

# Clients & Friends Alert

## EU Court of Justice Rejects UK Challenge to the EU Financial Transactions Tax

1 May 2014

The progress of the European Financial Transaction Tax (the “FTT”) towards becoming law in eleven participating Member States of the European Union overcame another hurdle on 30 April 2014 with the Court of Justice of the European Union (the “CJEU”) dismissing, perhaps unsurprisingly, the UK’s first legal challenge to the implementation of the FTT.

This Clients & Friends Alert provides the background to the UK’s application to the CJEU, an overview of the CJEU’s decision and a discussion of what the CJEU’s decision means for the future of the FTT.

### The UK’s Application

On 18 April 2013 (the last day on which an application could be filed on time), the UK filed an application to annul the European Council Decision<sup>1</sup> authorising the introduction of the FTT among eleven participating Member States through the EU’s enhanced cooperation procedure. Under the enhanced cooperation procedure, a limited number of Member States (at least nine) are able to agree to proceed with certain proposals without the support of all of the Member States. On 14 February 2013, the EU Commission published a revised Directive to introduce an FTT in eleven participating Member States, namely Austria, Belgium, Estonia, France, Germany, Greece, Italy, Portugal, Slovenia, Slovakia and Spain. A detailed Clients and Friends memorandum regarding the proposed form of the FTT published on 14 February 2013 is available [here](#).

However, under the draft Directive published on 14 February 2013, it is possible that the proposed FTT may impact upon entities and businesses established within Member States which do not introduce the proposed FTT (“**non-participating Member States**”). In this regard, the UK’s application sought to annul the Council Decision on the basis that it would give rise to “extraterritorial effects”.

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<sup>1</sup> Council Decision 2013/52/EU

The UK's application set out two arguments as to how these extraterritorial effects would infringe EU law. First, the UK argued that an extraterritorial effect would arise where a UK party to a transaction could become liable to the FTT either (i) by virtue of entering into a transaction with a financial institution resident in a participating Member State, even where the shares, securities or derivatives used in the transaction had not been issued by an entity in a participating Member State; or (ii) where the shares, securities or derivatives used in the transaction are issued in a participating member state regardless of the residence of the counterparty. Second, the UK argued that an extraterritorial effect arose by reference to the implementation costs that would potentially be borne by non-participating Member States.

It is important to note that the UK's application challenged the Council Decision which authorised the use of the enhanced cooperation procedure in relation to the implementation of the FTT. The UK Government's challenge was not a challenge against the actual implementing measures under which the FTT might eventually be introduced.

Furthermore, the UK's application was, in many respects, a protective measure that preserves the UK's right to file future applications in respect of the actual implementing measures which will bring the FTT into existence, such as any final EU Commission Directive which would then need to be introduced into the law of the participating Member States. Applicable EU case law requires a person to challenge a decision at the first opportunity or risk being bound by that decision; accordingly, the UK's challenge was in part a measure to ensure that the UK's standing in respect of future legal challenges to the FTT was preserved.

### **The CJEU's Decision**

The CJEU has ruled that the UK's application would be dismissed. The CJEU has rejected the UK's application on the grounds that the UK's arguments were directed at the substantive elements of the FTT, rather than the specific authorisation by the European Council of authorisation of enhanced cooperation in the area of the FTT, which was the narrower subject of the UK's challenge. The decision of the CJEU is therefore one which has focused on the procedural aspects of the UK's challenge.

While it was anticipated that the CJEU might reject the UK's application on these procedural grounds, several interesting points can still be drawn from the CJEU's judgement.

In respect of the UK's first argument, the CJEU noted that the arguments relied upon by the UK were "premature and speculative" as the legislation implementing the FTT has not yet been adopted by the participating Member States. This limb of the CJEU's decision was unsurprising, not least because the UK's application made it clear that its challenge was, at least in part, a protective measure.

The UK's second argument was rejected by the CJEU as also being premature as the Council Directive contained no provision dealing with the issue of expenditure linked to the implementation of the proposed FTT. The CJEU's response to this second argument therefore

focused on the costs that would be incurred by non-participating Member States to implement the FTT and not the actual tax cost of the FTT itself.

The CJEU's judgement declined to address the substantive issues of the UK's application regarding the legality of the FTT under EU law, and in particular whether the introduction of the FTT would comply with Articles 3, 327 and 332 of the Treaty on the Functioning of the European Union. The CJEU did, however, note positively that its review of the Council Decision did not necessarily preclude a subsequent application by the UK for the annulment of any measure actually implementing the FTT. In this regard, the CJEU leaves open the possibility of further action by the UK in respect of the implementation of the proposed FTT.

### **Future of the FTT**

Progress as to the implementation of the proposed FTT has slowed since 2012 and early 2013. It is understood that the participating Member States are discussing the extent and form of the FTT, with different participating Member States framing these discussions with at least an eye to their own domestic political environment and their view of the optimum scope of the tax.

While the CJEU's decision should permit further action to be taken by the participating Member States, the CJEU's decision does not provide a green light for the implementation of the FTT in the form published in draft by the EU Commission on 14 February 2014. Indeed, the FTT is scheduled to be discussed at the ECOFIN meeting of 6 May 2014, and it is possible that further developments regarding the scope and mechanics of the FTT will follow that meeting. Even if an agreement can be achieved across all of the eleven participating Member States regarding the nature and form of the FTT, it is unlikely that any final Directive for implementation of the tax can be enacted into the local legislation of each of the participating Member States within the remainder of this year.

### **The UK's position as regards the FTT**

Turning to the UK, it is possible that the dismissal of its challenge will not be as disappointing as it might first appear. The UK's application for the annulment of the Council Decision can be construed as an ultimately strategic move to preserve its right to future actions. Furthermore, the substantive objections which the UK Government has regarding the impact of the FTT on non-participating Member States should not be diminished by the largely procedural points addressed in the CJEU's decision.

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