EUROPEAN COMMISSION

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Proposal for a

COUNCIL DIRECTIVE

on a common system of financial transaction tax and amending Directive 2008/7/EC

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

1.1. Introduction: Financial and economic crisis context, policy goals and need to ensure the proper functioning of the internal market

The debate on taxes targeted to the financial sector or the activities in financial markets, in particular a Financial Transaction Tax (FTT) has gained momentum at the global, international, European and national level after the recent financial and economic crisis. The European Commission already explored the idea of implementing a FTT in its Communication of 7 October 2010 on Taxation of the Financial Sector[1]. The discussion on FTT currently focuses on different policy goals. Firstly, the generation of additional tax revenue from the financial sector for national, EU and international purposes, including budget consolidation or financing climate change and development policies. Secondly, the assurance that the financial sector contributes in a fair and substantial way to recoup the costs of the crisis. Thirdly, the use of taxes as a tool to improve the functioning of financial markets in general, in particular that overly risky and myopic activities by financial institutions are not encouraged and that taxes are complementary to the efforts to better regulate financial markets and institutions. The activities concerned are typically those which aim at generating and then capitalising on short-term information asymmetries among actors on the financial market. Fourthly, financial sector taxation should ensure even taxation of the sector vis-à-vis other sectors, as most financial and insurance services are exempted from VAT.

However, given the extremely high mobility of most of the transactions to be potentially taxed, it is important to avoid distortions liable to be caused by tax rules conceived by Member States acting unilaterally. Indeed, a fragmentation of financial markets across activities and across borders can only be avoided and equal treatment of financial institutions in the EU and, ultimately, the proper functioning of the internal market, can only be ensured through action at EU level.

Member States' taxes on financial transactions should thus be harmonised.

1.2. Statements made by the European Parliament and by the Council

On 10 and 25 March 2010 and 8 March 2011 the European Parliament adopted resolutions[2] calling the Commission to carry out an impact assessment of a FTT exploring its advantages and drawbacks. Further, it asked to assess the potential of FTT options to contribute to the EU budget and to which extent the options under consideration could also be used as innovative

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[1] COM(2010) 549 final. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0549:FIN:EN:PDF

[2] European Parliament resolution of 10 March 2010 on financial transaction taxes – making them work (http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0056+0+DOC+XML+V0//EN), European Parliament resolution of 25 March 2010 on the effects of the global financial and economic crisis on developing countries and on development cooperation (http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0089+0+DOC+XML+V0//EN&language=EN) and European Parliament resolution of 8 March 2011 on innovative financing at global and European level (http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0080+0+DOC+XML+V0//EN&language=EN).

financial mechanisms to provide support for adaptation to and mitigation of climate change for developing countries, as well as for financing development cooperation. Moreover, the European Parliament considered that the introduction of a FTT could help to tackle the highly damaging trading patterns in financial markets, such as some short-term and automated High Frequency Trading transactions, and curb speculation; stressed that a FTT would thus have the potential to improve market efficiency, increase transparency, reduce excessive price volatility and create incentives for the financial sector to make long-term investments with added value for the real economy. The Parliament also considered that a low-rate FTT as broadly based as possible could constitute a substantial contribution by the financial sector to the cost of the crisis and to public finance sustainability and that the EU should promote the introduction of a FTT at global level, failing which, the EU should implement a FTT at European level as a first step. The Parliament called on the Commission swiftly to produce a feasibility study, taking into account the need for a global level playing field, and to come forward with concrete legislative proposals.

On 17 June 2010 the European Council[3], agreed that Member States should introduce systems of levies and taxes on financial institutions to ensure fair burden-sharing and to set incentives to contain systemic risk and that such levies or taxes should be part of a credible resolution framework. It was also agreed that further work is urgently required on their main features and issues of level playing field and cumulative impacts of various regulatory measures should be carefully assessed. The European Council concluded in preparation for the G-20 Toronto Summit, that "[t]he EU should lead efforts to set a global approach for introducing systems for levies and taxes on financial institutions with a view to maintaining a world-wide level playing field and will strongly defend this position with its G-20 partners. The introduction of a global financial transaction tax should be explored and developed further in that context."

On 28 and 29 October 2010 the European Council[4] concluded that further work is necessary on levies and taxes on financial institutions, at both the international and internal levels and that there should be further coordination between the different levy schemes in place in order to avoid double-charging. Furthermore, the European Council concluded that different options regarding the taxation of the financial sector should also be examined, as well as good practices aimed at impeding tax havens and tax evasion.

At the European Council meeting on 11 March 2011[5] the heads of state or government of the Euro area agreed that “the introduction of a financial transaction tax should be explored and developed further at the Euro area, EU and international levels.”

On 24 and 25 March 2011 the European Council[6] repeated its earlier conclusion that the introduction of a global financial transaction tax should be explored and developed further.

1.3. EU Budget Review

The issue of financial sector taxation was also part of the Commission Communication on the EU Budget Review of 19 October 2010[7] which states that “The Commission considers that

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3 http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/115346.pdf
4 http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/117496.pdf
5 http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/119809.pdf
6 http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf
7 COM(2010) 700 final
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0700:FIN:EN:PDF

the following non-exclusive list of financing means could be possible candidates for own resources to gradually displace national contributions, leaving a lesser burden on national treasuries: - EU taxation of the financial sector." The subsequent Proposal for a Council Decision on the system of own resources of the European Union of 29 June 2011[8] identified a FTT as a new own resource to be entered in the budget of the EU. Consequently, this proposal will be complemented by an own resource proposal setting out how the Commission proposes that the FTT will serve as a source for the EU budget.

