TECHNICAL FICHE[1]

TAX COLLECTION

Taxing financial transactions is one of the least expensive ways of collecting taxes, as most transactions are carried out electronically and the tax can be collected electronically and at the source. FTT can be collected at very low cost (less than 1% of revenue raised), especially when good use can be made of existing market infrastructures, e.g. with the help of trading platforms, trade repositories or clearing houses. [2]

Nevertheless, concerns have been raised that the tax as proposed would be hard to implement and to enforce as data availability is limited. However, the following sections highlight that the already existing "Markets in Financial Instruments Directive" (MiFID)[3] and the "European Market Infrastructure Regulation" (EMIR)[4] would allow for the payment of the tax to be properly ensured and monitored. These pieces of legislation are to be complemented by the provision for "joint and several liability" as foreseen in Art. 9.3 of the proposal, and that should also encourage voluntary compliance.

1. DATA MAINTENANCE AND PLACE OF KEEPING AT THE DISPOSAL OF DATA

Pursuant to Art. 25(2) of the current Markets in Financial Instruments Directive (MiFID) investment firms and credit institutions are obliged to keep relevant data relating to <u>all</u> transactions in financial instruments (including OTC transactions) which they have carried out, whether on own account or on behalf of a client. In the case of transactions carried out on behalf of a client, the records shall contain all the information required to identify the client and information required to prevent the use of the financial system for money laundering. The data have to be kept at the disposal of the competent (MiFID) authority for at least five years. It is not mentioned where the data is to be kept, but the competent authority referred to should normally be that of the home Member State which authorises the performance of investment services and activities under MiFID. The home Member State as a rule is the State where the

[1] This technical fiche should be considered as a non-paper that commits only the Commission's services involved in its preparation.

[2] IMF (2011), CPB (2011).

[3] The Directive 2004/39/EC is currently in the process of being reviewed by the co-legislator.

[4] A Council agreement was reached in January 2012; the text is still in the process of first reading by the

head office is situated (natural persons) or in which its registered office (legal persons) is situated (Art. 4(20) of the MiFID). Consequently, the information should be easily available in the Member State of authorisation (head office, registered seat).

Some persons, such as (in principle) those only dealing on their own account (unless they are market makers or deal on own account outside a regulated market or an MTF on an organised, frequent and systematic basis)are not subject to the MiFID.

In order to avoid possible lacuna, Article 10(3) of the FTT proposal provides for the (tax) obligation that where financial institutions are not subject to Article 25(2) of the MiFID they shall keep at the disposal of the competent authority, i.e. the tax authority, for at least five years, the relevant data relating to all financial transactions which they have carried out, whether in their own name or in the name of another person, for their own account or for the account of another person. Member States will be required to ensure that financial institutions comply with this obligation. In view of the above it would be logical that this ("tax") information is kept and readily available in the Member State of authorisation of the financial institution (if applicable) or of its head office/registered seat. This applies per separate legal entity.

Financial institutions with a registered seat or head office located outside the EU but with a branch in a Member State of the EU will normally be authorised as a financial institution by that Member State under national regulations. In that case, the above principles remain valid. In case of multiple branches in the EU, different Member States will be involved and data per branch is to be kept in the Member State of the branch.

Financial institutions which do not have any seat or branch in the EU, but are deemed to be established in a Member State of the EU pursuant to Art. 3(1)(e) of the FTT proposal - because of transactions with an EU established party or because they are acting in the name of a party to a transaction with an EU established party - will need to be registered, and keep transaction data at the disposal of the competent tax authorities, in the Member State of establishment of that latter party (cf. Art. 10 of the Commission Proposal).

It is also to be noted that the proposal for a new MiFID will create a harmonised framework for granting access to EU markets for businesses and market operators based in third countries

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European Parliament.

in order to overcome the current fragmentation into national third country regimes and to ensure a level playing field for all financial services actors in the EU territory. Harmonised rules for third country investment firms with or without an EU branch will be provided for.

2. REPORTING OBLIGATIONS UNDER MIFID AND EMIR

Pursuant to Art 25(3) of the current MiFID Member States shall require investment firms which execute transactions in any financial instruments admitted to trading on a regulated market to report details of such transactions to the competent authority as quickly as possible, and no later than the close of the following working day. This obligation applies whether or not such transactions were carried out on a regulated market.

According to Art. 54(5) of the MiFID, that Directive does not prevent competent authorities from exchanging or transmitting, in accordance with national law, confidential information that has not been received from a competent authority of another Member State.

