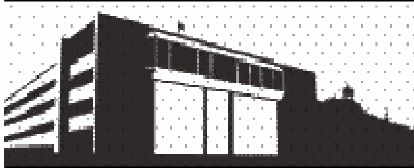

Л.Н. Гумилев атындағы Еуразия ұлттық университетінің ХАБАРШЫСЫ.
ISSN: 2616-6844. eISSN: 2663-1318

ҚҰҚЫҚ СЕРИЯСЫ/ LAW SERIES/ СЕРИЯ ПРАВО

IRSTI 10.21.63
Scientific article

https://www.doi.org/10.32523/2616-6844-2025-150-1-228-242

A Euro Model for the Tobin Tax? The (Possible) Impact of the Tax on the European Financial Market (and on the Non-EU Investors)

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Abstract: This article offers an overview of the Financial Transaction Tax (FTT) proposed by the European Commission, with a focus on its innovative character and origins in the "Tobin Tax". The study examines the FTT's potential impact on the European financial market and non-EU investors. The FTT is notable for being the first tax introduced in the European Union under enhanced cooperation, a procedure allowing certain Member States to implement legislation when unanimity has not been achieved. Moreover, it is the first tax based on the principle of issuance of the underlying asset, irrespective of the taxpayer's residence, thus affecting even non-EU investors. The analysis includes a literature review of academic discourse on the FTT, discussing its objectives, potential economic ramifications, challenges in implementation, and the behavioral changes it may induce among market participants. Key findings highlight that the FTT, while aiming to generate revenue and stabilize markets, faces challenges such as potential market disruption, tax avoidance, and the complexity of ensuring harmonization across different legal systems. The article concludes by discussing the implications of the FTT's implementation, emphasizing the need for an “all in, all out” approach to avoid distortions and ensure effectiveness.

Keywords: financial transaction tax, European union, Tobin tax, enhanced cooperation, taxation.

Introduction

The problem of Taxing Finance: from the “Tobin Tax” to the Financial Transaction Tax. For a lawyer with a civil law background, studying a tax inspired by the model proposed by James Tobin about 50 years ago presents one of the most fascinating challenges available these days.

The reason is that, in the field of tax law, it is rare to discuss a theoretical proposal which was part of a more comprehensive and complex reform of the currency system in place when it was introduced. When Professor Tobin illustrated his idea about what is now known as a “Financial Transactions Tax” (FTT, from now on), he arguably perceived his proposal as a component of a broader reform aimed at the international currency and financial markets on the eve of the post-Bretton Woods era [35, 37].

The first and most significant contribution to the "Tobin Tax" saga was an article focused on the currency issue sparked by US President Nixon [33], who ended the Bretton Woods system in the mid-seventies.

In this respect, the conceived tax was mainly aimed at slowing down currency fluctuations, particularly that of the US dollar. Drafted at a time when the world was divided into two parts, it arguably originated from the author's skepticism about the self-regulatory power of the currency market [19]. He understood that the ability to trade on the spot (to buy and sell short) would provide investors with significant opportunities for speculation and profit but also for losses. The erratic behaviour of the markets was (and is) not in the interests of the states.

A tax on qualified currency transactions, therefore, had to be regarded as an attempt to balance two opposing needs: on the one hand, the necessity for a dominant global market and a liberalized economy, and on the other, the need to manage the invisible hand, curtailing the inherent unpredictability of floating exchange rates, their trends, and excessive fluctuations. For this reason, James Tobin was considered in academia as a “Free Market Keynesian” [19]. The American economist was convinced that free-floating exchange rates of currencies would not solve all the problems facing the US economy: the Oil Shock, and the challenges of the European Monetary System. Ultimately, the recent issues with the Euro currency somehow reaffirmed his stance on this matter [1, 17].

In this respect, the tax aimed to slow down speculative investments in cross-currencies (and only in cross-currencies), imposing a fee of 1% as an indirect tax. Although brief, his proposal presents tax lawyers with several points that seem to have been overlooked by the mainstream literature (both scientific and otherwise) that developed later on.