1.4. Global context

The debate on financial sector taxation is not limited to the European Union. It indeed reflects the global and systemic nature of the financial crisis and its consequences. There have been discussions in the G-20 and at the level of the United Nations on new forms of taxation. However, there is at this stage no global consensus on additional tax instruments.

The Commission supports further exploration and development of a FTT at the G-20 level and wants to promote an agreement with the most relevant international partners.

As soon as the idea of introducing a financial transaction tax at the level of the EU and in other major global economies would be accepted and implemented further emphasis will need to be put on working towards a higher degree of coordination between Member States. Such an increased coordination with a view to strengthening the Internal Market should then in particular refer to a better alignment of the tax rates.

1.5. Regulatory reforms

Preceding the recent debate on taxes for the financial sector, a comprehensive set of initiatives for a regulatory tightening of the sector had been advanced and is still ongoing in order to improve the stability and market-functionality of the financial system. These reforms comprise tighter rules on capital requirements, better incentives in compensation systems, an increase in the use of central clearing platforms (CCP), better supervision and regulation and market transparency.

In such a context, taxes could and should be complementary to the efforts to better regulate financial markets and institutions, as they have the potential to strengthen price signals and to alter the relative cost-benefit ratios of different market segments and activities. Tax policy in this area should, generally speaking, favour socially and economically sustainable activities and penalise economically and socially not rewarding activities, such as myopic profit maximisation based on asymmetric information, typically generated by such activities, such as automated high-frequency trading or the creating of complex structured products the aim of which is first of all to hide (instead of mitigate) risks.

The fact that one main function of taxes is to generate revenue does not detract from the need to preserve tax fairness. This applies, notably when it comes to taking into account ability to pay or to the possible need to limit the tax to cases where it can be useful in internalising an external cost.

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[8] COM(2011) 510 final
http://ec.europa.eu/budget/library/biblio/documents/fin_fwk1420/proposal_council_own_resources_en.pdf

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

2.1. External consultation and expertise

2.1.1. External studies

The Commission services launched three studies in the context of their Impact Assessment on Instruments for the Taxation of the Financial Sector. One study has been contracted to *PricewaterhouseCoopers (PwC).* This study analyses four areas of the tax system in order to identify potential legal provisions which might lead to tax advantages or disadvantages for the financial sector. The taxes considered are the Corporate Income Tax (CIT), the Personal Income Tax (PIT), the Value-Added Tax (VAT) and the tax treatment of financial products. A study on the reaction of profits and transactions to tax increases was commissioned to *Copenhagen Economics*. The study reviews the existing empirical literature with regards to the tax elasticities of profits, remuneration and transaction volumes in different markets.

The third study on remuneration in the financial sector was commissioned to the *'Chair of Applied Economics: Innovation and Internationalization'* at the ETH Zürich. The study provides an assessment of the extent of managerial pay around the world. It uses a novel database on managerial wages and other forms of compensation to compare managerial remuneration across different sectors with a special emphasis on the financial sector versus other sectors, and it does so by comparing different countries with each other for the years 2002 to 2007.

2.1.2. Public consultation

A public consultation, launched on 22 February 2011 and closed on 19 April 2011, aimed at receiving stakeholders' feedback on financial sector taxation. 213 individual submissions were received and 3411 petitions. All individual responses to this public consultation and a summary report have been published[9]. The feedback was divided into six stakeholder groups. In general, opinions of the respondents to the public consultation are strongly polarised depending on the groups and subgroups to which they belong, namely representatives of the financial sector were outspokenly against the introduction at the European level of any Financial Sector Tax (FST).

Nevertheless, it must be pointed out that there is a general agreement among the vast majority of respondents that patchwork measures introduced by Member States pose a problem, which is most often linked to possible distortions in the functioning of the internal market (including relocation and double taxation) and the level playing field in the EU. Another point of agreement amongst respondents is that improper risk management in the financial sector, improper incentive schemes, extensive deregulation and lax supervision were amongst the reasons for the financial crisis.

It is also noteworthy that the consultation focussed on the relative merits of different approaches to tax the financial sector only, and replies followed this pattern. Coming forward with alternative sources of revenue-raising (such as higher personal or corporate income taxes

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9 http://ec.europa.eu/taxation_customs/common/consultations/tax/2011_02_financial_sector_taxation_en.htm

or consumption taxes) or concrete proposals for expenditure cuts in case of rejection of an FST were not asked for. In consequence, none of the respondents refusing a FST as an option to raise additional resources came forward with alternatives to an FST to make up for the additional revenues foregone by not taxing the financial sector.

Not surprisingly, *financial organisations, business and consultancies (*accounting/consulting and real estate subgroups) generally oppose any additional tax burden on the financial sector or financial markets in general. *NGOs and trade unions* appear strongly in favour of a broad based financial transactions tax (FTT) harmonised at EU level (some submissions refer to the Euro zone instead). One out of the four Member States having responded and some public authorities and Central Banks are clearly against both FTT and FAT. Local authorities (mostly representatives in the Committee of Regions) accept a broad-based FTT at EU level. *Citizens'* individual submissions and the very large number of petitions are generally in favour of a broad-based FTT.

2.1.3. Consultations with stakeholders and Member States

2.1.3.1. Consultation workshop

On 4 May 2011 a consultation workshop *with representatives of the relevant associations of financial market operators*[10] took place. The agenda of the workshops included a preliminary summary by DG TAXUD of the results of the public consultation, a round-table on industry's assessment of expected administrative costs related to financial sector taxation. The arguments raised by the representatives were following closely their individual contributions to the public consultation outlined above.

