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Proposal for a

COUNCIL DECISION

authorising enhanced cooperation in the area of financial transaction tax

EXPLANATORY MEMORANDUM

1. INTRODUCTION

On 28 September 2011, the Commission adopted a proposal¹ for a Council Directive on a common system of financial transaction tax (FTT) and amending Directive 2008/7/EC².

The legal basis for the proposed Council Directive was Article 113 TFEU, as the Commission proposed provisions for the harmonisation of legislation concerning the taxation of financial transactions to the extent necessary to ensure the proper functioning of the internal market for transactions in financial instruments and to avoid distortion of competition. This legal basis prescribes Council unanimity in accordance with a special legislative procedure, after consulting the European Parliament and the Economic and Social Committee.

The proposal aimed at

- harmonising legislation concerning indirect taxation on financial transactions, which is needed to ensure the proper functioning of the internal market for transactions in financial instruments and to avoid distortion of competition between financial instruments, actors and market places across the European Union, and at the same time
- ensuring that financial institutions make a fair and substantial contribution to covering the costs of the recent crisis and creating a level playing field with other sectors from a taxation point of view³, and
- creating appropriate disincentives for transactions that do not enhance the efficiency of financial markets thereby complementing regulatory measures to avoid future crises.

While already before the onset of the financial and economic crisis some Member States had taxes only on some financial transactions in place, several others have decided or made known their intention to either introduce such a tax, broaden the scope of their existing FTT and/or increase the tax rates so as to ensure that financial institutions make a fair and substantial contribution to covering the costs of the recent crisis, and for consolidating public budgets.

In this context the efficient functioning of the internal market (for financial services in essence) required action intended to avoid distortion of competition across borders, and among products and actors. Such positive effects, as well as considerations of tax neutrality required harmonisation with a broad scope, notably to also cover very mobile products such as derivatives, mobile actors and market places.

¹ COM(2011) 594.

² Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital.

³ Financial institutions, either directly or indirectly, largely benefited from the rescue and guarantee operations (pre-)financed by the European taxpayer in the course of 2008 to 2012. These operations, together with the faltering of economic activity caused by the spread of uncertainty about the stability of the overall economic and financial system have triggered deterioration in the public finance balances across Europe. Also, most financial and insurance services are exempted from VAT.

In 2011, therefore, the Commission tabled the above mentioned proposal for a Directive on a common system of FTT. That proposal set out the essential features of such a common system for a broad based FTT in the EU that aims at achieving these objectives. It was conceived so as to minimise the risk of relocation.

The European Parliament delivered its favourable opinion on 23 May 2012⁴, and the Economic and Social Committee on 29 March 2012⁵. Moreover, also the Committee of Regions adopted a favourable opinion on 15 February 2012⁶.

The proposal and variants thereof were extensively discussed in the meetings of the Council, which started under the Polish Presidency⁷ and continued at an accelerated pace under the Danish Presidency, but failed to get the required unanimous support because of fundamental and un-bridgeable differences amongst Member States.

At the Council meetings of 22 June and 10 July 2012, it was ascertained that essential differences in opinion persist as regards the need to establish a common system of FTT at EU level and that the principle of harmonised tax on financial transactions will not receive unanimous support within the Council in the foreseeable future.

It follows from the above that the objectives of a common system of FTT, as discussed in Council upon the Commission's initial proposal, cannot be attained within a reasonable period by the Union as a whole.

In these circumstances, eleven Member States (Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal, Slovenia and Slovakia) have addressed formal requests to the Commission by letters received between 28 September and 23 October 2012 indicating that they wish to establish enhanced cooperation between themselves in the area of the establishment of a common system of FTT and that the Commission should submit a proposal to the Council to that end. They specified that the scope and objectives should be based on the Commission's proposal of September 2011 for a Council Directive on a common system of financial transaction tax. Reference was also made in particular to the need to avoid evasive actions, distortions and transfers to other jurisdictions.