These features of the so-called “Tobin Tax” make it different from the European proposal of a harmonised FTT, which would have been implemented starting from January 1st 2014 (EU Commission proposal COM (2013) 71 Final), had the EU member state found the needed unanimous consensus and that some countries (including for instance, Italy and France) had already enacted [2].

First of all, the draft proposal by James Tobin was aimed at qualified transactions as mentioned above: the taxable base was indeed formed by (1) cross (2) currency transactions that occurred (3) on the spot. The rationale was that the tax was intended to slow down

speculative investments, which were considered non-optimal in the interest of the market and the global community of states (the Author at that time suggested the picture of “putting some sand” in the machine of international finance) [7, 12]. In the eyes of the Nobel prize winner, the optimal scenario was somehow a system in which the currency exchange ratios were as stable as possible.

This stability was historically safeguarded by the Gold standard and then by the Dollar standard after 1944 [11]. Once the US withdrew their commitment to exchange US dollars with gold, a comprehensible fear spread across the markets, inflated by uncertainty about the future and the actual value of assets in various currencies [14].

Professor Tobin argued that a tax could have helped maintain the status quo and stable exchange rate in an emerging era where neither Gold nor the US Dollar could have done the job. A tax so conceived would have slowed down the speculative movement of exchange rates while providing the State with adequate resources to contrast the adverse trends in exchange ratios [14].

For these reasons, the tax must be applied exclusively to cross-currency exchanges (not to financial instruments in general, as the EU Commission currently mandates) and, among these, only to those on the spot: that is, to those primarily (or solely) motivated by speculative intent.

The latter of the papers mentioned above [35, 36] on a “Currency exchange tax proposal” does not mention derivative contracts on currencies. The reason is probably that James Tobin's first proposal was drafted at a time when the derivatives market had yet to flourish. Undoubtedly, cross-currency derivatives would have been included in the first tax proposal if they were known and used at that time.

This is the “FTT” as Professor Tobin intended. It’s not easy to understand when and why it was changed to address financial market transactions, as the European Commission suggested more than a decade ago.

At the very beginning, the tax was aimed at a specific market with a preventive purpose. More precisely, it aimed to reduce possible future fluctuations in currency exchange rates. Later, the “Tobin Tax” emerged from subsequent reinterpretation. It aimed at targeting all financial transactions (without a clear definition of the latter), including currencies, but without limiting its application to them. In this respect, shares, obligations, warrants, and almost endless species of financial instruments, including hybrids, were considered.

The “Tobin Tax,” supported by various groups [13, 4, 27, 19] and stakeholders today, is an indirect tax on all financial transactions. Its only purpose is to raise more money and thus more fairly distribute the burden of the welfare state and of the more recent costs States incurred into [32].

There’s no room here to go into details of the various proposals of a second-generation “Tobin Tax”, a kind of tax that Professor Tobin never considered as his own, and that he rejected questioning the use of his name to promote it [19]. However, on one point, both tax proposals converge: the levy must be applied worldwide according to the same scheme, the same rules and, most important of all, the same rates and taxable base [32, 23].

Currency and financial assets are the most volatile forms of investment, so the introduction of a tax of this kind (either in the first or the second version) would quickly result in the

relocation of investment into more favourable (tax) jurisdictions [10]. This would eventually lead to an erosion of the taxable base that would frustrate the scope of the tax.

James Tobin has always considered it a condicio sine qua non: it had to be applied to all jurisdictions worldwide, both on the regulated market and not.

In this respect, even the subsequent proposals inspired by his article always maintained the condition that the tax to be implemented had to be applied to every transaction on a global scale. Attempts made in the past to implement it on a local (State) scale demonstrated how doomed these attempts were to fail, such as in the case of the Swedish Tobin Tax that was later repealed [39].

The debate on a "Tobin Tax", either in an orthodox way to interpret it or in the more unorthodox way as it was subsequently intended, was limited to the academic world or to the political discussion on scientific papers or (mainly) other non-scientific sources [6, 17, 29, 30].

The situation changed drastically with the explosion of the so-called "Global Financial Crisis" and its aftermath on the balances of various Western states, including the US and most European countries (the subsequent COVID-19 crisis and eventually the conflict in the East exacerbated the scenario).