2.1.3.2. Consultations with Member States in the Tax Policy Group

In addition, the potential instruments for an additional taxation of the financial sector, including FTT, were twice on the agenda of the *Tax Policy Group* chaired by Commissioner Šemeta. These discussions took place in October 2010 and in January 2011 and showed diversity in the opinions of Member States on this issue. In addition, Member States and the Commission discussed the issue of financial sector taxation in the *Council High Level Working Party* on 8 December 2010 and on 28 April 2011.

2.1.3.3. Consultations with academia and practitioners

The *Brussels Tax Forum*[11] of 28-29 March 2011 was dedicated to "Taxation of the Financial Sector". The audience and the speakers and panellists included a large number of academics, tax practitioners, policy-makers and other stakeholders. The main topics discussed were the responsibility of the financial sector in the crisis and the public support for the financial sector, the under/over taxation of the financial sector, the interactions with initiatives in the area of financial regulation, and the options for taxing the financial sector – FTT and FAT.

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[10] European Association of Cooperative Banks, European Savings Bank Group, European Banking Federation, European Association of Public Banks, Association of International Life Offices, Comité Européen des Assurances, Association of European Cooperative and Mutual Insurers, Association Internationale des Sociétés d'Assurance Mutuelle, European Fund and Asset Management Association, Alternative Investment Management Association, European Forum of Securities Association, European Central Securities Depositories Association, International Capital Market Association, Federation of European Securities Exchanges

[11] http://ec.europa.eu/taxation_customs/taxation/gen_info/tax_conferences/tax_forum/index_en.htm

On 11 May, the Commission held a by-invitation *workshop with academics* from different fields as to get technical inputs on some of the issues raised in the impact assessment, among which the presentations of the General Equilibrium Models and the SYMBOL model, the risks of relocation, the clarification of some technical concepts and the interactions between taxation and regulation.

2.1.3.4. Consultation with social partners

On 7 March 2011 the issue of the taxation of the financial sector and the upcoming impact assessment was presented by DG TAXUD at the *Liaison forum*. Trade union representatives expressed some employment concern on the FAT. On 3 May 2011, DG TAXUD participated in a meeting with trade union representatives of *UNI-Europa*, on which the same concerns about FAT were voiced.

2.2 Impact assessment

This proposal is accompanied by an impact assessment on Instruments for the Taxation of the Financial Sector[12]. The aim of the impact assessment was to analyse the consequences of additional taxes on the financial sector with regard to the objectives set.

The Impact Assessment instructed the design of the present proposal on a financial transaction tax in various ways: Primary markets both for securities and currencies should not be within the scope of FTT so as to avoid negative consequences for the financing of public deficits and of large as well as medium-sized and smaller (SMEs) companies; the latter being a longstanding point of EU policies enshrined also in Directive 2008/7/EC and the European SME policies (see below). Likewise, any effect of FTT on the effectiveness and tightness of monetary policies should be avoided, not because of but especially also in the light of the current economic and financial crisis. This pleads inter alia in favour excluding transactions with central banks from the scope of the tax. Finally, effects on the real economy and the international competitiveness of the European financial sector should be minimised and, thus, incentives for avoiding FTT by delocalisation mitigated, wherever possible.

3. LEGAL ELEMENTS OF THE PROPOSAL

3.1 Legal basis

The pertinent legal basis for the proposed Directive is Article 113 TFEU.. The proposal t aims at harmonising legislation concerning indirect taxation on financial transactions, which is needed to ensure the functioning of the internal market and to avoid distortion of competition.

3.2 Subsidiarity and proportionality

A uniform definition at EU level of the essential features of a FTT is necessary to avoid relocations of transactions and market participants and substitution of financial instruments within the EU. In other words, a uniform definition at EU level is necessary to ensure the proper functioning of the internal market and avoid distortions of competition within the EU.

[12] The impact assessment report can be found on: http://

By the same token, a uniform definition at EU level could play a crucial role in reducing the existing fragmentation of the Internal Market, including for the different products of the financial sector that often serve as close substitutes. Non harmonisation of FTT leads to tax arbitrage and potential double or non taxation. This not only prevents financial transactions to be carried out on a level playing field, but also affects revenues of Member States. Furthermore, it imposes extra compliance costs on the financial sector arising from too different tax regimes.

This is supported by empiric evidence. National taxes on financial transactions so far either resulted in delocalisation of activities and/or institutions or were, so as to avoid this, designed in a way that they were levied on relatively immobile tax bases only, leaving close substitutes often untaxed. Harmonisation of key concepts and coordination of implementation at EU level are thus a prerequisite for an application of financial transaction taxes to be successful and to avoid distortions. Such EU action will also foster the desirable approach.

A common framework for an FTT in the EU therefore respects the subsidiarity and proportionality principle a set in Article 5 TEU. The objective of this Proposal cannot be sufficiently achieved by the Member States and can therefore, by reason of ensuring the proper functioning of the internal market, be better achieved at Union level.

The harmonisation proposed, in form of a Directive rather than a Regulation, does not go beyond what is necessary in order to achieve the objectives pursued, first and foremost for the proper functioning of the internal market. It thus complies with the principle of proportionality.

3.3 Detailed explanation of the proposal

3.3.1 Chapter I (Subject matter, scope and definitions)

This chapter defines the essential framework of the proposed FTT in the EU. This FTT aims at taxing gross transactions before any netting off and has the characteristics of a cumulative tax.

The scope of the tax is wide, because it aims at covering transactions relating to all types of financial instruments as they are often close substitutes for each other. Thus, the scope covers instruments which are negotiable on the capital market, money-market instruments (with the exception of instruments of payment), units or shares in collective investment undertakings and alternative investment funds and derivatives agreements. Furthermore, the scope of the tax is not limited to trade in organised markets, such as regulated markets, multilateral trading facilities, but also covers other types of trades including over-the-counter trade. It is also not limited to the transfer of ownership but rather represents the obligation entered into, mirroring whether or not the financial institution involved assumes the risk implied by a given financial instrument ("purchase and sale"). Also, where a derivatives agreement results in a supply of financial instruments, in addition to the taxable derivatives agreement the financial instruments supply is also subject to tax, provided that all other conditions for taxation are fulfilled.

