

**CONFIDENTIAL**

**Draft for a Directive implementing enhanced cooperation in the area of financial transaction tax**

Proposal for a

## **COUNCIL DIRECTIVE**

### **implementing enhanced cooperation in the area of financial transaction tax**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 113 thereof<sup>1</sup>,

Having regard to Council Decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax,

Having regard to the withdrawal of the Republic of Estonia as a Member State participating in the establishment of the enhanced cooperation,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Parliament<sup>2</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>3</sup>,

Acting in accordance with a special legislative procedure,

Whereas:

Financial transactions under this Directive are defined as the acquisition of ownership of a financial instrument for consideration. Acquisitions free of charge are thus not in the scope of the Directive.

Financial instruments means equity financial instruments, including, among others, shares admitted to trading on a trading venue issued by an entity whose registered office is established in the territory of a participating Member State and which has a market capitalisation exceeding EUR one billion on 1 December of the calendar year preceding that in which the FTT becomes chargeable. On the one hand, it means that in case these shares admitted to trading on a trading venue are traded elsewhere, for example over-the-counter, the resulting financial transactions are also taxable. On the other hand, it means that in case certain shares of these entities are not admitted on a trading venue that type of shares will not be taxable

The instruments representing ownership of taxable shares, in particular depository receipts, as referred to in MiFID Art. 4 (1) 44. b) and 45. are however not part of the instruments equivalent to taxable shares and thus are not included in the scope of the Directive.

The tax shall not apply to transactions carried out by financial institutions for the purpose of market making activities, irrespective of their membership of a trading venue or similar third-country venue.

Acquisition of ownership is defined as the registration of the acquisition of a financial instrument by means of a book entry on a financial instrument's account, a register, or a central securities depository maintained by or on behalf of an intermediary, with the aim of discharging the obligations of parties to that transaction, considered at the intended settlement date. The intermediary concerned can be any intermediary and should not be restricted to mere financial intermediaries. The acquisition of ownership requirement means that net acquisitions of a financial instrument at settlement are considered.

The financial transaction tax under this Directive is based on the issuance principle. The tax shall apply to the acquisition of ownership for a consideration of shares or similar instruments issued by a company, a partnership or other entity whose registered office is established in the territory of a participating Member State, wherever the transaction takes place and whoever the counterparties are. The right to tax the financial transactions belongs to that participating Member State.

HAS ADOPTED THIS DIRECTIVE:

## **Chapter I**

### **Subject matter and definitions**

#### *Article 1*

##### *Subject matter*

1. This Directive implements the enhanced cooperation authorised by Decision 2013/52/EU by laying down provisions for a harmonised financial transaction tax (FTT).
2. Participating Member States shall charge FTT in accordance with this Directive.

#### *Article 2*

##### *Definitions*

For the purposes of this Directive, the following definitions shall apply:

- (1) 'Participating Member State' means a Member State which participates, at the time when FTT becomes chargeable pursuant to this Directive, in enhanced cooperation in the area of FTT by virtue of Decision 2013/52/EU, but taking account of the withdrawal of the Republic of Estonia as a Member State participating in the establishment of the enhanced cooperation, or by virtue of a decision adopted in accordance with the second or third subparagraph of Article 331(1) of the TFEU;
- (2) 'Financial instruments' means shares, including ordinary and any preference shares, admitted to trading on a trading venue or a similar third country venue issued by a company, a partnership, or other entity whose registered office is established in the territory of a participating Member State

with a market capitalisation that exceeds EUR 1 billion on 1 December of the calendar year preceding that in which the FTT becomes chargeable pursuant to this Directive, or other securities equivalent -to such shares;