This proposal for a Council Decision authorising enhanced cooperation in the area of FTT is the Commission's response to these requests for enhanced cooperation.

2. LEGAL BASIS FOR THE ENHANCED COOPERATION

Enhanced cooperation is regulated by Article 20 of the Treaty on European Union (TEU) and Articles 326 to 334 of the Treaty on the Functioning of the European Union (TFEU).

This proposal of the Commission for a Council Decision authorising enhanced cooperation in the area of FTT is based on Article 329(1) TFEU.

⁴ P7_TA-(2012)0217.

⁵ ECO/321 – CESE 818/2012 (OJ C 181, 21.06.2012, p. 55).

⁶ CDR 332/2011 (OJ C 113, 18.04.2012, p. 7).

⁷ FTT was first on the agenda of the Council on Economic and Financial Affairs on 8 November 2011 and then at three subsequent meetings in March, June and July 2012. From December 2011 to June 2012 seven Council Working Party meetings on Tax Questions – Indirect taxation were devoted to the subject.

3. MEASURES FORESEEN WITH A VIEW TO IMPLEMENTING ENHANCED COOPERATION

The present proposal for a Council Decision concerns the authorisation of enhanced cooperation in the area of FTT. A proposal for specific measures implementing such enhanced cooperation – i.e., on substance, for a Directive on a common system of FTT – will be submitted in due course. This proposal will be largely based on the original Commission proposal, in terms of scope and objectives.

4. ASSESSMENT OF THE LEGAL CONDITIONS FOR ENHANCED COOPERATION

4.1. Area covered by the Treaty

Article 329(1) TFEU lays down that enhanced cooperation can be established "in one of the areas covered by the Treaties". This requirement is fulfilled.

First, a common system of FTT as contemplated by the Commission proposal and in the discussions held in Council is covered by the Treaties, as an instance of harmonised indirect taxation within the meaning of Article 113 TFEU. According to this provision, the Council may adopt provisions which, as the common system thus proposed and discussed, are necessary to ensure the functioning of the internal market and to avoid distortion of competition.

Second, a common FTT scheme like the one in question is sufficiently broad to be considered as corresponding to an "area" covered by the Treaties, in which enhanced cooperation may be established. The essential framework would harmonise the structure of the tax and provide for minimum rates. It would also attribute taxing rights as between Member States, notably with a view to avoid double taxation or double non-taxation, harmonise chargeability and designate the debtors of the tax. It would finally contain various elements intended to ensure that the tax is effectively collected in all Member States.

Article 20(1) TEU lays down that enhanced cooperation can only be established "within the framework of the Union's non-exclusive competences". The competence granted by Article 113 TFEU concerns the establishment and proper functioning of the internal market which is a shared, i.e. non-exclusive competence (Article 3 and 4(2) TFEU).

4.2. Authorising decision as last resort and participation of at least nine Member States

Article 20(2) TEU lays down that a decision authorising enhanced cooperation can be adopted by the Council only as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and that at least nine Member States participate in it.

Already during the first relevant meeting of the Council on Economic and Financial Affairs of 8 November 2011, some Member States declared that they were against any common system of financial transaction tax at the level of the European Union unless an FTT of similar kind were introduced at the global level. At that stage, one Member State proposed to vote on the proposal in order to spare any future discussion regarding harmonised FTT at European level.

During the seven Council "Working Party meetings on Tax Questions – Indirect Tax (FTT)", first under the Polish and then under the Danish Presidency, in which also numerous alternative design features of an FTT based on the Commission proposal were tabled, examined and discussed, it was confirmed that unanimous support for a common system of FTT, be it along the lines of the Commission proposal or any variant thereof, could not be reached at the level of all Member States.

At the Council meeting on 22 June 2012, the Member States that had expressed their opposition to a common system of FTT already at earlier stages reiterated their position. In those circumstances, several other Member States voiced their intention to request an authorisation for engaging in enhanced cooperation in accordance with Article 20 TEU and Article 329 TFEU. Some of the opponents to a common system of FTT (of any kind) stated that they would not oppose a procedure of enhanced cooperation on this issue in case all the necessary requirements were met.