In particular, in Europe, the need to raise more revenue and the rigorous constraints of the Euro system urged to find alternative solutions and, to a certain extent, atypical tax bases to be considered by the legislators. The need for a new taxable base and the fact that a lot was done for the financial sector (and in particular for European banks) perhaps pushed academics and policymakers to re-consider the "Tobin Tax" from a different perspective: as a matter of fact, even the US were not immune from this rethinking [15, 18, 28].

Literature Review

The academic discourse surrounding the European Financial Transaction Tax (FTT) proposal is characterised by a multifaceted analysis, navigating the intricate balance between potential fiscal gains and the risks of market disruption. Scholarly works [16] consistently address the core objectives driving the FTT, primarily the pursuit of substantial revenue generation, particularly in the context of post-financial crisis economic stabilization. This focus is frequently coupled with investigations into the tax's capacity to mitigate speculative trading, thereby fostering greater market stability. However, the potential for the FTT to achieve these objectives is heavily debated [18].

A significant portion of the literature concentrates on the projected economic ramifications, with particular emphasis on the delicate interplay between taxation and market liquidity. Researchers extensively explore the possibility of reduced trading volumes, a consequence that could potentially undermine market efficiency. Concurrently, the impact on the competitive landscape of European financial markets remains a central concern, as scholars assess the likelihood of capital relocation and the subsequent effects on economic growth. The complexities of tax base definition and the challenges of preventing tax avoidance are also recurring themes. Studies delve into the intricacies of implementation, acknowledging the inherent difficulties in establishing a robust and equitable tax framework.

Furthermore, the academic community dedicates considerable attention to the potential for the FTT to induce behavioral changes among market participants. Analyses of historical and contemporary FTT implementations provide valuable insights into the possible responses of financial institutions, including the potential for relocation and the development of tax avoidance strategies. The question of whether the FTT will have a negative impact on the real economy, versus just speculative trading, is also a key area of study. The literature consistently underscores the inherent uncertainties surrounding the FTT's ultimate impact, emphasizing the sensitivity of projections to various economic and regulatory factors. In essence, the body of academic work offers a nuanced perspective on the European FTT proposal, acknowledging both its potential merits and the significant challenges associated with its implementation.

The European Commission released two proposals concerning a possible financial transaction tax which, at first glance, were (and are) similar to what we could superficially qualify as a sort of “Tobin Tax 2.0” mentioned above. While the first one (the first proposal was released on 28 November 2011), was struck down by EU member states (according to EU rules and the TFEU, unanimity is still needed to pass directives in the field of taxation), the second was supposed to come into force from 1 January 2014 (see the Press release by the Commission’s service IP/12/1138).

However, Europe's price was remarkable: the forthcoming directive in the field of taxation was the first one adopted only by qualified Member States. Only 11 Countries out of 27 accepted to implement it in the framework of the so-called “enhanced cooperation,” a procedure that allows the EU to pass directives or other regulations that will come into force only in qualified member States of the Union (namely, those who accepted them) [38].

The pros of this procedure are described in the TFEU [38]. It allows States to empower the Union in some fields and issues (taxation in this case) in which unanimity would have been otherwise impossible to reach, thus pushing harmonisation far beyond what could be possible otherwise. The cons are that the more enhanced cooperation is used, the more (tax) harmonisation throughout all Europe is jeopardised, and the EU tax law is somehow gerrymandered across the Old Continent depending on the will of the States to join some harmonization projects and to refuse others.

The list of European States that chose to proceed with enhanced cooperation in the field of FTT covers mainly two categories of Countries: those which need more revenue for internal issues (most of them have already implemented a State-based FTT right in 2013, such as France and Italy for instance) and those that decided to go for it for political reasons, either because found reasonable to ask for more to the financial sector or because during the crisis have demonstrated a particular will to influence the trend of the market using legal instruments in a broad sense of the word. In the case of Germany, for instance, while the global financial crisis was peaking, Mrs. Merkel’s Government, in charge at that moment, prohibited selling short on the stock exchange, thus trying to limit the (unfavourable) fluctuation of the stock market [9].

