EU Tax Centre

July 11, 2013

EU FTT under enhanced cooperation: summary of European Parliament amendments

European Union – Enhanced cooperation procedure – Financial Transaction Tax

Background

In the absence of unanimity in the ECOFIN Council, eleven Member States – Austria, Belgium, Estonia, France, Germany, Greece, Italy, Portugal, Slovenia, Slovakia and Spain, agreed to move forward with the FTT under the enhanced cooperation procedure. This was approved by the European Parliament on December 12, 2012 and by the ECOFIN Council on January 22, 2013.

The next step was for the Commission to issue its substantive proposal for an FTT to be implemented by the 11 Member States. This materialized on February 14, 2013. The Commission's proposal was based on the original proposal for all 27 Member States published in September 2011, with adaptations to reflect the fact that not all EU Member States will apply the tax. The tax would be imposed on transactions involving one or more financial institutions in financial instruments, at a minimum rate of 0.1% (or 0.01% for derivatives).

The European Parliament's position

On July 3, 2013, the European Parliament (EP) adopted its position on an EU FTT under enhanced cooperation. The EP approved the Commission's proposal subject to certain proposed amendments. It is important to note that the EP only plays a consultative role in this legislative procedure. The ECOFIN (the legislator in this case) can therefore disregard the EP's proposed amendments.

The main amendments proposed refer to:

- Extending the scope of the tax to cover currency spots on the FX markets;
- The introduction of the transfer of legal title principle;
- Permanent reduced rates on REPOs and temporary reduced rates on trades in sovereign bonds and trades of pension funds;
- The introduction of an exemption for market makers.

Summary of proposed amendments

Amendments to the Recitals to the Directive relate to:

- **The destination of revenue collected from the FTT**: the EP notes (new recital 1 a) that the use of revenues from the EU FTT as a Union own resource is only possible under enhanced cooperation if national contributions of participating Member States are reduced by the same amount. This can only change, i.e. add the revenue to the Union's budget with no related decrease in MSs contributions, if/when the FTT is implemented at EU level;

- **Impact assessment:** the EP urges the Commission (new recital 1 b) to prepare a new analysis and impact assessment prior to introduction of an FTT under enhanced cooperation, in particular demonstrating that it will not disrupt the internal market;

- **Extraterritoriality**: the amended recitals state that the FTT should not result in extra-territorial taxation infringing the potential tax base of non-participating MS.

- **An FTT Committee**: the EP (new recital 19 a) suggests that the Commission establish an expert working group to monitor the implementation of the Directive. the FTT Committee – made up of representatives from all MSs, the Commission, the ECB and the ESMA, could detect the use of abuse arrangements and propose measures to combat such practices.

Amendments to the Scope of the Directive relate to:

- **Exemption for 'liquidity providers'** (market makers): defined as :
  "[…] (cb) A person who holds himself out on the financial markets on a continuous basis as being willing to deal on own account by buying and selling financial instruments against his proprietary capital (market maker),when performing an essential function with regard to illiquid bonds and shares in his role of liquidity provider, as provided for in the agreement between the market maker and the organised venue where the financial ***transaction is carried out, where that transaction is not part of a high-frequency trading strategy."***[1]

  A 'high-frequency strategy' is defined by reference to portfolio turnover, proportion of orders cancelled, timing of unwinding of positions, discounted orders, etc.

- **Clarified definition of financial transactions** (article 2(1)2): includes contracts for difference, speculative forward transactions, currency spots on the FX markets and cancelled orders related to HFT;

  On the other hand, the EP excludes certain transactions between entities of a group or between entities of a network of decentralised banks, where these transfers are carried out in order to fulfil a legal or prudential liquidity requirement that is set by national or Union law

- **Lower threshold for non-financial sector undertakings:** the Commission's intention was to tax entities performing financial transactions that carry out financial transactions worth more than 50% of their average net annual turnover. Entities whose activities did not exceed this threshold would be entitled to request to not/no longer be viewed as a financial institution.

  The EP proposes lowering this threshold to 20%. However, certain non-OTC derivative contracts would be excluded from the value of an entity's average annual financial transactions for these purposes. This appears to relate to the EP's proposal for an exemption for commercial (i.e. non-speculative) hedging carried out by non-financial sector undertakings.

- **Branches located outside participating Member States:** the EP proposes making explicit that branches of financial institutions having their registered office in a participating Member State would result in the institution being in scope of the Directive. This would appear to cover branches outside the participating Member States.

---

[1] European Parliament legislative resolution of July 3, 2013 on the proposal for a Council directive implementing enhanced cooperation in the area of financial transaction tax (COM(2013)0071 – C7-0049/2013 – 2013/0045(CNS))

© 2013 KPMG International Cooperative ("KPMG International"). KPMG International provides no client services and is a Swiss entity with which the independent member firms of the KPMG network are affiliated.

- **Principles defining the scope**:

  Revised issuance principle:

  OTC derivatives would no longer be excluded from the issuance principle.

  The EP also proposes a broad scope for when a financial instrument is deemed to be issued in a participating Member State, i.e. if:
  (a) it is a security or a derivative related to a security and the issuer is located in such a state, or
  (b) it is a derivative admitted to trading on a stock exchange of a participating MS, or
  (c) it is cleared by a CCP governed by the law of a participating MS, or
  (d) it is a financial instrument traded based on an agreement carried out under the law of such a state, or
  (e) it is a structured instrument and at least 50% of the value of assets backing it represent financial instruments issued by a legal person that is registered in a participating MS.

  Transfer of legal title principle: a financial transaction in relation to which FTT is due but has not been levied will not result in the transfer of ownership of the underlying instrument.

Amendments to the *Rates* relate to:

- **A reduced rate on REPO and reverse REPO agreements**: 0.01% on such instruments with a maturity of up to 3 months.
- **Potentially higher rate on OTC trades:** Participating MSs are also given the possibility to apply a higher rate to OTC trades, as these are unregulated, less controlled and less transparent.

- **Transitional rates (until January 1, 2017):**
  - 0.05% on trades in sovereign bonds,
  - 0.05% for trades of pension funds in stocks and bonds, and
  - 0.005% for trades of pension funds in derivatives. The rates applicable to trades of pension funds should be assessed by the Commission in its report on the application of the Directive (to be submitted every 3 years, and not 5 as initially envisaged by the Commission).

Should you require further assistance in this matter, please contact the EU Tax Centre or, as appropriate, your local KPMG tax advisor. Click here for KPMG's FTT technical and business support unit

Robert van der Jagt
Chairman KPMG's EU Tax Centre
vanderjagt.robert@kpmg.nl

Barry Larking
Head of Knowledge Management
KPMG's EU Tax Centre
larking.barry@kpmg.nl

www.kpmg.com/eutax
www.kpmg.com/ftt

This memo is published by KPMG International Cooperative in collaboration with the EU Tax Centre. Its content should be viewed only as a general guide and should not be relied on without consulting your local KPMG tax adviser for the specific application of a country's tax rules to your own situation. The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

© 2013 KPMG International Cooperative ("KPMG International"), a Swiss entity. Member firms of the KPMG network of independent firms are affiliated with KPMG International. KPMG International provides no client services. No member firm has any authority to obligate or bind KPMG International or any other member firm vis-à-vis third parties, nor does KPMG International have any such authority to obligate or bind any member firm. All rights reserved.

The KPMG name, logo and "cutting through complexity" are registered trademarks or trademarks of KPMG International.