

Implementing enhanced cooperation in the area of Financial Transaction Tax
Questions to the Commission from the working level

This non-paper summarizes questions of the participating member states on the working level to the Commission concerning the proposal for implementing enhanced cooperation in the area of financial transaction tax. This non-paper is provided purely for information purposes.

The participating Member States strongly welcome the Commission's proposal for enhanced cooperation. It is necessary to harmonize rules for the taxation of financial transactions. In order to quickly make further progress with our work the participating member states ask for clarifications in the following areas:

Collection of the tax

- *Acts implementing collection and declaration of the tax*

Article 11, par. 1 of the Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax (the Proposal) states that "the participating Member States shall lay down registration, accounting reporting obligations and other obligations intended to ensure that FTT due is effectively paid to the tax authorities". Nevertheless, common general principles governing the collection and the declaration of the tax already included in the text of the Directive. could help facilitating: (i) the cross-border exchange of information amongst different MS or between MS and other third countries; (ii) the market operators and persons paying/ collecting the tax, by having a common system of collection and declaration in the different countries where they might have to pay/declare; (iii) the reduction of costs of implementation, as a result of the above; (iv) the implementation for both the market and the tax authorities, by having common rules and forms already defined.

Given the above, the 11 MS are also aware that the specific details regarding (for example) the methods of the collection and the tax return forms cannot be contained in the Directive.

As a consequence, the 11 MS would like to ask the Commission which acts could allow to further implement more in detail the general and common principles they would like to include in Article 11 of the Directive.

Would it be feasible to implement in more detail the general and common principles of collection and declaration of the tax in the Directive?
More specifically, which kind of legal acts and which procedure could allow them to work together on the definition of the details, forms, etc for a common collection and declaration system?

Last, how would the use of "implementing acts" work in case of the enhanced cooperation? Which MS would participate to the committee provided for by Article 5 of the Regulation 182/2011?

- *Cross-border exchange of information and recovery of the tax*

What are the Commission's plans to ensure the successful implementation of the FTT as far as non-EU member countries are concerned? In particular, what type of contacts/negotiations does the Commission believe should be established with non-EU governments/financial institutions?

For example, with regard to the exchange of information, the OECD Model has amended in year 2000 Art.26 by including also other taxes not covered by the other articles of the treaty ("*The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind*"). Only treaties signed or amended after that date may contain the provision of exchange of information on all the taxes, but from experience of some MS very few treaties include it. Similar considerations can be made on Article 27.

With respect to the OECD-Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters, if the FTT should be considered as included in Article 2, paragraph 1.b.iii G ("any other taxes"), then very few countries would allow the exchange of information on FTT, and still less would grant the assistance in recovery of tax credits.

As a result, what is the Commission's view on the potential application of current double taxation treaties or other Conventions to ensure effective exchange of information/cooperation in the collection of the FTT?

Liable person

The definition of "Financial institution" should not lead to some distortionary effects or to some circumvention of the tax by shifting, to transactions where a financial institution is not involved.

In case of listed instruments, there may be situations in which no "financial institution" as defined in Article 2 of the Directive is involved in the transaction.

In case of non-listed instruments, in many situations no "financial institution" is involved (but mainly Notary Public, or direct transaction between the parties, etc).

How would the FTT apply in these cases?

Last, when shares are exchanged between two different entities with no intermediaries, sending the order to their depositary entity, would this transaction be taxed?

Bonds

- *Government bonds*

The impact assessment accompanying the document Proposal (SWD(2013)28 Final) it is not fully clear on how the taxation on government bonds would interact with the cost of national debt and whether at the overall level of the 11 MS the negative effect of the increase of the cost of national debts could be counterbalanced by the revenues of the FTT.

In particular, it is not clear:

- (i) if the redistribution effect amongst the 11 MS has been considered or not by the Commission, and if yes, which are the related figures (the present scope of the Commission's proposal in terms of "territoriality" would not allow each MS to collect the whole EU FTT paid on the bonds issued by the same MS. As a result, the increase of cost of government debt which one MS would bear due to the application of the EU FTT would not necessarily be compensated by the collection of the tax on the same instruments. In the "impact assessment" accompanying the Proposal the Commission affirms that "for each euro potentially to be spent on higher interest rates governments would receive more than three euro in return in form of higher FTT revenue (gross revenue)".

Could the Commission detail such analysis? Could the Commission explain in particular the redistributive effect of revenues amongst participating MS deriving from the specific "territorial" principle contained in the Proposal?

- (i) how the figures indicated in the impact assessment are calculated; in particular, it is not clear how the Commission estimated the 2bn euro related to the mitigating effects, as well as more clarifications would be requested on the calculation of the 0.07% increase of the public budgets and on the revenues from bonds.

Can the Commission give evidence of such estimates?

Regarding the low maturity of the repo operations on sovereign bonds market (more than two thirds of repo operations on sovereign bonds have a maturity lower than three days), the tax will induce an additional cost that is not sustainable for the market participants, ie companies and Member States which need to manage properly their cash in a secure environment. The extinction of the market will negatively affect the sovereign bonds market and by consequence will rise the government funding costs. Repo operations are very useful for managing the treasury liquidity and the disappearance of this market combined by the lack of viable alternatives will induce serious problems about risk management. The problem also holds for banks in managing their marginal liquidity and might cause both higher financial costs on the real economy and financial stability issues.