Having regard to the views expressed, the (Danish) Presidency concluded at the same meeting that support for an FTT as proposed by the Commission was not unanimous. The Presidency also noted that there was support by a significant number of delegations for considering enhanced cooperation.

On its part, the European Council stated at its meeting of 28 June 2012: "[A]s noted at the Council on 22 June 2012, the proposal for a Financial Transaction Tax will not be adopted by the Council within a reasonable period. Several Member States therefore will launch a request for an enhanced cooperation in this area, with a view to its adoption by December 2012."

At the Council meeting of 10 July 2012, the (then Cypriot) Presidency referred to the discussions held at the Council meeting of 22 June 2012 and the above mentioned conclusions of the European Council. It noted the lack of unanimous support for the FTT proposal discussed under the Danish Presidency. It concluded that essential differences in opinion persist as regards the need to establish a common system of FTT at EU level and that the principle of harmonised tax on financial transactions will not receive unanimous support within the Council in the foreseeable future. It finally noted that there is support by a substantial number of Member States for considering enhanced cooperation, which would allow a limited number of Member States to first proceed among themselves.

It follows from the above that the objectives of a common system of FTT, as proposed by the Commission and discussed in Council, cannot be attained within a reasonable period by the Union as a whole. Thus, the last resort for progress on this file within the Treaty framework would be a process of enhanced cooperation in accordance with Article 20 TEU and Article 329 TFEU.

In these circumstances, eleven Member States (Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal, Slovenia and Slovakia) have addressed formal requests to the Commission indicating that they wish to establish enhanced cooperation between themselves in the area of the establishment of a common system of FTT and that the Commission should submit a proposal to the Council to that end.

4.3. Furthering the objectives of the Union, protecting its interests and reinforcing its integration process

The establishment of an internal market is one of fundamental objectives of the Union as set out in Article 3(3) TEU. This objective would be furthered through a common system of FTT, since capital markets are now characterised by an important international dimension, and significant differences in taxation in this field would entail significant distortions of competition and would stand in the way of the establishment of a real internal market for the products covered.

The harmonization of legislation concerning different forms of indirect taxation in accordance with Article 113 TFEU serves "the establishment and functioning of the internal market" and "to avoid distortion of competition".

The coexistence of various national forms of FTT currently applicable or that are likely to be applied in the foreseeable future in a number of Member States, implies a fragmentation of the market. This in turn translates in distortions of competition on account of tax arbitrage, deflections of trade, both between products and geographical areas, incentives for operators to avoid taxation through operations with little economic value as well as extra costs borne by them due to the complexities inherent in such situation. This scenario emerges already at present and will further develop if no harmonisation is undertaken. It is contrary to the Union objective of a properly functioning internal market, quite apart from its negative effects on tax revenue.

This is of particular relevance in the financial sector where the tax bases are highly mobile by nature and choices depend often on the level of transaction costs (which include taxes) and where the risk of a cost-driven relocation is very high.

The original Commission proposal based on Article 113 TFEU aimed at addressing the above issues. By its nature, such objective of establishing a true internal market and improving its functioning is equally pertinent within the scope of the enhanced cooperation requested, i.e. among a smaller number of Member States.

At the beginning of the enhanced cooperation, the immediate benefits for the internal market would, by necessity, only accrue within the geographical reach of such cooperation, given that not all Member States participate. However, as such cooperation must "remain open at any time to all Member States" (Article 20(1) second subparagraph TFEU, second sentence), its geographical reach will extend in a corresponding manner, if and when other Member States join it.

Moreover, the advantages for the internal market, in terms of reducing costs due complexity, will also accrue to institutions of Member States not participating initially. Their financial transactions covered by enhanced cooperation will be subject to a single common system and not to a plethora of different national rules.

In sum, the enhanced cooperation requested would further the objectives of the Union, protect its interests and reinforce the integration process.

