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Operational Tax News.
FTT update

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Financial Transaction Tax - Act 2

As expected, the EU Commission just adopted a revised draft Directive implementing a Financial Transaction Tax (FTT) via the Enhanced Cooperation Procedure (ECP) with the view to generate approximately EUR 30-35 billion per year.

This follows the January 2013 decision of the Council of the EU to authorise enhanced cooperation between a subset of eleven EU Member States representing 2/3 of EU GDP: Austria, Belgium, Estonia, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain (the “Participating Member States” or the “FTT zone”). This new proposal is largely based on the original draft Directive published by the EU Commission in September 2011 although some important adjustments have been added.

We have highlighted the key features of this new proposal.

The “FTT zone”

The draft Directive has been adjusted to introduce a common transaction tax between the Participating Member States. Non-Participating Member States will not have to introduce this tax. They may participate in the discussions although the Participating Member States only will have to agree unanimously on the proposal and to take part to the final vote.

Broad scope

The scope of the tax is very wide as it is envisaged to cover many transactions carried out by Financial Institutions on all Financial Instruments as long as there is a link to the FTT zone.

1. Products in scope

The Financial Instruments in scope are defined by reference to the Markets in Financial Instruments Directive (MiFID). In a nutshell, they cover shares, bonds, money-markets instruments, units in collective investments undertakings, derivatives (e.g. options, futures, swaps, CFDs etc.), structured products, etc.

Depositary Receipts or similar securities issued with underlying securities issued in a Participating Member State would be treated as issued in Participating Member States.

The EU Commission insists on the fact that most day-to-day financial activities involving citizens and businesses are out of the scope: insurance contracts, mortgage lending, credit card transactions, payment services, deposits are excluded. Spot currency transactions are also excluded to preserve the free movement of capital.

2. Entities in scope

It is proposed that Financial Institutions are liable to pay the tax in order to meet one of the main objectives of the proposal: ensure that the financial sector makes a fair and substantial contribution to public finances and covering the cost of the crisis.

The term “Financial Institutions” is broadly defined and covers primarily Banks, UCITS, Alternative Investment Funds (AIF), Insurance and Reinsurance undertakings, Securitization Vehicles, Pension Funds etc.

The tax would not apply to some entities which are listed on the proposal: Central Counter Parties (CCPs), Member States including public bodies managing public debt.

Tax rates and taxable basis

The applicable rates set by the proposal are:

- 10 bps for financial transactions (other than derivatives) on the value of the transaction or market price of the operation if its value is below the market price;
- 1 bps for derivatives contracts on its notional value referred in the contract.

The proposed rates are minimum rates - Participating Member States would be free to apply higher rates if they want to.

The tax would impact both sides of the transaction and it would have to be paid by each Financial Institution involved in the transaction. Therefore, the transfer of shares between two qualifying Financial Institutions would be subject to at least 20bps.

Exemptions

A limited number of exemptions would apply, e.g.:

- Primary market transactions (including first issuance of shares/units by UCITS and AIF) would be exempt;
- Transactions with European Central Bank, Member States' central banks, the European Financial Stability Facility, the European Stability Mechanism etc.;
- Some restructuring operations.

Contrary to the UK Stamp Duty Reserve Tax (SDRT) or the French FTT, there is no Market Maker Exemption. As a result, the possibility remains for cascading FTT charges on typical capital markets trades involving multiple financial intermediaries.

(Extra)Territoriality

The tax would apply to the extent that there is a link to the FTT zone.

The original version of the proposal incorporated the territorial application of the tax based on the residence principle. Under this principle, a qualifying Financial Transaction would only be taxable if at least one of the parties to the transaction is established in the territory of a participating Member State. This would for instance cover Financial Institutions with their registered seat within the FTT zone, or which have been authorised by the authorities of a Participating Member States to act as such.

In order strengthen anti-avoidance of taxation, it is also proposed to introduce the issuance principle to cover Financial Transactions between Financial Institutions established outside the FTT zone as long as they trade securities issued by an entity located in a Participating Member State.

GAAR

A General Anti-Abuse Rule has also been introduced in order to disregard artificial or circular arrangements designed to avoid FTT.

Timing

The EU Commission maintains its original timeline: introduction of the tax by 1 January 2014. Participating Member States shall also adopt and publish national legislations and regulations by 30 September 2013 at the latest.

This timing seems, however, to be a very optimistic one.

Impact for Luxembourg

Even if Luxembourg has not opted in for the enhanced cooperation, the proposed tax will impact Luxembourg Financial Sector players to the extent that they enter into qualifying transactions with a link to the FTT zone as described above.

It is the right time to start a preliminary impact analysis to understand the impacts of the proposal to your business, participate to lobbying actions and take appropriate actions within your organisation.

Stay abreast of the latest developments via our brand new FTT website by clicking on the link below and do not hesitate to register to receive our FTT Newsletters.

http://www.deloitte.com/view/en_LU/lu/market-challenges/financial-transaction-tax/index.htm

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