Transactions with the European Central Bank and national central banks are however excluded from the scope so as to avoid any negative impact on the refinancing possibilities of financial institutions or on monetary policies in general.

In particular, for both the financial instruments whose purchase and sale is taxed and for derivatives agreements, the relevant regulatory framework at EU level provides clear, comprehensive and accepted set of definitions[13]. As regards more particularly the derivative agreements thus referred to, these concern derivatives for investment purposes. [It emerges from the definitions used that spot currency transactions are not taxable financial transactions, while currency derivative agreements are.] Derivatives of commodity transactions are also covered, while physical commodity transactions are not. This also holds true for derivatives of energy commodity markets or of the European emission-trading markets for CO_2 allowances.

Financial transactions can also consist of the purchase and sale of structured products, meaning tradable securities or other financial instruments offered by way of a securitisation. Such products are comparable to any other financial instrument and thus need to be covered by the term financial instrument as used in this proposal. Excluding them from the scope of FTT would open avoidance opportunities. This category of products notably includes notes, warrants and certificates as well as banking securitisations which usually transfer the credit risk associated with assets such as mortgages or loans into the market, as well as insurance securitisations, which involve the transfers of other types of risk, for example underwriting.

However, the scope of the tax is focused on financial transactions carried out by financial institutions acting as party to a financial transaction, either for their own account or for the account of other persons, or acting in the name of a party to the transaction. This approach ensures that FTT is comprehensively applied. In practical terms this is usually evident via respective entries in the books.

The definition of financial institutions is broad and essentially includes investment firms, organised markets, credit institutions, insurance and reinsurance undertakings, collective investment undertakings and their managers, pension funds and their managers, holding companies, financial leasing companies, special purpose entities, and where possible refers to the definitions provided by the relevant EU legislation adopted for regulatory purposes.

Central Counterparties (CCPs), Central Securities Depositories (CSDs) and International Central Securities Depositories (ICSDs) are not considered financial institutions in as much as these are exercising functions which are not considered to be trading activity in itself. They are also key for a more efficient and more transparent functioning of financial markets.

The territorial application of the proposed FTT and the Member States' taxing rights are defined on the basis of the residence principle. In order for a financial transaction to be taxable in the EU, the one of the parties to the transaction needs to be established in the territory of a Member State. Taxation will take place in the Member State in the territory of which the establishment of a financial institution is located, on condition that this institution is party to the transaction, acting either for its own account or for the account of another person, or is acting in the name of party to the transaction.

In case these establishments of the different financial institutions, parties to the transaction or acting in the name of such parties, are located in the territory of different Member States these different Member States will be competent to subject the transaction to tax at the rates they

[13] Article 4 (18) and (19) of the Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC and (1), (2) and (3) of Section C of the Annex I to the Directive

have set in accordance with this Proposal. Where the establishments concerned are located in the territory of a State which is not part of the Union the transaction is not subject to FTT in the EU, unless one of the parties to transaction is established in the EU in which case the third-country financial institution will also be deemed to be established and the transaction becomes taxable in the Member State concerned. Where transactions are carried out on trade venues outside the EU, they will be subject to tax if at least one of the establishments carrying out or intervening in the transaction is located in the EU. Furthermore, where financial instruments whose purchase and sale is taxable form the object of a transfer between entities of a group, this transfer shall be taxable even though it might not be a purchase or sale.

It follows from the foregoing that many financial activities are not considered to be financial transactions in the logic of the FTT which follows the above-mentioned objectives. Further to the exclusion of primary markets explained above most day-today financial activities relevant for citizens and businesses remain outside the scope of FTT. This is the case for the conclusion of insurance contracts, mortgage lending, consumer credits, payment services etc. (though the subsequent trading of these via structured products is included). Also, currency transactions on spot markets are outside the scope FTT, which preserves the free movement of capital. However, derivatives based on currency transactions are covered by FTT since these are no currency transactions as such.

3.3.2 Chapter II (chargeability, taxable amount and rates)

The moment of chargeability is defined as the moment when the financial transaction occurs. Subsequent cancellation cannot be considered as a reason to exclude chargeability of the tax, except in cases of genuine errors.

As the purchase and sale of certain financial instruments (other than derivatives), on the one hand, and derivatives agreements, on the other, have a different nature and characteristics, they have to be associated to different taxable amounts.

For the purchase and sale of certain financial instruments (other than derivatives), usually a price or any other form of consideration will be determined. Logically, this is to be defined as the taxable amount. However, to avoid market distortions special rules are necessary where the consideration is lower than the market price or for transactions taking place between entities of a group and which are not covered by the notions of "purchase" and "sale". In these cases the taxable amount is to be the market price determined at arm's length at the time FTT becomes chargeable.

For the conclusion and modification of derivative agreements the taxable amount of the FTT shall be the notional amount at the time the derivative agreement is concluded or modified. This approach would allow for a straightforward and easy application of FTT on derivative agreements while ensuring low compliance and administrative costs. Furthermore it implies the taxation at the moment of the conclusion or modification of the contract as compared to taxing cash-flows at different moments in time during the life cycle of the agreement. The rate to be used in this case will need to be rather low in order to define an adequate tax burden.

