

The Proposed Financial Transaction Tax – Extraterritorial Effect, Tax Evasion and Other
Legal Problems Facing the Proposal

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The main topic of this master's thesis is the proposed EU directive on a financial transaction tax. Ten Member States which want to enact the directive by using enhanced cooperation are currently negotiating the contents of the proposal. This tax would be levied on specific products which are traded on the financial markets. As an example the transaction of stocks would be taxed at a percentage of 0.1 percent, and the transaction of derivatives at a percentage of 0.01 percent.

The proposed financial transaction tax would enter into force in said ten countries but it would still have effects on those countries, which are not planning on participating in this taxation system. This is one of the main reasons why this tax has faced a lot of opposition in several European Union countries. The main legal problems the tax is predicted to have are tax evasion, double taxation, and extraterritorial effect.

The Commission has stated that it is aiming to reach certain objectives with the financial transaction tax. These objectives are for example to stabilise the financial markets following the financial crisis, and to deter tax evasion. Commission has defended the planning of the financial transaction tax by stating that the tax is likely to reach its objectives.

The planning of the financial transaction tax began already in 2011 when the Commission published the first draft of the proposal. Following this the proposal was last amended in 2013, but the participating Member States are currently still negotiating the contents of the proposal. The participating Member States published a statement in December 2015 in which they promised that there will be a decision made about the financial transaction tax by the end of June 2016.

Keywords:

European Union, financial transaction tax, enhanced cooperation, tax evasion, extraterritorial effect, double taxation, financial sector.

Table of Contents

Bibliography	III
Literature	III
Legislation and other official sources	V
Case law	VI
European Court of Justice	VI
Abbreviations	VII
1. Introduction	1
1.1 Introducing the Subject	1
1.2 The Focus and the Scope of This Thesis.....	3
1.3 Methodology and Sources.....	5
2. Background.....	8
2.1 The Eurozone Crisis.....	8
2.2 The History of the Financial Transaction Tax	12
2.2.1 Tobin Tax.....	12
2.2.2. Spahn Tax	15
2.3 Not Such an Original Idea after All - Previous Models of the FTT.....	17
2.4 Current Taxation of the Financial Sector in the EU.....	20
2.5 Development of the FTT	23
2.6 Other Regulatory Proposals for the Financial Sector.....	28
3. The Proposal - What Will It Change.....	31
3.1 The Current Proposal	31
3.2 Estimated Impacts	33
3.3 Legal Problems Facing the Proposal.....	36
3.3.1 Extraterritorial Effect	38
3.3.2 Tax Avoidance	42
3.3.3 Double Taxation.....	46
3.3.4 Other Legal Problems	48

4. Supporting and Opposing Arguments	52
4.1 Supporting Arguments	52
4.2 Opposing Arguments	56
4.3 The European Court of Justice	60
5. What Is Next for the FTT?	64
6. Conclusions	68

Bibliography

Literature

Aarnio A, 'Oikeussäännösten Systematisointi Ja Tulkinta' in Häyhä J (ed), *Minun metodini* (Werner Söderström Lakitieto Oy 1997).

Adema RPC, 'Financial Transaction Tax: Pan-European Market for Master-Feeder Structures – or Part of It – Smothered?' (2014) 42/10 Intertax 653.

Arghyrou MG and Tsoukalas JD, 'The Greek Debt Crisis: Likely Causes, Mechanics and Outcomes' (2011) 34/2 The World Economy 173.

Baldwin RE and Giavazzi F (eds), *The Eurozone Crisis* (CEPR Press 2015).

Brainard WC, Nordhaus WD and Watts HW (eds), *Money, Macroeconomics, and Economic Policy: Essays in Honor of James Tobin* (Massachusetts Institute of Technology 1992).

Cannas G, Cariboni J, Marchesi M, Nicodème G, Petracco Giudici M and Zedda S, 'Financial Activities Taxes, Bank Levies and Systemic Risk' (2014) WP43 European Commission Taxation Papers.

Chaudhry SM, Mullineux AW and Agarwal N, *Balancing the Regulation and Taxation of Banking* (Edward Elgar Publishing 2015).

Cloer A and Trencsik S, 'Alive and Deadly – The European Financial Transaction Tax through Enhanced Cooperation: Current Progress' (2014) 54/7 European Taxation 307.

Constâncio V, 'The European Crisis and the Role of the Financial System' (2014) 39 Journal of Macroeconomics 250.

DeYoung R, Gron A, Torna G and Winton A, 'Risk Overhang and Loan Portfolio Decisions: Small Business Loan Supply before and during the Financial Crisis' (2015) 70/6 The Journal of Finance 2451.

Dietlein G, 'National Approaches towards a Financial Transaction Tax and Their Compatibility with European Law' (2012) 21/4 EC Tax Review 207.

Dover R and Frosini J, *The extraterritorial effects of legislation and policies in the EU and US* (Directorate-General for External Policies of the Union 2012).

