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NOTE

From: General Secretariat of the Council
To: Permanent Representatives Committee/Council

Subject: Enhanced cooperation in the area of Financial Transaction Tax

- Proposal for a Council Directive implementing enhanced cooperation in the area of Financial Transaction Tax
- = State of play

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/EC. The objective of the proposal was to ensure a fair contribution of the financial sector to the costs of the financial crisis, avoid fragmentation of the Single Market and create appropriate disincentives for transactions that do not enhance the efficiency of financial markets. 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 have not received unanimous support within the Council in the foreseeable future.

2. On the basis of the request of eleven Member States (Austria, Belgium, Estonia, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain - hereafter referred to as "participating Member States"), and in accordance with the authorization of the Council of 22 January 2013¹, which was adopted following the European Parliament's consent given on 12 December 2012, the Commission on 14 February 2013 submitted a proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax (hereafter referred to as the "Commission proposal"). This Commission proposal, essentially, mirrored the scope and objectives of the original FTT proposal put forward by the Commission in 2011.

II. STATE OF PLAY

3. Following the preparatory work by the Working Party on Tax Questions (WPTQ), and, where relevant, by the High Level Working Party on Tax Questions (HLWP), the state of play on this dossier has been discussed at the following meetings of ECOFIN Council:
- 6 May 2014, where the Ministers of ten participating Member States released a Joint Statement²;
 - 7 November 2014³ and 9 December 2014⁴, on the basis of the Presidency reports;
 - 8 December 2015⁵, where, on the basis of the Presidency report, the Council took note of the progress achieved by the participating Member States and positions of the non-participating Member States. At that ECOFIN meeting, on the basis of a presentation by Austria, ten participating Member States (without Estonia) agreed the statement that was inserted into the minutes of that Council meeting⁶ (reproduced in the Annex to this note).

¹ OJ L 22, 25.1.2013, p. 11.

² See doc. 9399/14 FISC 79 ECOFIN 445 and doc. 9576/14 PV/CONS 22 ECOFIN 460.

³ See doc. 14949/14 FISC 181 ECOFIN 1001.

⁴ See doc. 16498/14 FISC 222 ECOFIN 1159 and doc. 16753/14 FISC 230 ECOFIN 1188 CO EUR-PREP 50, points 36 to 46.

⁵ See doc. 14942/15 FISC 181 ECOFIN 947.

⁶ See doc. 15112/15 PV/CONS 72 ECOFIN 961 ADD 1.

4. On 16 March 2016, the Republic of Estonia has completed the formalities required to leave the enhanced co-operation on FTT⁷.
5. Under the Netherlands Presidency, which enabled the continuation of discussions on this dossier among all Member States, during the first half of 2016, one WPTQ meeting took place, where, at the initiative of some of the participating Member States, the debate continued on selected issues that were already covered by the exchange of views at December 2015 ECOFIN, namely:
 - a) application of "issuance" and "residence" principles and the territorial scope for the FTT⁸;
 - b) exemption from FTT of market making activities⁹;
 - c) scope of transactions in derivatives contracts to be subject to the FTT¹⁰.

III. RECENTLY DISCUSSED ISSUES

- a) *Application of "issuance" and "residence" principles and the territorial scope for the FTT*
6. Point 1(d) of 8 December 2015 statement by 10 participating Member States is as follows:

"The territorial scope of the tax should follow the Commission's proposal. It is now being determined whether it is more sensible to start taxation with only shares issued in the Member States participating in the enhanced cooperation. Important elements in this determination include relocation risks and administrative costs."

⁷ See doc. 7808/16 FISC 47 LIMITE.

⁸ See doc. 14942/15 FISC 181 ECOFIN 947, point 7 to 11.

⁹ See doc. 14942/15 FISC 181 ECOFIN 947, point 15 to 17.

¹⁰ See doc. 14942/15 FISC 181 ECOFIN 947, point 18 to 19.

7. To serve the objectives of the December 2015 statement on this issue, which is one of the most extensively discussed in the Council¹¹, some of the participating Member States have suggested that the compromise solution could contain the following elements:
- i) lists of items falling under the definitions of "financial instruments" and "derivatives contracts" could be designed in the draft Directive on FTT;
 - ii) an exemption could be foreseen that would exclude from FTT the transactions in shares issued in non-participating Member States. It would remain to be decided on whether such an exemption should be temporary and what could be the modalities for its possible review or modification. At WPTQ level, views were exchanged on whether, as a possible compromise, this exemption could cease to operate unless a decision by participating Member States is taken to extend its duration. In this context, further work would be required, in order to determine which voting modalities permitted under TFEU could be used for taking such a decision, as enhanced co-operation in this case is being pursued in the area of EU tax law, and the interests of all EU Member States have to be secured.
 - iii) as an additional feature, the participating Member States, that so wished, could nevertheless apply their own taxation rules to transactions in such shares, provided that EU law is respected (e. g. Art. 63 TFEU and the Capital Duty Directive)¹².
8. However, at WPTQ level, some participating Member States have maintained reservations on such a solution. A number of non-participating Member States have raised concerns that, as far as any extraterritoriality of a future FTT under enhanced co-operation is concerned, the design of FTT must adhere to the current EU legal framework and respect the competences, rights and obligations of the non-participating Member States.

¹¹ See doc. 14949/14 FISC 181 ECOFIN 1001 points 18 to 23 and doc. 14942/16 FISC 181 ECOFIN 947, points 7 to 9.