Some remarkable opt-outs from the cooperation exist: they include jurisdictions that make the most of their national GDP from financial market (such as Luxembourg), those with a well-developed stock market that would be impaired by an FTT (such as the Netherlands), and eventually those that do not need it at all.

The UK fell in the first of these categories before the Brexit. It filed a case in front of the ECJ (case C-209/13 from an action brought on 18 April 2013, the UK v. Council of the European Union), considering enhanced cooperation in this field (and in the ways and means it is carried on) as in contrast with the TFEU and, therefore, urging the ECJ to declare the Directive in comparison with the Treaty and deprived of any effect. The case was struck down by the Court of Luxembourg of formal ground (case C-209/13 decided on 30 April 2014, see in particular § 38).

Irrespective of the state's position, one point is clear: a new tax with a global aspiration requires new criteria to regulate its application.

James Tobin depicted his version of the tax to be applied globally by all the States of the International Community according to an "all in or all out" scheme. The European version applies to a territory that does not encompass the Old Continent, limited mainly (although not exclusively) to southern states. Moreover, it had to be consistent with TFEU guidelines for enhanced cooperation. Still, at the same time, it had to minimise either tax avoidance or tax base erosion by allocating the taxable base to a more friendly tax jurisdiction.

The Commission tried to address all these needs by introducing new criteria for the territorial scope of the tax, which is somehow new to European experience and perhaps also worldwide: the place of issuance of the financial instrument the tax is applied to (or, more precisely, to whose trade it is levied).

This is also the more remarkable distinction between the two proposals of the FTT (in 2011 and 2013, respectively), with the second being driven by the necessity to fine-tune the taxable base to the new necessities that enhanced cooperation arose. With a more limited number of States involved in applying the tax, the Commission had to find a way to safeguard its introduction (in particular, reducing tax erosion within Europe) without violating the constraint conditioning to the enhanced cooperation.

Therefore, while the first version of the directive applied to taxpayers resident within the Union's territory, the second applies to non-resident investors trading on financial instruments issued within the Union (see for instance Article 4, (1), (g) of the Directive). In this respect, the European FTT might target Kazakh financial companies if they decide to trade or operate on financial instruments issued in Europe.

The scope of the tax is remarkably broadened, eventually crossing the border of the Union as such and also involving traders resident outside the EU that, however, negotiate Financial instruments issued in one of the 11 tax jurisdictions interested by the tax [16].

The Methodology

For several reasons, the FTT is a unique kind of tax in Europe (and perhaps in the global scenario). Its analysis deserves a specific methodology.

It was born for a compensatory purpose, as is set out in the consideranda to the Directive approved (paragraph 1.1.). It's perhaps the first time in the European scenario (with the exclusion of the so-called Environmental Taxes) that a tax is imposed to compensate for previous damage incurred to the State (and to the EU) budget. The reference made in the text

of the directive is to the costs that emerged because of the various bailouts of banks across the old continent, and the price supported by individual taxpayers to rescue the banking system via capitalisation or nationalisation of credit institutes.

However, while the "compensatory" principle of environmental taxes is drafted in the Treaty (in which polluters must pay the ecological damages) [26], nothing is clarified for the financial sector.

It's essential to see whether this ratio is compatible with the EU principles that allow intervention (also) in taxation. Still, this is necessary only insofar as it creates a level playing field on the Continent or implements and empowers an actual common market (Article 115 TFEU).

While this is the first attempt to introduce a tax in the financial sector, targeting particular financial transactions, it is evident that one of the first legal difficulties to be overtaken is the definition of financial instruments and the financial market.

In fact, in recent history, all tax proposals have been carried forward by economists and policymakers who have been keen on the basic features of the tax without going into details, including the definition of the taxable base, the kind of transactions to be targeted, and so on.

James Tobin was probably aware of this slippery situation when he suggested linking the tax application to currencies only. When the proposal was drafted, the derivative market for currencies was not as developed as it is today (and as it became in the middle of the subsequent decade); therefore, it could have been reasonably neglected. Today, this is not the case any longer.

However, when the scope of the tax is shifted from the notion of currency (and instrument of payment) to the idea of a financial instrument, the situation becomes much more complicated. If the legislator follows an itemised approach, the risk of tax avoidance is high.