PriceWaterhouseCoopers, 'Review of Current Practices for Taxation of Financial Instruments, Profits and Remuneration of the Financial Sector' (2012) WP31 European Commission Taxation Papers.

Fabbrini F, 'Enhanced Cooperation under Scrutiny: Revisiting the Law and Practice of Multi-Speed Integration in Light of the First Involvement of the EU Judiciary' (2013) 40/3 Legal Issues of Economic 197.

Federation of Finnish Financial Services ‘Lausunto – Ehdotus Neuvoston direktiiviksi yhteisestä finanssitransaktiojärjestelmästä’ (22 November 2011).

Federation of Finnish Financial Services ‘Kannanotto – Mikä on rahoitusmarkkinaver?’ (18 October 2012).

Federation of Finnish Financial Services ‘Kannanotto – Rahoitusmarkkinaver’ (September 2014).

Gagnon JE and Hinterschweiger M, *Flexible Exchange Rates for a Stable World Economy* (Peterson Institute for International Economics 2011).

Grahl J and Lysandrou P, ‘The European Commission's Proposal for a Financial Transactions Tax: A Critical Assessment’ (2014) 52/2 *Journal of Common Market Studies* 234.

Craig P and de Búrca G, *EU Law: Text, Cases, and Materials* (5th edn, Oxford University Press 2011).

Habermeier K and Kirilenko A, ‘Securities Transaction Taxes and Financial Markets’ (2001) International Monetary Fund Working Paper WP/01/51.

Hemmelgarn T, Nicodème G, Tasnadi B and Vermote P, ‘Financial Transaction Taxes in the European Union’ (2015) WP62 European Commission Taxation Papers.

HJI Panayi C, ‘United Kingdom - The EU’s Financial Transaction Tax, Enhanced Cooperation and the UK’s challenge’ (2013) 53/8 *European Taxation* 358.

Kekkonen J, ‘Oikeudellisen muutoksen tutkimisesta – Minun metodini’ in Häyhä J (ed), *Minun metodini* (Werner Söderström Lakitieto Oy 1997).

Kovács L, ‘Bank Taxes in the European Union’ (2012) LVII/3 *Public Finance Quarterly* 332.

Larking B, ‘Overview of National Taxation of the Financial Sector’ (2012) 14/2 *Derivatives & Financial Instruments* 67.

Millar A, ‘A Financial Transaction Tax – Review of Impact Assessments’ (2012) Report prepared for the International Regulatory Strategy Group 2.

Monetary and Economic Department, *Triennial Central Bank Survey - Foreign exchange turnover in April 2013: Preliminary global results* (Bank for International Settlements 2013).

Ollivaud P and Turner D, ‘The effect of the global financial crisis on OECD potential output’ (2014) 1 *OECD Journal: Economic Studies* 41.

Phua S, ‘Convergence in global tax compliance’ (2015) July *Singapore Journal of Legal Studies* 77.

Polito V and Wickens M, ‘How the Euro Crisis Evolved and how to Avoid Another: EMU, Fiscal Policy and Credit Ratings’ (2014) 39 *Journal of Macroeconomics* 364.

Randall KC, 'Federal jurisdiction over international law claims: Inquiries into the alien tort statute' (1985) 18/1 N.Y.U. Journal of International Law and Politics 1.

Rosenthal S, 'The OECD's International Tax Proposal: The Action Plan' (2013) 33/1 Review of Banking & Financial Law 20.

Schäfer D, 'The financial transaction tax -- Boon or bane?' (2012) 47/2 Intereconomics 76.

Sideris D, 'Comment on "How the Euro Crisis Evolved and how to Avoid Another: EMU, Fiscal Policy and Credit Ratings"' (2014) 39 Journal of Macroeconomics 375.

Song JG, 'The End of Secret Swiss Accounts?: The Impact of the U.S. Foreign Account Tax Compliance Act (FATCA) on Switzerland's Status as a Haven for Offshore Accounts' (2015) 35/3 Northwestern Journal of International Law & Business 686.

Soone A, 'Some Legal Issues with Implementing Commission Proposed Financial Transaction Tax in Estonia' (2014) 42/1 Intertax, 44.

Spahn PB, 'International Financial Flows and Transaction Taxes: Survey and Opinions' (1995) International Monetary Fund Working Paper WP/95/60.

Tavares DFL, 'Notes on the Conditions for a Corrective Financial Transaction Tax' (2014) 42/12 Intertax 788.

Tobin J, 'A Proposal for International Monetary Reform' (1978) 4/3-4 Eastern Economic Journal 153.

Vogel T and Cortez B, 'The Commission's Proposal to Introduce an EU Financial Transaction Tax' (2012) 52/2-3 European Taxation 77.

Legislation and other official sources

Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Taxation of the Financial Sector' COM (2010) 549 final.

Commission, 'European Commission Proposal for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC' COM (2011) 594 final.

Commission, 'European Commission Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax' COM (2013) 71 final.

Commission, 'Implementing enhanced cooperation in the area of financial transaction tax – Analysis of policy options and impacts' SWD (2013) 28 final.