Special provisions might be necessary in the Member States in order to prevent avoidance, evasion and abuse of the tax (see also section 3.3.3). For example in cases where the notional amount is artificially divided: the notional amount of a swap could for instance be divided by an arbitrarily large factor and all payments be multiplied by the same factor. This would leave the cash flows of the instrument unchanged but arbitrarily shrink the size of the tax base.

Special provisions are necessary to determine the taxable amount in respect of transactions where the taxable amount or parts thereof are expressed in another currency than that of Member State of assessment.

The purchase or sale of certain financial instruments (other than derivatives), on the one hand, and derivatives agreements, on the other, are different in nature. Moreover, markets are likely to react differently to a financial transaction tax applied to each of these two categories. For these reasons, and in order to ensure a broadly even taxation, the rates should be differentiated as between the two categories.

The rates should also take into account differences in the applicable methods for the determination of the taxable amounts.

Generally speaking, the minimum tax rates (above which there is room of manoeuvre for national policies) are proposed to be set at a level sufficiently high for the harmonisation objective of this Directive to be achieved. At the same time, the proposed rates are situated low enough so that delocalisation risks are minimised.

3.3.3 Chapter III (Payment of FTT, related obligations and prevention of evasion, avoidance and abuse)

As mentioned above, this proposal defines the scope of FTT by reference to financial transactions to which a financial institution established in the territory of the Member State concerned is party (acting either for its own account or for the account of another person) or transactions where the institution acts in the name of a party. In fact, financial institutions execute the bulk of transactions on financial markets, and the FTT should concentrate on the financial sector as such rather than on citizens. Therefore, these institutions should be liable to pay the tax to the tax authorities. However, Member States should have the possibility to hold other persons jointly and severally liable for payment of the tax.

Member States should be obliged to take appropriate measures for FTT to be levied accurately and timely, which includes measures of verification. Details of the necessary arrangements should be left to the Member States, which can thus adapt them to their legislative and administrative systems. Many financial transactions are carried out by electronic means. In these cases, FTT should be due immediately at the moment of chargeability. In other cases, FTT should be due within a period which, while being sufficiently long so as to allow for the manual processing of the payment, avoids that unjustifiable cash-flow advantages accrue to the financial institution concerned. A period of three working days can be considered appropriate in this sense.

The provision of appropriate measures to ensure payment of the tax and to monitor and verify correct payment of it should be left to the Member States in order to allow them to take account of their legislative and administrative systems. However, as means to verify the payment Member States can make use of existing and forthcoming EU legislation on financial markets that includes reporting and data maintenance obligations with respect to financial transactions.

Furthermore, the available administrative cooperation instruments relating to the assessment and recovery of taxes, in particular Directive 2011/16/EU of the Council of 15 February on

administrative cooperation in the field of taxation and repealing Directive 77/799/EEC[14] (as of 1 January 2013), Directive 2010/24/EC of the Council of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures[15] (as of 1 January 2012) and OECD - Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters[16] can be used by the competent tax authorities.

The conceptual approach outlined above makes it that avoidance and evasion of the FTT, e.g. via delocalisation of financial institutions or activities to non-taxing jurisdictions, is minimised, where possible: broad scope, residence principle, no exemptions etc. On top of this, in order to further define *what* should be done by Member States in order to prevent evasion, avoidance and abuse of this tax, delegated acts may be developed by the Commission based on appropriate consultations.

3.3.4 Chapter IV (Final provisions)

It follows from the harmonisation objective of this proposal that Member States should not be allowed to maintain or introduce taxes on financial transactions other than the FTT object of the proposed Directive or VAT. Indeed, as far as VAT is concerned, the right of option tax as provided for in Article 137.1.(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax[17] should continue to apply. Other taxes like those on insurance premiums etc. have of course a different nature, as have registration fees on financial transactions, in case they represent a genuine re-imbursement of costs or consideration for a service rendered. Such taxes and fees are thus not affected by this proposal.

The provisions of Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital[18] continue to be in principle fully applicable. This entails for instance that the primary issue – as mentioned in Article 5(2) of Directive 2008/7/EC - of shares or other securities of the same type, or of certificates representing such securities, debentures - including government bonds - or other negotiable securities relating to loans is not subject to FTT in the EU. In order to avoid any potential conflict between the two Directives, it should however be provided that the Directive proposed here has precedence over the provisions of Directive 2008/7/EC.

4. BUDGETARY IMPLICATION

The Proposal for a Council Decision on the system of own resources of the European Union of 29 June 2011 identified a FTT as own resources to be entered in the budget of the Union as of 2018 at the latest.

The revenue arising from the FTT in the EU can be wholly or partly used as own resource for the EU Budget. The European Commission proposes new own resources that would replace certain existing own resources paid out of national budgets, which would contribute to

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[14] OJ L 64, 11.3.2011, p. 1.
[15] OJ L 84, 31.3.2010, p. 1.
[16] http://www.oecdilibrary.org/docserver/download/fulltext/2311331e.pdf?expires=1309623132&id=id&accname=ocid194935&checksum=37A9732331E7939B3EE154BB7EC53C41
[17] OJ L 347, 11.12.2006, p.1
[18] OJ L 46, 21.2.2008, p.11.

budgetary consolidation efforts in the Member States. The new system proposed would also be more transparent and fairer. Having in mind that the FTT was proposed as an own resource, a certain degree of harmonisation would also be necessary in order to ensure equal treatment in the financing of the EU budget.

Preliminary revenue estimates for the tax revenues included in the Impact Assessment accompanying this Proposal indicate that between EUR […] and […] billion could be collected on a yearly basis in the whole EU.

There might however be budgetary implications in the sense that the FTT implies a degree of administrative cost, mostly for Member States but also, no doubt to a lesser degree, for the EU authorities.