4.4. Compliance with the Treaties and Union law

In accordance with Article 326, paragraph 1, TFEU, enhanced cooperation must comply with the Treaties and Union law. Thus, establishing a common harmonised system of FTT, enhanced cooperation must respect the existing *acquis* in this area.

At present, there is only one legal act of the Union pertaining to taxation of financial transactions, namely Council Directive 2008/7/EC⁸. In particular, in its Article 5(2) this Directive excludes any form of indirect tax whatsoever on the issuance of certain securities (primary market transactions in these securities). On the other hand, notwithstanding this exclusion, Article 6(1)(a) of this Directive provides EU Member States with the possibility to tax the transfer of securities (secondary market transactions). It follows that while a tax may be charged on transfers of securities, no tax may be charged on the issuance and acquisition by the first holder of financial instruments covered by Article 5(2) of Directive 2008/7/EC.⁹

Any potential Council Directive implementing enhanced cooperation in the area of FTT will have to respect the provisions of Council Directive 2008/7/EC, so as to avoid any potential conflict between the two Directives.

4.5. No undermining of the internal market or economic, social and territorial cohesion; no barrier to or discrimination in trade; no distortion of competition

4.5.1. *Enhanced cooperation must not undermine the internal market or economic, social and territorial cohesion*

Article 326, paragraph 2, TFEU requires that enhanced cooperation must not undermine the internal market or economic, social and territorial cohesion.

The enhanced cooperation in the present context would not conflict with the requirement that such cooperation must not undermine the internal market. The harmonization of FTT in the territory of a group of Member States (the FTT jurisdiction) would contribute to a better functioning of the internal market, although those advantages will not accrue, both immediately and fully, at the scale of all 27 Member States¹⁰. Risks of fragmentation of the internal market and of a distortion of competition will first of all be reduced and/or avoided within the scope of the FTT jurisdiction covered by enhanced cooperation. Compared to a situation without such cooperation, the functioning of the internal market, at the level of the 27 Member States, would be improved rather than undermined.

Moreover, financial operators also from outside the FTT jurisdiction will benefit from the simplification inherent in the harmonised regime applicable by all participating Member States, as opposed to a scenario of diverging non harmonised FTT regimes.

For similar reasons, economic, social and territorial cohesion would not be adversely affected by the enhanced cooperation sought. There are no indications that enhanced cooperation with a view to the adoption of harmonising provisions regarding FTT would lead to appreciable differences in the economic or social development between participating and non-participating Member States. Nor would it, in particular, in any way negatively affect the

⁸ Council Directive 2008/7/EC concerning indirect taxes on the raising of capital, OJ L 46, 21.2.2008, p. 11.

⁹ See Judgment of the Court of Justice of 1 October 2009, Case C-569/07, points 32-35, citing case C-415/02 (OJ C 282, 21.11.2009, p. 6).

¹⁰ See Section 4.3 above.

economic or social development of economically poorer or geographically more remote regions of the European Union. In this regard, it may also be noted that the Member States requesting enhanced cooperation present important differences, both in regard to their economic performance and to their geographic position within the Union.

4.5.2. Enhanced cooperation must not constitute a barrier to or discrimination in trade between Member States nor distort competition between them

Article 326, paragraph 2, TFEU also requires that enhanced cooperation must not constitute a barrier to or discrimination in trade between Member States, nor distort competition between them.

The Commission considers that this requirement is fulfilled, for the following reasons.

The terms of any harmonised FTT regime operated under enhanced cooperation would apply consistently to all financial institutions and transactions concerned, in accordance with objective criteria and, notably, the geographical connecting factors referred to.

Moreover, the mere coexistence of the legal system of harmonised FTT, applicable within the participating Member States, on the one hand, and national legal systems of non-participating Member States, on the other, cannot as such be considered a barrier, discrimination or distortion of competition. In the absence of enhanced cooperation, an even greater number of legal systems would coexist. From this perspective, rather, the enhanced cooperation sought diminishes the potential for distortions of competition, notably where it concerns distortions through non-taxation or double-taxation.