Consistent with a longstanding tradition in the EU, the Directive opens with a list of definitions to clarify the subsequent articles (most notably Articles 1 and 2 of the Directive).

Although it deals with taxation, it relies mainly on previous interventions to harmonise the financial sector in the EU. In this respect, and for tax purposes in general and the application of the directive in particular, the concept of a financial instrument is the one reported in Section C, Annex I to the Directive 2004/39/EC, which includes, inter alia, Transferable securities, money market instruments, derivative contracts and similar assets.

This approach can clearly align tax definitions with those provided by commercial law to interpreters and practitioners, thus avoiding redundant clarifications and ambiguous interpretations.

The disadvantage is that definitions "per relationem" such as the one provided by the Directive, sometimes leave room for interpretation by the interpreter. This is because the drafting of commercial law rules differs from that of tax law, and the scope of the legislator is also not identical. In the Italian experience, for instance, while commercial law is drafted based on principles and rules that are sufficiently general to allow the judiciary a margin of interpretation, tax law rules are written more precisely to minimise the margin of appreciation by the interpreter, be they the taxpayer or the revenue service [24, 31]. To a certain extent, one could argue that many other countries in Europe and around the world also follow this approach.

Legal transplants are, therefore, risky even when operated within the same legal system. If this is true at the national level, it is also true when the case law is the EU one [22[.

The same approach applies when the directive references the idea of "Financial transaction": the operation to which the tax is applied (Article 2, (1), (2)).

In this case, taking into account the lack of definitions in other European provisions, the legislator considers the transaction to include, among other things, the purchase and sale of a financial instrument (any potential netting is disregarded for tax purposes) or its transfer among companies (entities) within the same group. The FTT confirms its nature as an indirect tax on the contracts the parties enter into or on the equivalent disposal of ownership of the assets considered by the law (financial instruments, including derivative contracts).

It is well known that the financial market, in particular was and still is a source of new contracts and instruments through which investments are carried on and rightly negotiated. Therefore, the directive's wording reflects the legislator's fear of forgetting some instrument or, more precisely, some form of legal disposal of assets.

The effort to introduce a comprehensive concept of "Financial transaction" was not executed as intended; instead, there was a preference for enumerating (see Article 1, (2) point from (a) to (e)) various contracts or operations that could be characterised as forms of transactions for taxation purposes. This approach obligates the company (or the individual) conducting the operation to pay tax accordingly.

Most of the operations listed focus on selling and purchasing instruments, their swaps, creating qualified derivative contracts, and establishing specific hybrid instruments. Although it may be hard to believe that the legislator overlooked anything at first glance, the extreme flexibility in setting up transactions that the market affords financial traders arguably makes Article 1 one of the directive's more outdated aspects in the short term.

Discussion

The discussion on FFT is not over, of course. Another issue the FTT will have to address is the "neighbourhood" problems related to other directives and taxes that the EU has already regulated. These problems concern harmonisation and the establishment of a true common market.

The first issue is the compatibility of FTT with Directive 2008/7/EC, which regulates the raising of capital by EU-based companies, specifically regarding indirect taxes on capital raising. In fact, in 2008, the European legislator recast one of the earliest provisions introduced in the EU to harmonise indirect taxation outside the scope of VAT.

In 1969, the European Community prioritized (Directive 1969/335/EEC) establishing uniform rules applicable when a company chose to increase its capital by issuing new shares, allocating various assets, and so on.

At that time, the Commission prioritised removing any form of fiscal limitation on raising risk capital by EU-based companies and, therefore, banned any (indirect) tax on the aforementioned operations. This decision significantly impacted many national tax systems, including the Italian one, where the attribution of assets to companies (whether businesses,

IP rights, money, etc.) was subject to a registration tax proportional to the value of the assets actually attributed at that time.

Currently, Registration tax applies only when the attributed asset is real estate (not part of a business as a going concern), at least in Italy. The EU legislator provides various member states with this option, and it would not be surprising if one of them chose to exempt even this type of attribution.