Proposal for a

COUNCIL DIRECTIVE

on a common system of financial transaction tax and amending Directive 2008/7/EC

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 113 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Parliament[19],

Having regard to the opinion of the European Economic and Social Committee[20],

Acting in accordance with a special legislative procedure,

Whereas:

(1) The recent financial crisis has led to debates at all levels about a possible additional tax on the financial sector and in particular a financial transactions tax (FTT). This debate is stemming from the desire to generate additional revenue for general budgets or specific policy purposes; to make the financial sector contribute to the costs of the crisis which it is often seen to have caused and to even the taxation of the sector vis-à-vis other sectors; to dis-incentivise overly risky activities by financial institutions and to complement regulatory measures aimed at avoiding future crises.

(2) In order to prevent distortions through measures taken unilaterally by Member States, bearing in mind the extremely high mobility of most of the relevant financial transactions, and thus to ensure the proper functioning of the internal market, it is important that the basic features of a FTT in the Member States are harmonised at Union level. Incentives for tax arbitrage in the EU and allocation distortions between financial markets in the EU, as well as possibilities for double or non taxation should thereby be avoided.

(3) Since the objective of this Directive, namely to harmonise the essential features of a FTT at Union level, cannot be sufficiently achieved by the Member States and can therefore, by reason of ensuring the proper functioning of the Single Market, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle

[19] OJ C , , p. .
[20] OJ C , , p. .

of proportionality, as set in that Article, this Directive does not go beyond what is necessary in order to achieve this objective.

(4) For the internal market to function properly, FTT should apply to trade in a wide range of financial instruments, including structured products, both in the organised markets and "over-the-counter", as well as to all derivative contracts. For the same reason, it should apply to a broadly defined range of financial institutions.

(5) In order to preserve the efficient and transparent functioning of financial markets, it is necessary to exclude certain entities from the personal scope of this Directive, in as much as these are exercising functions which are not considered to be trading activity in itself but rather facilitating trade, or as they enter into financial transactions in order to financially assist EU Member States.

(6) Transactions with the European Central Bank and national central banks should not be subject to FTT so as to avoid any negative impact on the refinancing possibilities of financial institutions or on monetary policies in general.

(7) Outside derivative contracts, trade on primary markets should be excluded from the scope of FTT so as to not to undermine the raising of capital by companies and governments.

(8) Chargeability and taxable amount should be harmonised so as to avoid distortions in the internal market.

(9) The moment of chargeability should not be unduly delayed and should thus coincide with the moment where the financial transaction occurs.

(10) The taxable amount should as much as possible be easy to identify and use in the calculation of the tax due in order to save costs for businesses and for tax administrations. That is why the notional amount should be used in the case of derivatives agreements. The same tax rate should be used for different financial transactions that represent either conclusions or modifications of derivative agreements or financial transactions with financial instruments other than derivatives..

(11) In order to concentrate the taxation on the financial sector as such rather than on citizens and because financial institutions execute the bulk of transactions on financial markets, the tax should apply to these institutions, whether they trade in their own name, in the name of other persons, for their on own account or for the account of other persons.

(12) Because of the high mobility of financial transactions, the FTT should be applied on the basis of the residence principle in order to help mitigating the potential tax avoidance.

(13) The minimum tax rates of this Directive should be set at a level sufficiently high for the harmonisation objective of this Directive to be achieved. At the same time, they have to be low enough so that delocalisation risks are minimised.

(14) In order for the FTT to be levied accurately and timely, Member States should be obliged to take the necessary measures. Already existing reporting and data maintenance obligations under the financial sector legislation for the purposes of

preventing avoidance, evasion and abuse should be used. Available administrative cooperation instruments under EU law and OECD - Council of Europe convention, relating to the assessment and recovery of taxes should also be used.

(15) The Commission should be empowered to adopt delegated acts in accordance with Article 290 TFEU where expressly provided for in this Directive. In particular, the Commission should be empowered to adopt delegated acts to further specify measures for the prevention of evasion, avoidance and abuse. It is of particular importance that the Commission carries out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing-up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and Council.

HAS ADOPTED THIS DIRECTIVE:

Chapter I
Subject matter, scope and definitions

Article 1

Subject matter and scope

1. This Directive establishes the common system of financial transaction tax (FTT).

2. Each Member State shall subject to FTT all financial transactions, including those entered into between entities of a group, on condition that at least one party to the transaction is established in a Member State of the European Union and that a financial institution established in the territory of the Member State concerned is party to the transaction, acting either for its own account or for the account of another person, or is acting in the name of a party to the transaction.

3. The following entities shall not be liable to pay tax:

   (a) the European Financial Stability Facility;

   (b) an international financial institution established by two or more Member States, which has the purpose to mobilise funding and provide financial assistance to the benefit of its members that are experiencing or threatened by severe financing problems;

   (c) Central Counterparties (CCPs) where exercising the function of a CCP;

   (d) Central Securities Depositories (CSDs) and International Central Securities Depositories (ICSDs) where exercising the function of a CSD or ICSD.

   Where an entity is not taxable pursuant to the first subparagraph, this shall not preclude the taxability of its counterparty.

4. The following transactions shall not be subject to FTT:

(a) primary market transactions referred to in point (c) of Article 5 of Regulation (EC) No 1287/2006, except for the issue and redemption of shares and units of UCITS as defined in Article 1(2) of Directive 2009/65/EC and AIF as defined in Article 4(1)(a) of Directive 2011/61/EC;

(b) transactions with the European Central Bank and central banks of Member States.