Furthermore, the European Market Infrastructure Regulation (EMIR) proposal COM(2010)484/5[5] stipulates that counterparties (financial and non financial) and central counterparties (CCPs) shall ensure that the details of any (OTC) derivative contract they have concluded and any modification, or termination of the contract is reported to a trade repository. A trade repository shall maintain it for at least ten years following the termination of the relevant contracts and shall make the necessary information available to relevant supervisory authorities, including ESMA. Where a trade repository is not available to record the details of a derivative contract, counterparties and CCPs shall ensure that the details of the derivative contract are reported to ESMA. A CCP shall maintain, for a period of at least ten years following the termination of a contract it has processed, all information on that contract.

The EMIR recitals state that "*For the exchange of information, strict professional secrecy is needed. It is essential, due to the wide impact of OTC derivative contracts, that other relevant authorities, such as tax authorities and energy regulators, have access to information necessary to the exercise of their functions*."
It would seem appropriate to provide in national law for access to data held by competent (supervisory) authorities, trade repositories, CCPs, trading venues and ESMA in order for tax authorities to be able to use these data for possible cross checking.

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[5] A political agreement was reached in Trilogue for this Proposal. The final text will be approved soon.

3. ADMINISTRATIVE COOPERATION

For tax monitoring purposes, Member States will have to ensure well-functioning administrative cooperation both at national and European/international level. Data available at one side of the transaction should be provided to the tax authority competent for the monitoring of the tax payment at the other side of the transaction. From an EU and international perspective, the administrative cooperation tools in place will need to be used effectively. To this end, Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC could be used as from the entry into force of the FTT Directive.

In principle, the current scope of Directive 2011/16/EU is broad enough to include FTT, as an FTT is not covered by the exception in Article 2 (2) (i.e. it is not value added tax or an excise duty). This means that apart from the automatic exchange of information, all mechanisms of the Directive would apply to the tax, i.e. exchange of information on request, spontaneous exchange of information; presence in the offices where the administrative authorities of another Member State carry out their duties or presence during administrative enquiries; simultaneous controls. Finally, FTT could also benefit from the sharing of best practices and experience provided by Directive 2011/16.

As regards the automatic exchange of information, the Directive provides for the exchange of available information in respect of a number of defined categories from 1 January 2015 regarding taxable periods as from 1. January 2014. These do not include financial transactions. However, the tax could be included at a later stage in the context of the review of the automatic exchange of information which is due to be submitted before 1 July 2017.

As regards the recovery of the tax, Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures applies since 1 January 2012 and would be applicable to FTT.

The use of the above mentioned EU administrative cooperation tool is outlined in Art. 11(3) of the FTT proposal. From a wider international perspective, the Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters could be applicable to the tax given its very wide scope: it covers exchange of information on request, spontaneous exchange of information (for example in case one State has grounds for supposing a loss of tax in the other State), subject to mutual agreement or consultation: automatic exchange of information, simultaneous tax examinations, tax examinations abroad and finally, assistance in recovery and service of documents. Currently, the Convention applies to Azerbaijan, Belgium, Denmark, Finland, France, Georgia, Iceland, Italy, the Netherlands, Norway, Poland, Slovenia, Spain, Sweden, Ukraine, the United Kingdom and the United States. Some other countries have signed as well, but there is no entry into force yet (Ireland, Korea, Mexico, Moldova, Portugal). A number of additional countries (Argentina, Australia, Brazil, Canada, Germany, Indonesia, Japan, Russia, Turkey and South Africa) have signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters on 3 November 2011 in the margins of the Cannes G20 summit. The Cannes G20 Summit final communiqué mentioned: "*We welcome the commitment made by all of us to sign the Multilateral Convention on Mutual Administrative Assistance in Tax Matters and strongly encourage other jurisdictions to join this Convention. In this context, we will consider exchanging information automatically on a voluntary basis as appropriate and as provided for in the convention.*" Recently, India and Greece signed the Convention.

4. JOINT AND SEVERAL LIABILITY

Where a financial institution which is liable to pay the tax on a transaction does not pay the tax due within the time limits set, each party to the transaction (including persons other than financial institutions) shall become jointly and severally liable for the payment of the tax on that transaction (Art. 9(3) of the proposal). This is not only an additional measure to ensure payment of the FTT, but for commercial reasons it should also encourage the financial institution liable (in the first instance) to pay the amount of the tax due. Member States may also provide that other persons (e.g. advisors) are held jointly and severally liable for the payment of the tax.

5. AUDIT

The implementation of the tax in the Member States will entail certain audit efforts of their tax authorities. First, tax payments will have to be checked against tax returns. Second, the information included in the tax returns will have to be checked against transaction data and cross-checked with other available data as explained before. It is obvious that IT procedures would have to be developed possibly on an EU-wide basis or with knowledge sharing between Member States. The starting point would be to put in place an accurate register of financial institutions established in the territory of a Member State by using the data of supervisory authorities and that on counterparties mentioned in records on transactions. The establishment in the Member States of dedicated tax audit teams which have or acquire financial sector expertise seems to be an appropriate solution.