- (3) 'Trading venue' means a venue as defined in point (24) of Article 4(1) of Directive 2014/65/EU;
- (4) 'Similar third country venue' means a venue which were it established in the Union, would fulfil the definition provided in point (3);
- (5) 'Acquisition of ownership' means the registration of the acquisition of a financial instrument by means of a book entry on a financial instrument's account, a register, or a central-securities depository maintained by or on behalf of an intermediary, with the aim of discharging the obligations of parties to a transaction, considered at the intended settlement date;
- (6) 'Market capitalisation' of a company, partnership or another entity means the total market value of all the entity's outstanding shares admitted to trading on a trading venue or similar third country venue. The market value of a share means the latest price of the share recorded on the most relevant market in terms of liquidity as defined in Article 4 of the Commission delegated Regulation (EU) 2017/587. The total market value means the market value of a share multiplied with the number of outstanding shares;
- (7) 'Settlement' means settlement as defined in point (7) of Article 2(1) of Regulation (EU) No 909/2014 of the European Parliament and of the Council on improving securities settlement in the European Union and on central securities depositories and amending Directive 98/26/EC;
- (8) 'Intended settlement date' means the date as defined in point (12) of Article 2(1) of Regulation 909/2014;
- (9) 'Financial instruments' account' means the acquiring party's account on which financial instruments may be credited or debited;
- (10) 'Central Counter Party' (CCP) means an entity as defined in point (1) of Article 2(1) of Regulation (EU) No 648/2012 of the European Parliament and of the Council;
- (11) 'Central securities depository' (CSD) means an entity as defined in point (1) and (2) of Article 2(1) of Regulation (EU) No 909/2014 of the European Parliament and of the Council on improving securities settlement in the European Union and on central securities depositories and amending Directive 98/26/EC;
- (12) 'Collective investment undertaking' means an undertaking for collective investments in transferable securities (UCITS) as defined in Article 1(2) of Directive 2009/65/EC of the European Parliament and of the Council and an alternative investment fund (AIF) as defined in point (a) of Article 4(1) of Directive 2011/61/EU of the European Parliament and of the Council;
- (13) 'Group' means the group of undertakings consisting of a parent undertaking and its subsidiaries within the meaning of Art 22 (1) to (7) of Directive 2013/34;
- (14) 'Intra-group transactions' mean the acquisitions of financial instruments between companies or entities in the same group or acquisitions of financial instruments in connection with a merger, division, or partial division, with the exception of transactions carried out as part of restructuring operations;
- (15) 'Repurchase agreement' and 'reverse repurchase agreement' means an agreement as defined in

Article 3(9) of Regulation (EU) 2015/2365 of the European Parliament and of the Council;

- (16) 'Securities lending' and 'securities borrowing' mean an agreement referred to in Article 3(7) of Regulation (EU) 2015/2365 of the European Parliament and of the Council;
- (17) 'Buy-sell back transaction' and 'sell-buy back transaction' mean a transaction as defined in Article 3(8) of Regulation (EU) 2015/2365 of the European Parliament and of the Council;
- (18) 'Market making activities' mean activities carried out by a financial institution when it acts on own account, whether trading on or outside a trading venue or a similar third country venue, in any of the capacities referred to in point (i) to (iii) of point (k) of Article 2(1) of Regulation (EU) No 236/2012 of the European Parliament and of the Council;
- (19) 'Liquidity agreement', means an agreement concluded by a company or entity whose shares are admitted to trading on a trading venue or similar third country venue with a financial institution. The agreement defines conditions under which that institution intervenes on behalf of that company or entity to promote the liquidity of its shares, pursuant to accepted market practices within the meaning of point (9) of Article 3(1) of Regulation (EU) No 596/2014 or similar third country legislation;
- (20) 'Buy-back programme' means a programme within the meaning of point (17) of Article 3(1) of Regulation (EU) No 596/2014 of the European Parliament and of the Council;
- (21) 'Stabilisation' means operations as referred to in point (d) of Article 3(2) of Regulation (EU) No 596/2014;
- (22) 'Resolution of a CCP' means the application of a resolution tool as referred to under national legislation on resolution of CCPs;
- (23) 'Recovery of a CCP' means measures to be taken by the CCP itself to restore its financial position following a significant deterioration of its financial situation;
- (24) 'Daily net long position' means the positive difference, at an intended settlement date, calculated per person liable for the payment of FTT, per acquirer and per type of instrument between the number of financial instruments the acquiring party has received and the number this party has transferred during the trading day relating to that intended settlement date, after subtracting from these numbers, the numbers of instruments relating to transactions as referred to in point (c) to (l) of Article 9. It is calculated by the person liable to pay FTT for each of its clients and for its own account, per specific financial instrument, at the intended settlement date;
- (25) 'Financial institution' means any of the following:
  - (a) an investment firm as defined in point (1) of Article 4(1) of Directive 2014/65/EU;
  - (b) a credit institution as defined in point (1) of Article 4(1) of Regulation (EC) No 575/2013 of the European Parliament and of the Council;
  - (c) an entity established in a third country which, were it established in the Union, would fulfil the definitions provided for in points (a) and (b) of this paragraph.
- (26) 'Acting on own account' means acquiring the ownership of a financial instrument;