Despite this derogation, the aims pursued by the EEC at that time and the policy underpinning that decision highlight the potential overlap with the FTT. A possible application of the FTT may occur when a company raising its capital issues financial instruments, including hybrids or other forms of atypical shares, to achieve that goal.

The EU addressed this potential conflict in Directive (Article 3, (4), (g)), prioritising neutrality over imposing a tax on financial transactions, even if such a tax would be harmonised across the continent. This conclusion aligns with the priorities on the European agenda if we consider, as highlighted years ago, that the primary purpose of the directive on capital raising was to empower European-based companies relative to their non-European counterparts.

In other words, the scope pursued in 1969 was not to harmonise (to a zero level) the indirect taxation on capital raising but rather to facilitate these operations as much as possible to enhance the competitiveness of EU companies.

In this respect, FTT, harmonised as it is, would constitute a remarkable limitation to the strengthening of companies and, therefore, would have a negative impact even on a non-financial market. This is why any business combination of financial operations leading to the emission or negotiation of financial instruments issued in the framework of directive 2008/7/EC won't trigger the FTT.

The issue concerning 2006/112/EC is entirely distinct and, to some extent, novel as well (Article 15 of the proposed directive on FTT).

It is well known that most operations that qualify as financial or fall into the core business of insurance companies, banks, and similar firms are exempt for VAT purposes (Article 135 Directive 2006/112/EC).

The concept of "VAT exempt" operations is arguably a distinctive feature of the European VAT system, not replicated in various other (and more recent) VAT/GST laws, such as those in New Zealand. It is well known that within EU law, a crucial distinction exists between zero-rated VAT operations and exempt ones, as the latter prevents businesses from deducting the VAT they have been charged [3, 5, 8, 35].

Academia recently recommended reconsidering the scope of VAT exemption, suggesting replacing the exemption concept with "zero tax" [8]. Stakeholders in that field and states with more developed financial sectors supported and encouraged this position.

Even the ECJ played an essential role in defining the concept of VAT-exempt operations in its case law (see case C-275/11 GfBk Gesellschaft für Börsenkommunikation mbH v. Finanzamt Bayreuth decided on March 7th 2013). It clarified which types of operations could qualify. It addressed some highly complex tax planning schemes, ultimately leading to abuses of law aimed at circumventing the prohibition on deducting input VAT by banks and other financial institutions.

One of the leading cases in this field, Halifax (C-255/02, Hailfax plc, decided on 21 February 2006), involved a bank seeking to recover the VAT it had been charged for purchasing real estate through the involvement of satellite companies and trusts.

Similar to directive 2008/7/EC, VAT could also conflict with the FTT, but in this case, the conflict is twofold, with both taxes potentially poised to overtake one another.

The FTT and VAT Directives include a clause that excludes similar taxes based on a comparable taxable base. For instance, in the case of VAT, Article 33 of the former VI Directive, mirrored by the current Directive 2006/112/EC, clearly states that Member States are prohibited from implementing and maintaining a tax resembling VAT. This provision resulted in a significant decision (The Banca di Cremona case C-475/03 decided on 3 October 2006) involving the Italian system and the potential survival of IRAP, an Italian tax that some authors view as similar to VAT [25].

The same applies to the Financial Transactions Tax: the legislator determined that once implemented, the FTT must be the sole tax applicable to financial transactions within the borders of the Member States which opted for it. In this respect, the application of the tax to financial transactions, although exempt from VAT, could theoretically lead to a conflict of laws, warranting closer attention from the European legislator.

The proposed directive solves the possible conflict by stating that the two taxes are not intended to be similar and can coexist. More precisely, the application of FTT by qualified member states is made possible by derogation from the provisions concerning VAT.

From this perspective, it would have been better to reconsider the exemption system applicable to financial transactions for VAT purposes instead of designing a new tax.

Rethinking the exemption system would have simplified it, reduced distortion, and eventually constituted another step towards making European VAT a value-added tax.

The reasons why the Commission and the Council went in different directions can be found in elements that go beyond the technicalities of the law and are found in a cost-benefit analysis along with a consideration of its sustainability.

Findings

The introduction of the FFT has had a remarkable impact on various investors in the financial sector. Although it has only been implemented in a limited number of European States, some of them, for the dimension of their economies and the quality of their markets, are included in the G-7 ranking, such as Germany, France, and Italy.