Article 2

Definitions

For the purposes of this Directive, the following definitions shall apply:

1. 'Financial transaction' means any of the following:

   (a) the purchase and sale of a financial instrument before netting and settlement, including repurchase and reverse repurchase and securities lending and borrowing agreements;

   (b) the transfer between entities of a group of the right to dispose of a financial instrument as owner and any equivalent operation implying the transfer of the risk associated with the financial instrument, in cases not subject to point (a);

   (c) the conclusion or modification of derivatives agreements;

   (d) [the purchase and sale of currencies of third countries].

2. 'Financial instruments' mean financial instruments as defined in points (1) to (3) of Section C of Annex I of Directive 2004/39/EC, units and shares in alternative investment funds as defined in Article 4 of Directive 2011/61/EU and structured products.

3. 'Derivatives agreement' means a financial instrument as defined in points (4) to (10) of Section C of Annex I to the Directive 2004/39/EC.

4. 'Repurchase agreement' and 'reverse repurchase agreement' means an agreement referred to in Article 3 of Directive 2006/49/EC.

5. 'Securities lending agreement' and 'securities borrowing agreement' mean an agreement referred to in Article 3 of Directive 2006/49/EC.

6. 'Structured product' means tradable securities or other financial instruments offered by way of a securitisation within the meaning of Article 4(36) of Directive 2006/48/EC or equivalent transactions involving the transfer of risks other than credit risk.

7. 'Financial institution' means any of the following:

   (a) an investment firm as defined in Article 4 of Directive 2004/39/EC;

(b) a regulated market as defined in Article 4 of Directive 2004/39/EC and any other organised trade venue or platform;

(c) a credit institution as defined in Article 4 of Directive 2006/48/EC;

(d) an insurance and reinsurance undertaking as defined in Article 13 of Directive 2009/138/EC;

(e) an undertaking for collective investments in transferable securities (UCITS) as defined in Article 1 of Directive 2009/65/EC; a management company as defined in Article 2 of Directive 2009/65/EC;

(f) a pension fund or an institution for occupational retirement provision as defined in Article 6(a) of Directive 2003/41/EC, an investment manager of such fund or institution;

(g) an AIF and an AIFM as defined in Article 4 of Directive 2011/61/EU;

(h) a securitisation special purpose entity as defined in Article 4 of Directive 2006/48/EC;

(i) a special purpose vehicle as defined in Article 13(26) of Directive 2009/138/EC;

(j) any other undertaking having one or more of the following as its principal activity:

  (i) activities referred to in points 1, 2, 3, 6 and 7 of Annex 1 of Directive 2006/48/EC;

  (ii) acquisition of holdings in undertakings;

  (iii) participation in or issuance of financial instruments or derivatives;

  (iv) the provision of services related to activities referred to in point (iii).

8. 'Central Counter Party' (CCP) means a legal entity that interposes itself between the counterparties to a trade within one or more financial markets, becoming the buyer to every seller and the seller to every buyer;

9. 'Netting' shall have the meaning defined in article 2 of Directive 98/26/EC.

10. 'Multilateral Trading Facility' (MTF) shall have the meaning defined in Article 4 (of Directive 2004/39/EC.

11. 'Notional amount' means the underlying nominal or face amount that is used to calculate payments made on a given derivative agreement.

12. 'Branch' means a place of business other than the head office which is a part of a financial institution, has no legal personality and carries out directly all or some of the transactions inherent to the business of a financial institution. All branches within one Member States shall be regarded as a single branch.

Article 3

Establishment

1. For the purposes of applying this Directive, a financial institution is deemed to be established in the territory of a Member State where any of the following conditions is fulfilled:

   (a) it has been authorised by the authorities of that Member State;

   (b) it has its registered seat within a Member State;

   (c) its permanent address or usual residence is located in a Member State;

   (d) it has a branch within a Member State which carries out financial transactions;

   (e) [it is party, acting either for its own account or for the account of another person, or is acting in the name of a party to the transaction, to a financial transaction with another financial institution covered by points (a), (b), (c) or (d), or with a party established in the territory of a Member State and which is not a financial institution].

2. Where more than one of the conditions in the list set out in paragraph 1 is fulfilled, the first condition met from the start of the list in descending order shall be relevant for determining the Member State of establishment.

3. A person which is not a financial institution is established within a Member State if its registered seat or, in case of a natural person, if its permanent address or usual residence is located in that State.

Chapter II
Chargeability, taxable amount and rates

Article 4

Chargeability of FTT

1. FTT shall become chargeable for each financial transaction at the moment it occurs in accordance with the definition in Article 2 point 1.

2. Subsequent cancellation or rectification of a financial transaction has no effect on chargeability, except for cases of genuine errors.

Article 5

Taxable amount of FTT in case of financial transactions other than derivatives agreements

1. In case of financial transactions within the meaning of point 1(a) of Article 2, the taxable amount shall be everything which constitutes consideration paid or owed, in return for the transfer, from the counterparty or a third party.

2. The taxable amount shall be the market price determined at the time FTT becomes chargeable

   (a) notwithstanding paragraph 1, in the cases referred to in point 1(a) of Article 2, where the consideration is lower than the market price;

   (b) in the cases referred to in point 1(b) of Article 2.

3. For the purposes of this Article, the market price shall mean the full amount that would have been paid as consideration for the financial instrument concerned in a transaction at arm's length.

Article 6

Taxable amount in case of derivatives agreements

The taxable amount of the FTT shall be the notional amount of the derivative agreement at the time the derivative agreement is concluded or modified.

Where more than one notional amount is identified, the highest amount shall be used for the purpose of determining the taxable amount.

Article 7

Common provisions on taxable amount

Where the reference value relevant, under Article 5 or Article 6, for the determination of the taxable amount is expressed, in whole or in part, in a currency other than that of the taxing Member State, the exchange rate applicable shall be the latest selling rate recorded, at the time the FTT becomes chargeable, on the most representative exchange market of the Member State concerned, or at an exchange rate determined by reference to that market, in accordance with the rules laid down by that Member State.