- (27) ‘Execution of a financial transaction means acting to conclude an agreement to acquire one or more financial instruments;
- (28) ‘Systematic internaliser’ means a firm as defined in point (20) of Article 4(1) of Directive 2014/65/EU and an entity established in a third country which, were it established in the Union, would fulfil that definition;
- (29) ‘Custodian’ means the institution established in any place in charge of the safekeeping and administering of financial instruments’ account of clients or of a register of financial instruments;
- (30) ‘Pension Fund’ means:
- i) an ‘institution for occupational retirement provision’ as defined in point (1) of Article 6 of Directive 2016/2341/EU;
  - ii) a occupational retirement provision business of institutions referred to in Article 3 of Directive 2016/2341/EU;
  - iii) occupational retirement provision business of life insurance undertakings in accordance with points (a)(i) to (iii) of Article 2(3) and points (b)(ii) to (iv) of Article 2(3) of Directive 2009/138/EC, provided that all assets and liabilities corresponding to the business are ring-fenced, managed and organised separately from the other activities of the insurance undertaking, without any possibility of transfer;
  - iv) any other authorised and supervised entities, or arrangements which provide pension products which, under national law, are recognised as having the primary purpose of providing the investor with an income in retirement and which entitle the investor to certain benefits;
- (31) ‘similar pension fund’ means a pension fund which were it established in the Union, would fulfil the definition provided in point (30) and it is subject to supervision in the jurisdiction where it is established.

## **Chapter II**

### **Scope of the common system of FTT**

#### *Article 3*

#### *Scope*

This Directive shall apply to all financial transactions.

Financial transaction means the acquisition of ownership of a financial instrument for consideration, including the acquisition by means of an exchange of financial instruments, a physical settlement of a derivative, the exchange, redemption or conversion of a debt instrument.

Each financial transaction shall be considered to give rise to a single transaction. However, each exchange of financial instruments shall be considered to give rise to two financial transactions.

**Chapter III**  
**Chargeability, taxable amount and rates of the common FTT**

*Article 4*  
*Chargeability of FTT*

The FTT shall become chargeable for each financial transaction at the moment it occurs.

*Article 5*  
*Taxable amount*

1. The taxable amount shall be everything which constitutes consideration paid or owed, in return for the acquisition of financial instruments, to the counterparty or a third party.
2. The taxable amount shall not include the FTT itself, other taxes, duties, fees, commissions, levies and charges.
3. When the acquisition of a financial instrument derives from the exchange, redemption or conversion of a debt instrument, the taxable amount shall be the consideration paid or owed in return for that acquisition determined in the issuance document.
4. When the acquisition of a financial instrument derives from the physical settlement of a derivative, the taxable amount shall be the market value of that financial instrument.
5. With the exception of consideration paid or owed in transactions carried out on a trading venue or similar third country venue, in case the consideration as referred to in paragraph 1 is lower than the market value of the financial instrument or in case this consideration is not entirely expressed in monetary terms, the taxable amount shall be that market value.
6. For the purposes of paragraphs 4 and 5, the market value of a financial instrument shall be the latest price of the financial instrument recorded at the time the FTT becomes chargeable on the market with the highest turnover for that instrument determined as set out in Article 4(2) to (3) of Commission delegated Regulation (EU) 2017/587.
7. Notwithstanding paragraphs 1,3 and 4, the taxable amount shall be the number of financial instruments as determined by the daily net long position multiplied by the average value of the instrument.
8. For the purposes of paragraph 7, the average value of a financial instrument shall be the weighted average consideration paid or owed in return for the acquisitions of that financial instrument on the trading day relating to the settlement date considered in the daily net long position.

In the cases referred to in paragraph 4 and 5, the considerations that determine the weighted average shall be the market value as referred to in paragraph 6. In the cases referred to in paragraph 3, the considerations that determine the weighted average shall be the consideration paid or owed determined in the issuance document.

*Article 6*  
*Common provisions on taxable amount*

For the purposes of Article 5, where the value relevant for the determination of the taxable amount is expressed, in whole or in part, in a currency other than that of the taxing participating Member State, the applicable exchange rate shall be the latest selling rate recorded, at the time the FTT becomes chargeable, on the most representative exchange market of the participating Member State concerned, or at an exchange rate determined by reference to that market, in accordance with the rules laid down by that Member State.

