

# Clients & Friends Alert

## The “State of Play” of the European Financial Transaction Tax: European Council Meeting, 8 December 2015

11 December 2015

On 3 December 2015 the Luxembourg President of the Council of the European Union released a “state of play” announcement on the progress made during the course of this year by the ten European Union participating member states (Austria, Belgium, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain)<sup>1</sup> towards the introduction of the European financial transaction tax (the “FTT”).

The “state of play” announcement was followed, on 8 December 2015, by a statement at the ECOFIN meeting in Brussels by the ten participating member states setting out their agreement on features that should be present in the final form of the FTT (the “December Statement”).

This Client & Friends Alert briefly considers the main features of the December Statement, and contemplates future developments regarding the implementation of the FTT. In its current form, the proposed FTT would apply to certain transactions in respect of financial instruments (including shares and derivatives) where at least one party is a financial institution, and at least one party is established in a participating member state, or the financial instrument in which the parties are dealing is issued in a participating member state. The potential breadth of the proposed FTT, notwithstanding only ten participating member states are currently cooperating to introduce the FTT, means that the implementation of the tax would have a potentially significant impact on the European financial sector and a wide group of financial institutions.

### December Statement: key features and themes

The December Statement offers the clearest summary to date of how currently outstanding issues regarding the form, scope and extent of the FTT are likely to be resolved. However, the technical details of the resolution of those issues still remain absent.

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<sup>1</sup> Estonia was originally one of the participating member states, but is understood on 8 December 2015 to have declined to participate further in the implementation of the FTT through the enhanced cooperation procedure.

Broadly, the December Statement identifies that the form of the FTT to be agreed by the participating member states should have the following features:

- all share transactions, including intra-day share trading transactions, will fall within the scope of the FTT. The territorial scope of the FTT for share transactions should follow the European Commission's proposals from February 2013 for taxation to be based on "residence" (determined as being where the place of establishment of the parties to the taxable transaction is located), supplemented by the "issuance principle" (determined as being the location of establishment of the issuer of the shares being used in the transaction).<sup>2</sup> The December Statement preserves some flexibility in this contentious area, however, stating that consideration needs to be given to "*whether it is more sensible to start taxation with shares issued in the [participating] member states*";
- share transactions in a chain will be subject to the FTT, except for transactions with certain agents and clearing members who act as "facilitators". Intermediaries would therefore be taxed to the extent that the transaction is carried out as a proprietary trade;
- a limited market making exemption for share transactions "might be required" in order to "sustain liquidity in illiquid market configurations";
- derivatives transactions will, as originally proposed by the European Commission in February 2013, fall within the scope of the FTT, and will be taxed based on both the residence and issuance principles. The December Statement identifies that the imposition of the FTT on derivatives trades "should not impact the cost of sovereign borrowing", a particular concern of several of the participating member states;
- the December Statement confirms that no exemption for market making regarding derivatives transactions is contemplated; and
- the determination of the tax base for derivatives will follow certain formulas based on the nature of the derivatives concerned. Option type derivatives will be taxed on any option premium. For non-option derivatives (such as contracts for differences), the taxation base suggested in the December Statement is the notional amount or market value of the derivative. The technical details of how the FTT charges are to be computed remains absent, however, and the December Statement notes that in order to "avoid distortions" adjustments to the tax rate or the definition of the tax base may be necessary.

A number of key themes can also be discerned from the December Statement:

- major issues remain outstanding regarding the extent and detailed implementation of the FTT. The December Statement notes that additional time will be required for the participating member states to conclude discussion on several open issues (including the determination of adequate tax rates for different versions of derivatives). The December

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<sup>2</sup> A detailed Clients and Friends memorandum regarding the proposed form of the FTT was published on 14 February 2013 and is available [here](#).

Statement appears to contemplate resolution of the remaining outstanding open issues at some point before 30 June 2016;

- the participating member states have reaffirmed their desire to avoid the negative impacts of the FTT on pension schemes and the provision of non-financial services in the “real economy”; and
- while reference is made in the December Statement of the need to prevent the FTT having a negative impact on the interests of non-participating member states, there is no detail of any measures to ensure that this objective is achieved. No reference is made in either the December Statement, or the “state of play” document prepared by the Luxembourg Presidency, of legal challenges under European law to the implementation of the FTT.<sup>3</sup>

### Comment

2015 has been an important year for international tax developments.

Significant progress has been made by the OECD under the Base Erosion and Profit Shifting Project, and this is likely to lead to many changes in how cross-border financing and commercial transactions are structured. Technical discussions regarding the proposals to establish a common consolidated corporate tax base in the European Union continue to be progressed politically.

In this context, the progress of the FTT towards implementation has been less visible and less public.

The December Statement is a timely reminder that although significant technical and macro-economic issues remain before the FTT can be introduced as a workable tax, the political will to achieve this aim remains present in the remaining ten participating member states.

It remains a concern, however, that key technical questions regarding the scope of the FTT (such as whether a resident or issuance principle applies for the determination of which transactions are subject to the tax) still remain almost three years after the Commission's proposals of February 2013. It also appears likely that other, more political, obstacles to the introduction of the FTT (including the potentially adverse impact on European pension schemes, and the final hypothecation of FTT revenues between participating member states) may continue to contribute to the delay of the implementation of the FTT.

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<sup>3</sup> A Clients and Friends Alert concerning the United Kingdom's filing of an application to annul the European Council Decision (2013/52/EU) authorising the introduction of the FTT through the enhanced cooperation procedure was published on 14 February 2013 is available [here](#).