4.6. Respecting the rights, competences and obligations of non-participating Member States

Article 327 TFEU requires that any enhanced cooperation respects the competences, rights and obligations of those Member States that do not participate in it.

Enhanced cooperation in the area of a common FTT system would comply with this requirement as well.

In particular, such system would in no way affect the possibility for non-participating Member States to keep or introduce an FTT on the basis of non-harmonised national rules, provided only they comply with Union law obligations that are anyway applicable.

Moreover, the common system of FTT would attribute taxing rights to the participating Member States only on the basis of appropriate connecting factors.

5. Overall conclusions

On the basis of the above, the Commission concludes that all legal conditions set by the Treaties for enhanced cooperation are fulfilled, provided that the act implementing the present enhanced cooperation fully respects the relevant provision of Council Directive 2008/7/EC.

The Commission also considers that it is appropriate and timely to authorise enhanced cooperation.

The recent global economic and financial crisis had a serious impact on the economies and public finances in the EU. The financial sector has played a major role in causing the economic crisis whilst governments and European citizens at large have borne the costs. The financial sector has experienced high profitability over the last two decades which could be partially the result of an (implicit or explicit) safety net provided by governments, combined with banking regulation and VAT exemption.

Under these circumstances, some Member States started to implement additional forms of financial sector taxation, whilst other Member States already had in place specific tax regimes for financial transactions.

The current situation leads to the following undesirable effects:

- a fragmentation of the tax treatment in the internal market for financial services - bearing in mind the increasing number of uncoordinated national tax measures being put in place- with the consequent possibilities of distortions of competition between financial instruments, actors and market places across the European Union and double taxation or double non-taxation;
- the financial institutions do not make a fair and substantial contribution to covering the cost of the recent crisis and a level playing field with other sectors from a taxation point of view is not ensured;
- taxation policy does not contribute to provide disincentives for transactions which do not enhance the efficiency of financial markets nor complement regulatory measures to avoid future crises, but which might only divert rents from the non-financial sector of the economy to financial institutions and, thus, trigger over-investment in activities that are not welfare enhancing.

The implementation of a common system of financial transaction tax amongst a sufficient number of Member States would entail immediate tangible advantages on all three points listed above, in regard to financial transactions covered by enhanced cooperation. In connection with these points, the position of the participating Member States in terms of relocation risks, tax revenues and efficiency of the financial market and avoidance of double taxation or non-taxation would be improved. Other Member States' legislation and policy in the area would not be affected, whereas operators from such other Member States may also benefit from the reduced fragmentation of the internal market (cf. above). Through a regime along the lines of the original Commission proposal it would be possible to address evasive actions, distortions and transfers to other jurisdictions.

Proposal for a

COUNCIL DECISION

authorising enhanced cooperation in the area of financial transaction tax

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 329(1) thereof,

Having regard to the requests made by Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal, Slovenia and Slovakia,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament¹¹,

Whereas:

- (1) In accordance with Article 3(3) of the Treaty on European Union (TEU), the Union shall establish an internal market.
- (2) Pursuant to Article 113 of the Treaty on the Functioning of the European Union (TFEU) the Council shall adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.
- (3) In 2011, the Commission took note of a debate on-going at all levels on additional taxation of the financial sector. This debate originates from the desire to ensure that the financial sector fairly and substantially contributes to the costs of the crisis and that it is taxed in a fair way vis-à-vis other sectors for the future, to disincentivise excessively risky activities by financial institutions, to complement regulatory measures aimed at avoiding future crises and to generate additional revenue for general budgets or specific policy purposes.
- (4) Against this background, the Commission adopted a proposal for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC.¹² The main objective of that proposal was to ensure the proper functioning of the internal market and to avoid distortion of competition.

¹¹ OJ C , , p. .

¹² COM (2011) 594 final of 28 September 2011.