¹² Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital (OJ L 46, 21.2.2008, p. 11).

b) Exemption from FTT of market making activities

9. Point 1(c) of the 8 December 2015 statement contains the sentence: "In order to sustain liquidity in illiquid market configurations, a narrow market making exemption might be required", as the need to include an exemption in the Directive on FTT was raised by some Member States and discussed extensively¹³.
10. Noteworthy, for the purposes of financial supervision, a number of specifically designed definitions of "market maker" or "market making" exist, for example: Article 4(1) point 7 of Directive 2014/65/EU (MIFID), Article 2 point (k) of Regulation No. 236/2012 (the Short-Selling Regulation), etc. However, at technical level, a number of delegations signalled that it is complicated to find objective criteria for defining "market making" and distinguishing it from proprietary trading for the purposes of FTT.
11. At WPTQ level, many participating Member States shared the view a workable solution could be the definition of market making, based on MIFID Articles 17 and 48. As an additional aspect of the compromise, it could also be foreseen that participating Member States, under a set of conditions, apply lower than the standard FTT rate to certain financial transactions carried out by market makers. The decision to apply the reduced rate would rest with the participating MS of "deemed establishment" of the financial institution (market maker) concerned, and would be limited to the FTT due by the market maker on his part of the transaction only.
12. The unanimity of the participating Member States on this approach on market making exemption could not be reached, as at WPTQ level one participating Member State maintained a reservation on this point. Some non-participating Member States have raised concerns that such definition could potentially be too restrictive.

¹³ See doc. 14942/16 FISC 181 ECOFIN 947, points 15 to 17.

c) Scope of transactions in derivatives contracts to be subject to the FTT

13. Point 2(b) of the statement of 8 December 2015 by 10 participating Member States contains the following sentence: "The taxation should be based on the principle of the widest possible base and low rates and it should not impact the cost of sovereign borrowing."
14. As one of the options, that was discussed at WPTQ, the draft Directive could contain a list of types of derivatives contracts, (possibly temporarily) exempt from FTT, the underlying assets of which are sovereign debt instruments. For a derivative contract to qualify for an exemption, the underlying "sovereign" asset would have to be issued by a "sovereign entity", that would also be listed in the Directive. Under the same principles, as explained in point 7(iii) of this note, the participating Member States could nevertheless apply their own taxation rules to transactions in those derivatives, provided they respect EU law.
15. However, the exchange of views at the WPTQ level has shown that there still remains an agreement to be reached on whether there should be such a (possibly temporary) list of derivatives exempt from FTT. Moreover, similarly as for the issue set out in point 7(ii) of this note, a compromise would still have to be found on a mechanism for a possible review or modification of the contents or duration of such an exemption, which would also have to be designed in a manner that respects the competences, rights and obligations of the non-participating Member States.

IV. THE WAY FORWARD

16. Given that point 4 of the 8 December 2015 statement of the participating Member States implies that a decision on open issues relating to FTT under enhanced co-operation should be made until the end of June 2016, it is deemed appropriate that the state of play on this legislative file is discussed at ECOFIN level.
17. In the light of the foregoing, and as already indicated in the December 2015 ECOFIN report to the European Council on Tax matters¹⁴, further work at the Council and its preparatory bodies will be required. A final agreement on this dossier to be reached among the participating Member States should respect the competences, rights and obligations of the non-participating Member States.
18. Against this background, the Committee of Permanent Representatives is invited to recommend to the Council to:
 - a) take note of the progress achieved to date; and
 - b) exchange views on the state of play on this dossier.

¹⁴ See doc. 15187/15 FISC 187 ECOFIN 968 Co EUR-PREP 50, point 40.

**EXTRACT FROM THE MINUTES OF
THE 8 DECEMBER 2015 ECOFIN MEETING (DOC. 15112/15 ADD 1)**

**Statement by Austria, Belgium, France, Germany, Greece, Italy, Portugal, Slovakia,
Slovenia, Spain**

Financial Transaction Tax

We reached today an agreement on the tax that should have the following features:

1. Regarding shares:
 - a) All transactions including intra-day should be taxed.
 - b) All transactions in the chain should be taxed except agents and clearing members (when acting as facilitators).
 - c) In order to sustain liquidity in illiquid market configurations, a narrow market making exemption might be required.
 - d) The territorial scope of the tax should follow the Commission's proposal. It is now being determined whether it is more sensible to start taxation with only shares issued in the Member States participating in the enhanced cooperation. Important elements in this determination include relocation risks and administrative costs.
2. Regarding derivatives:
 - a) The territorial scope of the tax should follow the Commission's proposal (cumulation of residence and issuance principles with application of counterparty principle).
 - b) The taxation should be based on the principle of the widest possible base and low rates and it should not impact the cost of sovereign borrowing.

- c) The determination of the tax base for derivatives should abide by the following principles:
 - i) For option-type derivatives the tax base should preferably be based on the option premium.
 - ii) For products other than option-type derivatives and coming with a maturity, a kind of term-adjusted notional amount / market value (where available) might be considered as the appropriate taxable base.
 - iii) For products other than option-type derivatives and not coming with a maturity, the notional amount / market value (where available) might be considered as the appropriate taxable base.
 - iv) In some cases, adjustments to the tax rates or to the definition of the tax base might be necessary in order to avoid distortions.
 - d) No exemption for market making activities should be granted.
3. Other elements: Member States agreed that further analysis with regard to real economy and pension schemes is required. Negative impact on real economy and pension schemes should be minimised. Further, the financial viability of the tax for each country is required.
4. On the basis of these features, in order to prepare the next step, experts in close coordination with the Commission should elaborate adequate tax rates for the different variants. A decision on these open issues should be made until the end of June 2016.
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