Although only 11 out of 28 states are included in the enhanced cooperation, the tax affects more than 50% of the European economy, despite the significant European financial center remaining out of [21].

The first version of the proposed tax, which was designed to apply across Europe, did not take into account important elements affecting the territoriality of the tax. Consistent with the traditional principles regulating EU and International tax law, the tax was triggered by businesses entering into financial operations, either for themselves or on behalf of others.

More precisely, liability to tax was linked to the residence of the latter in any of the European States. The risks of avoidance or tax erosion were considered. Still, in the eyes of the Commission, specific anti-avoidance rules, along with the low rate at which the tax

is applied, would have reduced both the risks to an acceptable level (Article 13 of the FTT, current version, contains a GAAR).

The failure of that project, the need for enhanced cooperation with only 11 tax jurisdictions in Europe, and the significant increase in the risk of avoidance/erosion of the taxable base urged the Commission to think differently.

In particular, the European experts (their positions are explained at page 10 of the Proposed Directive, and more precisely at paragraph 3.2.2.) shared that traditional territoriality principles and regulations would not have adequately addressed the abovementioned risks.

Therefore, it was decided to introduce a new condition under which a transaction would have been liable to tax: the issuance principle.

Under these new rules, as outlined in Article 4(1)(g) and Article 4(2)(c) of the directive, a financial transaction is liable for tax (and the taxpayer must be considered the seller of the asset alongside the financial institution acting on his or her behalf) when the underlying asset is issued in one of the eleven jurisdictions, regardless of where the operation takes place or where the parties to the transaction are situated.

It's evident that, in this way, the scope of the tax is widened as perhaps never before, opening the door for its application even to non-European operators investing in European assets, such as the Kazakhs.

The wording of the directive and the opinion of the first commentators suggest that the issuance principle will deserve careful attention from the practitioners and revenue services of the different Member States (together with the legislators of the countries that will have to enact the directive).

The risk is that this will trigger potential conflicts within EU law from at least two perspectives: the free movement of capital and the legal conditions that permit enhanced cooperation within Europe [16].

Starting from the latter risk, the UK has underlined in the appeal to the ECJ years ago that a tax like the one that will be implemented soon will have a spillover effect even on countries that didn't opt for the FFT. The UK's fear, probably shared by other States, was that financial operators based in the UK but negotiating, for instance, instruments issued in Germany, will be liable to this tax in the latter country.

Obviously, this fear was not ill-founded since the issuance principle also aims for this result.

From a theoretical perspective, the decision taken by the Commission (in fact, a compulsory decision since without the issuance principle, the scope of the directive would undoubtedly have been frustrated by the relocation of assets to more favorable jurisdictions within the EU) opens the floor to a debate that will likely engage academics and practitioners for years to come. It is the first time that a taxing rule is linked, regarding its application, to the nature of the item to be taxed rather than the residence (or domicile) of the taxpayer.

The only precedent in this sense is the VAT regime for movable goods during the importation procedure. Unless they are national or in EU free practice, their sale falls outside the scope of VAT. This is perhaps a unique case in which the legal status of a good (for customs purposes) may play a significant role in the application of a tax.

In this situation, FTT is applied depending on the law governing the issue of the goods or, more precisely, the location where the financial instrument is issued. Therefore, it could be

argued to some extent that it is the law of the State where the asset is 'born'. The nationality of the goods (i.e., financial instruments) plays a decisive role in determining whether to apply the tax.

Conclusion

It's difficult to draw concluding remarks for an ambitious Directive that has yet to come into force. Nonetheless, the European approach to the "Tobin Tax 2.0" already raises two issues: one concerning the methodology of its introduction and the other the moment in which it was introduced.

Enhanced cooperation is outlined in the TFEU and permitted as a sort of extreme measure in the ongoing process of EU harmonization. Incorporating it into the construction of the "Common European house" seems quite paradoxical since the use of this procedure effectively divides the Union into various groups that may partially overlap, in which harmonization is implemented to differing degrees. Realpolitik suggests its use in instances where the actions of certain States in safeguarding their national interests prevent unanimity from being achieved. The rule of reason should also be considered when determining the areas and issues that warrant it.

