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Euro Tax Flash
TAX

EU Tax Centre

Issue 211 – February 14, 2013

Commission issues proposal for an EU FTT under enhanced cooperation

Commission - FTT – enhanced cooperation

On February 14, 2013, the European Commission issued its proposal for a Financial Transaction Tax (FTT) to be adopted by 11 Member States under enhanced cooperation.

Background

As a result of discussions at Council level during 2012 it became apparent that Member States do not unanimously agree on an EU-wide FTT. However, eleven Member States – Austria, Belgium, Estonia, France, Germany, Greece, Italy, Portugal, Slovenia, Slovakia and Spain, agreed to move forward with the initiative under the enhanced cooperation procedure, which provides the legal basis for a limited number of Member States, i.e. at least nine, to adopt measures that only apply to those Member States. At their request, in October 2012 the Commission issued a draft decision for the authorization of 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.

The proposed draft directive

The proposal is, as expected, largely 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. That means basically that the tax is imposed on transactions involving one or more financial institutions in financial instruments, at a minimum rate of 0.1% (or 0.01% for derivatives).

Scope

In order for a transaction to be in scope of the FTT at least one of the parties to the transaction must be established in a participating Member State and at least one financial institution with a relevant connection to the transaction must also be established in a participating Member State. As in the original proposal, a financial institution based outside an FTT Member State can be deemed established in a participating Member State where it has a relevant connection with a transaction with a financial institution, or a party

that is not a financial institution, established in the FTT-zone. A relevant connection for these purposes means, very broadly, that the financial institution is a party or is acting for a party to a transaction.

The new proposal also introduces the “issuance principle” whereby a financial institution can be deemed to be established in a participating Member State where the transaction involves a financial instrument issued within an FTT Member State. This is the case irrespective of the location of other financial institutions or parties involved. This is designed to make it more difficult to avoid the FTT by relocating parties or financial intermediaries. Financial instruments for these purposes would include exchange traded derivatives. There is a similar provision that would deem parties that are not financial institutions to be based in an FTT Member State. As under the original proposal, if there is no link between the economic substance of the transaction and the Member State concerned, the above ‘deeming’ provisions will not apply.

Liability to FTT and enforcement

Once a transaction is in scope, each financial institution having a relevant connection with the transaction is in principle liable for FTT in the Member State where it is established. A relevant connection for these purposes depends on the context, but again very broadly means that the financial institution is a party to the transaction or is acting for a party to the transaction. Where a financial institution is acting for another financial institution only the latter would be liable. Each party to the transaction is jointly and severally liable for unpaid FTT. The Commission has indicated that it expects to rely on mutual assistance instruments for the collection of unpaid FTT. The new proposal also includes a general and specific anti-avoidance provision.

Exemptions

As in the original proposal certain transactions and entities are exempt from FTT. Although there has been discussion as regards excluding pension funds from the scope of the FTT, this has not been done. Also whereas issue and redemption of units in UCITS would have been taxable under the original proposal, only redemption would now be taxable. Recognizing the potential cumulation of FTT in the case of repos and securities lending type transactions, the new proposal would limit the FTT by recognizing just one sale and purchase. An exemption is also proposed for restructurings and primary market transactions (including underwriting and the like).

Implementation

The new proposal envisages the same start date as the original proposal, i.e. January 1, 2014.

FTT revenue

The Commission estimates that the revenues from the new tax could be EUR 30-35 billion on a yearly basis. The Commission has proposed that this revenue could partly be used as an own resource for the EU budget and partly be used as a revenue stream for the participating Member States.

Next steps

Although only participating Member States are allowed to vote on the proposed Directive in the Council, all 27 Member States will participate in the technical discussions and debates. Observations from non-participating Member States may therefore be taken into account when agreeing on the proposal.
Other Member States are also free to join the initiative. The European Parliament will also be consulted as part of the legislative procedure.

EU Tax Centre Comment

While existing FTT's will have to be abolished in the participating Member States, the risk of double taxation in other countries still arises. The Commission is considering the possibility of double taxation agreements to deal with this.
The issue of whether revenues from the enhanced cooperation FTT will contribute to individual Member States' budgets, or to the EU budget still remains open to discussion. This is likely to generate further debate in future Council meetings.

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 contacts.

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