



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

DOCUMENT PARTIALLY ACCESSIBLE TO THE PUBLIC (16.07.2019)

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.

¹ This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.

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. **DELETED FROM THIS POINT UNTIL THE END OF THE DOCUMENT (PAGE 10)**