*Article 7*  
*Application, structure and level of rates*

1. The participating Member States shall apply the rate of FTT in force at the time when the tax becomes chargeable.
2. The rate shall be fixed by each participating Member State as a percentage of the taxable amount.
3. The rate shall not be lower than 0.2%,
4. The participating Member States shall apply the same rate to all financial transactions.

**Chapter IV**  
**Exemptions**

*Article 8*  
*Exemptions related to transactions carried out by certain entities*

1. Participating Member States shall exempt financial transactions carried out by the following entities under the conditions set out:

- (a) CCPs and entities which perform activities in the name and on behalf of a CCP, where exercising all or some of the functions of a CCP;
- (b) CSDs and entities which perform activities in the name and on behalf of a CSD, where exercising all or some of the functions of a CSD;
- (c) States, regional and local authorities and other bodies entrusted with the function of managing the public debt, when exercising that function;
- (d) Central banks of States, the European Central Bank and the Bank for International Settlements;
- (e) without prejudice to point (d) and the European Financial Stability Facility, the European Stability Mechanism, the European Union, the European Atomic Energy Community,

the European Investment Bank, or bodies set up by the European Union or the European Atomic Energy Community to which the Protocol on the privileges and immunities of the European Union applies, within the limits and under the conditions of that Protocol, the headquarter agreements or

any other agreements concluded for the implementation of the Protocol;

- (f) international organisations or bodies, other than those referred to in points (d) and (e) recognised as such by the public authorities of the host State, within the limits and under the conditions laid down by the international conventions establishing the bodies or by headquarters agreements;
  - (g) Collective investment undertakings, insofar and to the extent that their units are held by pension funds on the date of the financial transaction;
2. Participating Member States may exempt transactions carried out by pension funds on financial instruments issued by a company, a partnership, or other entity whose registered office is established in their territory.

#### *Article 9*

##### *Exemptions related to the nature of certain transactions*

Participating Member States shall exempt the following financial transactions:

- (a) transactions in shares or units of collective investment undertakings, other than those referred to in (c) to (g);
- (b) transactions in financial instruments exclusively admitted to trading on SME growth markets as defined in point (12) of Article 4(1) of Directive 2014/65/EU and registered as such by a home competent authority in accordance with Article 33 of that Directive
- (c) transactions carried out as part of the operations referred to in point (a) of Article 5(2) of Directive 2008/7/EC, including the activity of underwriting, placing and subsequent allocation of financial instruments in the framework of their issue;
- (d) intra group transactions and transactions carried out as part of restructuring operations; transactions between members of the same institutional protection scheme as referred to in Article 113(7) of Regulation (EU) No 575/2013 of the European Parliament and of the Council and transactions between members of a network in accordance with legal or statutory provisions as referred to in Article 400(2)(d) of Regulation (EU) No 575/2013 of the European Parliament and of the Council including transactions within cooperative networks as specified in Article 10 of Regulation (EU) No 575/2013 of the European Parliament and of the Council, including transactions between credit institutions permanently affiliated to a central body and between those entities and the central body.
- (e) transactions carried out as part of repurchase agreements, reverse repurchase agreements, securities lending and securities borrowing and buy-sell back transactions and sell-buy back transactions;
- (f) transactions carried out as part of a title transfer financial collateral arrangement as defined in point (b) of Article 2(1) of Directive 2002/47/EC of the European Parliament and of the Council on financial collateral arrangements, other than those referred to in (e) including transactions involving natural persons and financial institutions ;
- (g) transactions carried out by financial institutions as part of market-making activities;
- (h) transactions carried out by financial institutions where acting within the limits of a liquidity agreement;

- (i) transactions carried out as part of a share buyback programme;
- (j) transactions carried out as part of a stabilisation;
- (k) transactions carried out as part of the application of Directive 2014/59/EU of the European Parliament and of the Council or Regulation 806/2014 of the European Parliament and of the Council or similar legislation established in third countries, other than those referred to in points (c) and (d);
- (l) transactions carried out as part of the recovery or the resolution of a CCP other than those referred to in points (c) and (d).