Certainly, this situation derives from political choices that are beyond the scope of this paper. First, it should lead Europeans to consider the opportunity to proceed in building the common project with all the States. In this respect, the "all in, all out" approach should be maintained in the making of a true Union, even at the cost of reducing the number of States involved.

In this specific case, perhaps the nature of the issue and the lack of need for harmonization would have suggested thinking twice before splitting the Member States into two categories of Countries, thus originating all those tensions that seem to emerge.

The need for an "all in, all out" approach to dealing with FTT should also have been considered in light of the words expressed by James Tobin more than 50 years ago when he suggested his idea of a tax. He was aware that fair taxation of financial transactions (or just those related to currency exchange) can be managed only if the largest number of States is involved (potentially all of them). Implementing that tax on a much smaller scale would have led to distortive effects on the allocation of financial resources and, eventually, to the frustration of the goal.

In this respect, within the framework of the global financial community, Europe is just one of the players: unilateral solutions to tax issues are rarely effective and tend to be counterproductive. Since the decision on a financial transaction tax (FTT) is made by fewer than half of the EU countries, all the doubts and uncertainties are likely to increase.

The contribution of the authors

Marco Greggi has done research and written entirely the article.

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Еуропалық Тобин салық моделі: (мүмкін) салықтың Еуропалық қаржы нарығына және ЕО-ға кірмейтін инвесторларға әсері

Андатпа: Мақалада Еуропалық Комиссия ұсынған қаржылық транзакция салығына (NFT) қысқаша шолу жасалады. Сонымен қатар, оның инновациялық сипатына және оның негізінде, яғни "Тобин салығы"деп аталатын нәрсеге ерекше назар аударылады.

NFT – кеңейтілген ынтымақтастық аясында Еуропалық Одақта енгізілген алғашқы салық. Бұл процедура тек кейбір мүше мемлекеттерге заңнаманы жүзеге асыруға мүмкіндік береді, себебі мәселе бойынша бірауыздылыққа қол жеткізілмеген. Сонымен қатар, оны қолдану үшін NFT мәміле жасалған базалық активті шығару принципіне негізделген бірінші салық болады. Бұл NFT салық төлеушінің резиденциясына қарамастан қолданылады дегенді білдіреді, осылайша ЕО-ға кірмейтін инвесторларға да әсер етуі мүмкін.

Түйін сөздер: қаржылық операцияларға салық, Еуропалық Одақ, Тобин салығы, кеңейтілген ынтымақтастық, салық салу

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Европейская модель налога Тобина: (возможное) влияние налога на европейский финансовый рынок и инвесторов из стран, не входящих в ЕС

Аннотация: В данной статье представлен обзор налога на финансовые операции (FTT), предложенного Европейской комиссией, с акцентом на его инновационный характер и происхождение от «налога Тобина». Исследование рассматривает потенциальное влияние FTT на европейский финансовый рынок и инвесторов государств, не входящих в ЕС. Особенностью данного налога является то, что он стал первым налогом, введенным в Европейском Союзе в рамках механизма расширенного сотрудничества, который позволяет группе государств-членов принимать законодательные меры без единогласного согласия всех стран ЕС. Кроме того, он основан на принципе выпуска базового актива, независимо от места жительства налогоплательщика, что делает его применимым даже к инвесторам за пределами ЕС.

Анализ включает обзор научных публикаций, посвященных FTT, с обсуждением его целей, возможных экономических последствий, сложностей при реализации и изменений в поведении участников рынка. Основные выводы показывают, что, несмотря на стремление налога к увеличению доходов и стабилизации рынков, он сталкивается с такими проблемами, как возможные рыночные потрясения, уклонение от налогообложения и сложность обеспечения гармонизации между различными правовыми системами. В заключении обсуждаются последствия введения FTT, подчеркивая необходимость принципа «все участвуют или никто» для предотвращения рыночных искажений и обеспечения эффективности налога.

Ключевые слова: налог на финансовые транзакции, Европейский союз, налог Тобина, усиленное сотрудничество, налогообложение.

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