Article 8

Application, structure and level of rates

1. Member States shall apply the rates of FTT in force at the time when the tax becomes chargeable.

2. The rates shall be fixed by each Member State as a percentage of the taxable amount.

3. The rates fixed under paragraph 2 shall not be lower than:

(a) [%] in respect of the financial transactions other than conclusion or modification of derivative agreements;

(b) [%] in respect of conclusion or modification of derivatives agreements.

4. Member States shall apply the same rate to different financial transactions that fall under the same category following paragraph 3, letters (a) and (b);

5. Where a financial institution established in the territory of a Member State is party to a financial transaction – acting either for its own account or for the account of another person – or is acting in the name of a party to the transaction with a person which is not established in the territory of a Member State the double of the rates specified in paragraph 3 shall apply.

Chapter III
Payment of FTT, related obligations and prevention of evasion, avoidance and abuse

Article 9

Person liable for payment of FTT to the tax authorities

1. FTT shall be payable by each financial institution party to a financial transaction, acting either for its own account or for the account of another person, and each financial institution acting in the name of a party to the transaction.

2. Where a financial institution acts in the name or for the account of another financial institution only that other financial institution shall be liable to pay FTT.

3. Member States may provide that a person other than the person liable for payment of the tax is to be held jointly and severally liable for the payment of the tax.

Article 10

Provisions relating to time limits for the payment of FTT, to obligations intended to ensure payment, to the verification of payment

Member States shall:

1. lay down registration, accounting, reporting obligations and other obligations intended to ensure that FTT due to the tax authorities is effectively paid;

2. adopt measures to ensure, where financial institutions are not subject to Article 25(2) of Directive 2004/39/EC, the keeping at the disposal of the competent authority, for at least five years, of 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 on own account or on for the account of another person;

3. adopt measures to ensure that FTT due is paid to the tax authorities at the following points in time

   (a) at the moment when the tax becomes chargeable in case the transaction is carried out electronically;

   (b) within three working days from the moment the tax becomes chargeable in all other cases;

4. adopt measures to ensure that the authorities competent in the matter verify whether the tax has been correctly paid;

Article 11

Specific provisions relating to the prevention of evasion, avoidance and abuse

1. Member States shall adopt measures to prevent tax evasion, avoidance and abuse.

2. In order to ensure a tight implementation of this tax in the European Union the Commission shall/may adopt delegated acts with a view to specifying the measures to be taken under paragraph 1 in the Member States. Those delegated acts shall be adopted in accordance with Articles 13, 14 and 15.

3. Member States shall systematically use the administrative cooperation instruments under EU law relating to the assessment and recovery of taxes in particular Directive 2011/16/EU of the Council of 15 February on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC and Directive 2010/24/EC of the Council of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, and shall make use of already existing reporting and data maintenance obligations related to financial transactions.

Chapter IV
Final provisions

Article 12

Other taxes on financial transactions

Member States shall not maintain or introduce taxes on financial transactions other than the FTT object of the present Directive or value-added tax as provided for in Council Directive 2006/112/EC.

Article 13

Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The delegation of powers referred to in Article 11 shall be conferred for an indeterminate period of time from the date referred to in Article 18.

3. The delegation of power referred to in Article 11 may be revoked at any time by the Council. A decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of the delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to Article 11 shall enter into force only if no objection has been expressed by the Council within a period of 2 months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the Council has informed the Commission that it will not object. That period shall be extended by 2 moths at the initiative of the Council.

Article 14

Revocation of the delegation

1. The delegation of power referred to in Article 11 may be revoked at any time by the Council.

2. If the Council has commenced an internal procedure for deciding whether to revoke the delegation of power it shall endeavour to inform the Commission and the European Parliament within a reasonable time before the final decision is taken, indicating the delegated power which could be subject to revocation and the possible reasons for a revocation.

3. The decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect immediately or at a later date specified therein. It shall not affect the validity of the delegated acts already in force. It shall be published in the *Official Journal of the European Union*.

Article 15

Objections to delegated acts

1. The Council may object to a delegated act within a period of 3 months from the date of notification. At the initiative of the Council that period shall be extended by 3 months.

2. If, on expiry of the period referred to in paragraph 1, the Council has not objected to the delegated act it shall be published in the *Official Journal of the European Union* and shall enter into force at the date stated therein. The delegated act may be published in the *Official Journal of the European Union* and enter into force before the expiry of that period if, upon a justified request by the Commission, the Council has informed the Commission of its intention not to raise objections.

3. If the Council objects to the adopted delegated act within the period referred to in paragraph 1, it shall not enter into force. In accordance with Article 296 TFEU, the Council shall inform the Commission and the European Parliament stating the reasons for objecting to the delegated act.

Article 16

Amendment of Directive 2008/7/EC

Directive 2008/7/EC is amended as follows:

(1) Article 6(1) point (a) is deleted.

(2) After Article 6, the following Article is inserted:

"Article 6a

Relationship with Directive …/…/EU

The present Directive is without prejudice to Directive …/…/EU."

Article17

Review clause

Every five years and for the first time by the end of 2019, the Commission shall submit to the Council a report on the application of this Directive and, where appropriate, a proposal for its modification. The report by the Commission shall, inter alia, examine the impact of the FTT on the proper functioning of the internal market, financial markets and the real economy and it shall take into account the progress on taxation of the financial sector in the international context.

Article18

Transposition

1. Member States shall adopt and publish, by [31 December 2013] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

They shall apply those provisions from [1 January 2014].

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 19

This Directive shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Union*.

Article 20

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Brussels,

For the Council
The President