- (5) At the Council meeting of 22 June 2012, it was ascertained that there was no unanimous support for a common system of financial transaction tax (FTT) as proposed by the Commission. The European Council concluded on 29 June 2012 that the proposed Directive would not be adopted by the Council within a reasonable period. At the Council meeting of 10 July 2012, reference was made to persisting and essential differences in opinion as regards the need to establish a common system of FTT at the Union level and it was confirmed that the principle of harmonised taxation on financial transactions will not receive unanimous support within the Council in the foreseeable future.
- (6) In these circumstances, 11 Member States, namely Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal, Slovenia and Slovakia, addressed requests to the Commission by letters received between 28 September and 23 October 2012 indicating that they wished to establish enhanced cooperation between themselves in the area of FTT. These Member States requested that the scope and objectives of the enhanced cooperation be based on the proposal for a Directive submitted by the Commission on 28 September 2011. Reference was also made in particular to the need to avoid evasive actions, distortions and transfers to other jurisdictions.
- (7) The enhanced cooperation should provide the necessary legal framework for the establishment of a common system of FTT in the participating Member States and ensure that the basic features of the tax are harmonised. To the extent possible, incentives for tax arbitrage and allocation distortions between financial markets, as well as possibilities for double or non taxation, as well as evasive actions, should thereby be avoided.
- (8) The conditions laid down in Article 20 TEU and Articles 326 and 329 TFEU are fulfilled.
- (9) It was recorded at the Council meeting on 29 June 2012 and confirmed on 10 July 2012 that the objective to adopt a common system of financial transaction tax cannot be attained within a reasonable period by the Union as a whole. Consequently, the requirement set out in Article 20(2) TEU that enhanced cooperation may be adopted only as a last resort is fulfilled.
- (10) The substantive area within which enhanced cooperation would take place, the establishment of a common system of FTT within the Union, is an area covered by Article 113 TFEU and therefore by the Treaties.
- (11) Enhanced cooperation in the area of the establishment of a common system of FTT aims at ensuring the proper functioning of the internal market. At the scale of this cooperation, it avoids the coexistence of differing national regimes and thus an undue fragmentation of the market, as well as ensuing problems in form of distortions of competition, deflections of trade, both between products, between actors and geographical areas and incentives for operators to avoid taxation through operations with little economic value. Such issues are of particular relevance in the area concerned, which is marked by highly mobile tax bases. Thus, it furthers the objectives of the Union, protects its interests and reinforces its integration process in accordance with Article 20(1) TEU.

- (12) The establishment of a common harmonised system of FTT is not included in the list of areas of exclusive competence of the Union set out in Article 3(1) TFEU. Since it serves the functioning of the internal market, in accordance with Article 113 TFEU, it falls under the shared competences of the Union within the meaning of Article 4 TFEU and thus within the Union's non-exclusive competence.
- (13) Enhanced cooperation in the area concerned complies with the Treaties and Union law, in accordance with Article 326(1) TFEU. In line with Article 326(2) TFEU, it will not undermine the internal market or economic, social and territorial cohesion, nor constitute a barrier to or discrimination in trade between Member States or distort competition between them.
- (14) Enhanced cooperation in the area concerned respects the competences, rights and obligations of non-participating Member States, in accordance with Article 327 TFEU. Such system would not affect the possibility for non-participating Member States to keep or introduce an FTT on the basis of non-harmonised national rules. The common system of FTT would attribute taxing rights to the participating Member States only on the basis of appropriate connecting factors.
- (15) Subject to compliance with any conditions of participation laid down in this Decision, enhanced cooperation in the area referred to therein is open at any time to all Member States willing to comply with the acts already adopted within this framework in accordance with Article 328 TFEU,

HAS ADOPTED THIS DECISION:

Article 1

Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal, Slovenia and Slovakia are hereby authorised to establish enhanced cooperation between themselves in the area of the establishment of a common system of financial transaction tax, by applying the relevant provisions of the Treaties.

Article 2

This Decision shall enter into force on the day of its adoption.

Done at Brussels,

*For the Council
The President*