## **Chapter V**

### **Payment of the common FTT, related obligations and prevention of evasion, avoidance and abuse**

#### *Article 10*

##### *Person liable for payment of FTT to the tax authorities (Reservations from one member state)*

1. In respect of each financial transaction, FTT shall be payable to the tax authorities by:
  - (a) the financial institution acting on own account;;
  - (b) if there is no financial institution acting on own account:
    - the financial institution which executes the financial transaction. Where several financial institutions participate in the execution of the transaction, the FTT is payable only by the financial institution having first been instructed by the acquirer of ownership of the financial instruments;
    - the systematic internaliser, acting as a transferring party with regard to the transaction;
    - if there is no financial institution intervening, the custodian
2. The participating Member States may provide that the person liable for payment of FTT be entitled to claim from the acquirer of the financial instruments the FTT due or paid.
3. The participating Member States may provide that the acquirer of the financial instruments is to be held jointly and severally liable for payment of FTT in cases of misapplication of the exemptions or incorrect determination of the taxable amount owing to the inaccurate or incorrect information provided to the person liable for payment of FTT by the acquirer of the financial instruments.

Likewise, the participating Member States may provide that the acquirer of the financial instruments is to be held jointly and severally liable for payment of FTT where the information referred to in article 11(3) is not properly transmitted to the custodian.
4. The FTT shall be payable to the tax authorities of the participating Member State in whose territory the company, the partnership or other entity, that issued the financial instrument has established its

registered office.

#### *Article 11*

##### *Provisions relating to time limits for the payment of FTT, to obligations intended to ensure payment, to the verification of payment*

1. The participating Member State shall adopt measures to ensure that every person liable for the payment of FTT submits to the tax authorities a return setting out all the information needed to calculate the FTT that has become chargeable during a period of one month.

The FTT return shall be submitted by the twentieth day of the month following the month during which the FTT became chargeable.

2. The participating Member States shall lay down registration, accounting, reporting obligations and other obligations intended to ensure that FTT due is effectively paid to the tax authorities by the twentieth day of the month following the month during which the FTT became chargeable.

The participating Member States shall ensure that any FTT due is paid to the accounts determined by the participating Member States

3. The participating Member States shall adopt measures to ensure that in the case referred to in point c) of Article 10(1) the acquiring party in a transaction transmits the information with regard to that transaction to the custodian to ensure that the return as referred to in paragraph 1 contains the correct information and that the tax is correctly paid.

4. The participating Member States shall adopt measures to ensure that in the cases referred to in point b) and c) of Article 10(1) the acquiring party in a transaction transmits the relevant genuine information to the person liable for payment of FTT to prove the exemption of a transaction claimed in the return as referred to in paragraph 1

The participating Member States shall ensure that the persons liable for the payment of FTT keep at the disposal of the tax authorities, for at least five years, the relevant data relating to all financial transactions for which they are liable to pay the FTT

In specifying that obligation they shall take account, where applicable, of obligations they have already imposed on liable persons in view of Article 25 of Regulation (EU) 600/2014 of the European Parliament and of the Council.

5. The participating Member States shall ensure that the tax authorities verify whether the tax has been correctly paid.

#### *Article 12*

##### *Prevention of fraud and evasion*

The participating Member States shall adopt measures to prevent tax fraud and evasion.

*Article 13*  
*General anti-abuse rule*

1. For the purposes of calculating FTT, participating Member States shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.
2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.
3. Where arrangements or a series thereof are ignored in accordance with paragraph 1, the FTT shall be calculated in accordance with economic reality.

**Chapter VI**  
**Final provisions**

*Article 14*  
*Other taxes on financial transactions*

The participating Member States shall not maintain or introduce taxes on financial transactions as defined in Article 3(1) other than the FTT object of this Directive or value added tax provided for in Council Directive 2006/112/EC.

*Article 15*  
*Review clause*

Every five years and for the first time after five years from the date of the entry into force of the Directive, the Commission shall submit to the Council a report on the application of this Directive, and, where appropriate, a proposal.

In that report the Commission shall, at least, examine the impact of the FTT on the proper functioning of the internal market, the financial markets and the real economy and it shall take into account the progress on taxation of the financial sector in the international context.

*Article 16*  
*Transposition*

1. The participating Member States shall adopt and publish, by 1 January XXXX at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

They shall apply those provisions from 1 June XXXX.

When the participating Member States adopt those provisions, they shall contain a reference to this

Directive or be accompanied by such a reference on the occasion of their official publication. The participating Member States shall determine how such reference is to be made.

2. The participating Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 17*  
*Entry into force*

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

*Article 18*  
*Addressees*

This Directive is addressed to the participating Member States.

Done at Brussels,

*For the Council*

*The President*