Is there an assessment about the effect of the tax on the repo market and therefore on the funding cost of the central government and the real economy ?

Furthermore, what impact will the tax have on the costs of government funding taking into consideration the costs of transactions on the repo and cash markets and the efforts to reduce public debt ?

- *Tax formula*

Could you state the effects of a tax formula which takes into account the duration of the bond on which the transaction takes place or is it preferable to set up lower minimum tax rates in general? The 0.1% uniform tax rate proposed by the Commission might create an inappropriate burden on short term bonds, repo operations etc, compared to long term bonds. A possible imbalance would have implications on the cost of the debt, including sovereign debt, on financial institutions' refinancing operations, as well as on the part of the asset management industry that is focused on short term maturities

- *Non-government bonds*

With regards to other bonds, business have expressed worries that the same effect described above for government bonds would replicate on the corporate issuers, with negative effects on the financing capability of companies. Considering, on the one hand, the difficulties in receiving funding from the banking sector in the present environment, and on the other hand the fact that exceptions on the FTT should be limited/reasonable, MS would like more information on the expected revenues from taxation on non-governments bonds.

Considering all the above, MS would like to receive from the Commission more evidence and information also with regards to the estimated figures related to non-government bonds. Where does COM see the delamination between private and public sector bonds/debt, namely, how are bonds treated that are issued by private companies that are 100% public owned or 100% public guaranteed and how are CoCo bonds treated - as private or as public, regardless of the ownership of the bank?

- *Primary exemptions on bonds*

Are the acquisitions of UCITS share exempted through the primary market exemption, as defined in Article 3.4.a?

Are bonds of legal entities guaranteed by Member States included? More generally are all bonds of public entities included (such as local authorities)

Definitions and clarification on the scope of taxation:

The 11 MS consider that some definitions should be clarified by the Commission.

- *Purchase and sale*

Article 2, par. 1. (2) (a) mentions “the purchase and sale of a financial instrument before netting or settlement” .

A common definition of “purchase and sale” is essential in order to have: (i) certainty in the legal basis for both taxpayers and tax administrations; (ii) uniformity in the application of the tax among participating MS. Considering that from a legal perspective the different MS may have different interpretation of a “sale” or of a “purchase”, it is considered it as essential to agree on a common definition.

What is the meaning of “purchase” and “sale” based on the Commission’s Proposal? Would it be feasible in the view of the Commission to further define these terms or to come up with alternative terms that are commonly defined within the MS?

- *Netting and settlement*

The reference to the Article 2, lett. k, of the Directive 98/26/EC of the European Parliament and of the Council for the meaning of netting does not seem sufficient to clarify it. Indeed, the Directive affirms: “netting shall mean the conversion into one net claim or one net obligation of claims and obligations resulting from transfer orders which a participant or participants either issue to, or receive from, one or more other participants with the result that only a net claim can be demanded or a net obligation be owed”. The reference to this Article does not clarify if the Commission wants to refer to the netting by single instrument, per day, per financial institution, etc..

The 11 MS ask for clarifications on this. As mentioned above, they consider that also the meaning of settlement should be more detailed.

- *Cancellation and rectification*

Article 5 of the Proposal states that “*subsequent cancellation or rectification of a financial transaction shall have no effect on chargeability, except for cases of errors*”.

The 11 MS would like to have clarification on the meaning of “*cancellation or rectification*”.

- *Pension funds (Art.2, par.1, nr 8, lett.f)*

The 11 MS would like to have clarification on the definition of pension funds. In particular, are both Pillar II and Pillar III included? In addition, reference is also made to “investment managers of such funds”: are all pension funds management companies included?

- definition of „undertaking...” (Art. 2, par.1, nr 8, lett. j, point ii)

Clarity is needed in the definition of this activity.

- definition of „undertaking...” (Art. 2, par.1, nr 8, lett. j, point iv) and v)

This part of definition seems to be according to our reading not consistent with Art. 3, par.4, lett. a) where these primary market transactions are excluded from the scope

High Frequency Trading:

The 11 MS would like to ask the Commission which would be the impact of their Proposal on High Frequency traders.

What would be the impact of the Proposal on High Frequency traders in the context of taxing intraday transactions? Are modifications and cancellations taxed? Are orders sent, even if cancelled or modified, taxed ?

Joint and several liability

The 11 MS would like some more clarifications and examples on par.3 of Article 10 of the Proposal, stating that “ *where the tax due has not been paid within the time limit set out in Article 11(5), each party to a transaction, including persons other than financial institutions shall be jointly and severally liable for the payment of the tax due by a financial institution on account of that transaction*”.

In practice, how will the provision of joint liability work? How will the “customer” or other entity in the chain know if the financial institution has paid or not a tax for which the financial institution is liable? Can the Commission make some examples on how it could work? (Is it possible that very often parties do not know which are all the financial institutions involved in the chain of the transaction since most of financial transactions are anonymized and the parties do not know each other’s on organized markets before the execution of the transaction)?.

Further clarification on the Commission’s impact assessment

According to the commission, the impact on traded volumes (-15% for securities) is an "ex-ante" working hypothesis.

Considering the importance of this hypothesis on impact assessment both in terms of market reactions and tax revenues, can the Commission elaborate on how it estimated such impact, especially between the different securities depending on the issuer (sovereign, corporate, etc.), maturity (short or long), and current liquidity?