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FTT newsletter

A round-up of FTT developments across Europe



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The potential inclusion of spot currency transactions within the FTT charge has been considered from a legal perspective in a leaked opinion from the Legal Service to the European Council. Specifically, the legal service has considered whether an amendment of the FTT directive to include spot currency transactions would (i) be compatible with the free movement of capital; and/or (ii) exceed the European Council's power to amend the proposed FTT directive.

The legal service concludes that taxing spot currency transactions (i) would not necessarily be contrary to the free movement of capital; but (ii) would exceed the Council's power of amendment.

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.

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

EU FTT

Spot currency transactions, such as exchanging an amount in one currency for the equivalent amount in another currency, are presently not within the charge to the FTT under the proposed directive (published on 14 February 2013, "the FTT directive"). The Legal Service to the European Council ("the legal service") has opined on the legality of amending the FTT directive to include spot currency transactions.



We summarise the conclusions reached by the legal service as follows:

Free Movement of Capital

The explanatory memorandum to the proposed FTT directive had stated that spot currency transactions are excluded from the scope of FTT as their inclusion would be contrary to the free movement of capital. The legal service disagrees with this conclusion on the following grounds:

- i. The FTT directive's reasoning had focused on spot currency transactions linked to other transactions, such as the purchase of goods and services. Spot currency transactions not linked to any underlying transaction would not necessarily impinge on the free movement of capital;
- ii. Spot currency transactions are no different from other financial instruments when determining whether free movement of capital would be disrespected; and
- iii. Harmonization measures that are genuinely aimed at establishing an internal market should not be incompatible with the free movement of capital.

Power of Amendment

Despite the conclusion reached above, the legal service also concludes that the inclusion of spot currency transactions within the scope of FTT would exceed the Council's power of amendment of the FTT directive.

The legal service reaches this view on two grounds. First, that the inclusion of spot currency transactions would mean that the FTT would no longer be a "financial transaction tax" but would come to apply to a wide range of transactions that are not related to financial markets. Secondly, including spot currency transactions is neither relevant nor appropriate for the attainment of the objectives of the original FTT proposal. As a reminder these objectives are:

- To ensure the proper functioning of the internal market for transactions in financial instruments and to avoid distortion of competition between financial instruments;
- To ensure that financial institutions make a fair and substantial contribution to covering the costs of the recent crises; and
- To create appropriate disincentives for transactions that do not enhance the efficiency of financial markets thereby complementing regulatory measures to avoid future crises

Outlook

The legal service opinion is not binding, and therefore the Council may seek to include spot currency transactions within the charge to FTT regardless. Alternatively the Council could look to proceed initially with a FTT applicable only to equities (as per the agreement understood to have been reached in the Franco-German summit between France and Germany) and look to include other instruments, including spot currency transactions, at a later date. As a third alternative, the Council could adopt the legal service's conclusion and not look to include spot currency transactions at all.

There are a number of practical considerations that would need to be dealt with were spot currency transactions to be included. For example, it is not clear how either the residence or issuer principle would apply to spot currency transactions or whether joint and several liability provisions could apply.

We will continue to keep you updated on further developments.



Martin Walker

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