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FTT newsletter

A round-up of FTT developments across Europe



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We set out below some details of the “non-paper” from the European Commission Services (“Commission”) in which the Commission concludes that the FTT Directive conforms with EU law and international law principles.

A report has also been released by the House of Lords, criticising both the FTT and the UK Government’s approach to the FTT.

To discuss any aspect of FTT please contact your usual Deloitte contact or **Martin Walker** on **+44 20 7303 7644**.



Please feel free to forward this newsletter onto any of your colleagues. Please also see our [FTT website](#) where you can access past editions of this newsletter and find other FTT related material.

European Commission “non-paper”

In our newsletter of 5 December 2013, we reported that in a “non-paper” the Commission had expressed their view that FTT Directive conforms with EU law and international law principles.

The Legal Service to the European Council (“Council LS”) had opined, in a draft document leaked in September 2013, that Article 4(1)(f) of the proposed FTT Directive was illegal. By way of background, this provision deems a party which is not established in a Member State which adopts the FTT but which transacts with a financial institution which is established in a participating Member State, to itself be deemed to be established in that participating Member State for the purposes of the FTT. For example, a UK bank entering into a financial transaction with a Spanish counterparty would be deemed to be established in Spain for FTT purposes under Article 4(1)(f).



The Commission describes the conclusions drawn by the Council LS as “unfounded”. In particular the “non-paper” provides lengthy discussion as to why there would be sufficient nexus between an entity in a non-participating Member State (e.g. UK bank) and a participating Member State (e.g. Spain) to justify the application of Article(4)(1)(f). This argument is largely based on the entity’s “voluntary participation” in a financial transaction with a counterparty

established in the FTT zone. The Commission notes “the financial institution concerned subjects both the transaction and itself to the tax jurisdiction of that Member State.” In other words, if a UK firm chooses to voluntarily trade with a Spanish counterparty then it voluntarily subjects itself to FTT.

The Commission draws a comparison to UK stamp duty reserve tax (“SDRT”) in order to illustrate this principle in practice. UK SDRT applies on an issuance basis and any party agreeing to acquire UK chargeable securities is liable to UK SDRT wherever they are located. However the scope of Article 4(1)(f) is far broader than the taxing provisions of UK SDRT or any existing financial transaction taxes and we are not persuaded by the analogy drawn to UK SDRT. We do not agree with the view that a UK bank by simply entering into a transaction with a Spanish counterparty over, for example, US shares necessarily subjects itself to Spanish fiscal jurisdiction.

The “non-paper” goes on to dismiss the arguments put forward by the Council LS that Article 4 (1)(f):

- (i) exceeds Member States’ jurisdiction under international customary law;
- (ii) is discriminatory and likely to lead to a distortion of competition to the detriment of non-participating Member States; and
- (iii) is not compatible with Article 327 of the treaty of Functioning of the European Union which states “any enhanced cooperation shall respect the competencies, rights and obligations of those Member States which do not participate in it. Those Member States shall not impede its implementation by the participating Member States”

The Commission concludes that the proposed FTT Directive is in complete conformity with existing international and European law.

The bullish nature of the Commission’s “non-paper” highlights the sustained will to bring a FTT into force. The FTT is likely once again to become a topic of regular discussion and debate at EU political meetings and further developments can be expected.

House of Lords

On 10 December the UK House of Lords (the upper chamber of UK parliament) published a follow up to its earlier report from March 2012 on FTT. The House of Lords once again is critical of the FTT proposal and the impact it would have on the UK economy. The Lords are also interestingly critical of what they describe as the Treasury’s “diffident” approach to the FTT, although they do acknowledge and welcome some moves taken by the Government, such as the legal challenge lodged before the CJEU. Should you wish to receive a copy of this report, please [contact us](#).



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Director

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