council decision authorising enhanced cooperation in the area of the creation of financial transaction tax, OJ C 434, 23.12.2015, p. 260, recital Q and point 1.

Moreover, the authorising decision does not fix the geographical scope of application of the enhanced cooperation because, as explained above, such a decision does not establish enhanced cooperation but simply authorises to proceed with it. That geographical scope is only known at the moment of adoption of the act establishing enhanced cooperation, *in casu* the FTT Directive, which should in turn list the Member States that are bound by it¹⁸.

IV. CONCLUSION

16. In the light of the above, the Legal Service concludes that:

- a Member State may withdraw freely from enhanced cooperation after the adoption of the authorising decision and before the adoption of the act establishing enhanced cooperation;
- in the absence of any formality required by the Treaties, a Member State wishing to withdraw from enhanced cooperation should simply notify its intention to the Council and to the Commission, without any further act being needed to give effect to that notification.

¹⁸ The practice followed in the two precedent cases of enhanced cooperation (Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343, 29.12.2010, p. 10, Article 3; Regulation (EU) No 1257/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ L 361, 31.12.2012, p. 1, Article 2) to refer to the authorising decision and to any future decision adopted in accordance with Article 331(1) TFEU is a manner of legislative drafting that could be adjusted in the case at issue by precisely naming the participating Member States in the body of the Directive that is at any rate a preferable drafting in terms of legal certainty.