Commission, 'Introducing public country-by-country reporting for multinational enterprises - Questions & Answers' (12 April 2016) Press release.

Commission Legal Services Working Paper, ‘Legality of the “counter-party principle” laid down in Article 4(1)(f) of the Commission Proposal for a Council Directive implementing enhanced cooperation in the area of FTT’ (March 2014).

Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards recordkeeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive [2006] OJ L 241/1

Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C326/01.

Council, 'Outcome of the Council Meeting' (2015) 3435th Council meeting Economic and Financial Affairs Brussels.

Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347.

Council Legal Services opinion ‘Opinion of the legal services department of the Council of the European Union on the Legality of the counterparty-based deemed establishment of financial institutions (Article 4(1) point f) of the proposal’ 2013/0045 (CNS).

Eurobarometer Survey 74, ‘Economic Governance in the European Union’ (January 2011).

European Central Bank, ‘Opinion Of The European Central Bank At The Request Of The Belgian Ministry Of Finance On A Draft Law Introducing A Tax On Exchange Operations Involving Foreign Exchange, Banknotes And Currency’ CON/2004/34.

Case law

European Court of Justice

Case C-209/13 *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union (UK v Council)* [2014].

Case C-255/02 *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise (Halifax)* [2006] I-1609.

Case T-113/96 *Edouard Dubois et Fils SA v Council of the European Union and Commission of the European Communities (Dubois)* [1998] II-125.

Abbreviations

AEOI	Automatic Exchange of Information
CIT	Corporate Income Tax
CJEU	The Court of Justice of the European Union
CLS	The European Council Legal Service
CRS	Common Reporting Standard
ECJ	European Court of Justice
ECOFIN	The Economic and Financial Affairs Council
EMU	Economic and Monetary Union of the European Union
EU	European Union
FAT	Financial Activities Tax
FATCA	Foreign Account Tax Compliance Act
FFI	Federation of Finnish Financial Services
FTT	Financial Transaction Tax
GDP	Gross Domestic Product
IMF	International Monetary Fund
OECD	Organisation for Economic Cooperation and Development
SDRT	Stamp Duty Reserve Tax
SEC	The Securities and Exchange Commission
SPV	Special Purpose Vehicles
STT	Securities Transaction Tax
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
VAT	Value-Added Taxation

1. Introduction

1.1 Introducing the Subject

Recently there have been several significant developments in the area of international financial taxation. There are both political and economic momentum for the governments to legislate the financial sector, especially since the fight against tax evasion has gained substantial support. Additionally, the recent financial crisis hit the European and global economies hard. A lot of people are still angered by the actions of financial institutions prior and during the crisis, and how much it has affected everyday people. Therefore, there is a lot of pressure from voters to make financial institutions contribute more towards the common budget.¹

There are a number theories on the reasons why the recent financial crisis had such a major impact on the European Union economy. However, the most popular theories on the causes of crisis revolve around the US subprime crisis, excessive foreign lending in the EU and irresponsible fiscal policies.² The EU legislators are determined to prevent another financial crisis from affecting the Eurozone as catastrophically as the previously crisis did. This is one of the reasons why there are currently several legislation projects ongoing in the financial sector within the EU.³

For the last five years, since 2011, the Commission has attempted to draft a financial transaction tax (hereinafter referred to as the FTT) which would be implemented within the EU.⁴ The idea of levying taxes on financial transactions has existed for decades, but it has never been implemented on an international level, only within the domestic jurisdictions of individual countries. The theory of transaction taxes was originally introduced in the seventies by James Tobin. This is why typically this type of tax is known as ‘the Tobin Tax’. A financial transaction tax is usually a small tax levied on certain type

¹ Barry Larking, ‘Overview of National Taxation of the Financial Sector’ (2012) 14/2 *Derivatives & Financial Instruments* 67, 68.

² Richard E Baldwin and Francesco Giavazzi (eds), *The Eurozone Crisis* (CEPR Press 2015) 19.

³ Commission, ‘European Commission Proposal for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC’ COM (2011) 594 final, 3.

⁴ Thorsten Vogel and Benjamin Cortez, ‘The Commission’s Proposal to Introduce an EU Financial Transaction Tax’ (2012) 52/2-3 *European Taxation* 77, 77.

of securities⁵ and derivatives.⁶ The European Union model of the FTT would levy a tax at a rate of 0.1% for transactions of shares and bonds, and 0.01% for derivatives.⁷ Moreover, several countries in the EU and globally have decided to implement their own, national versions of an FTT.⁸ On top of the FTT, there are various type of taxes levied on financial institutions.⁹ However, the financial transactions are notoriously exempt from Value-Added Taxation within the EU.¹⁰

The Commission's current proposal for an FTT was published in 2013, and the ten participating Member States are trying to come to an agreement on the contents of the proposal.¹¹ This proposal has awakened a lot of different opinions for and against the FTT. Especially the issuance and residence principles introduced by the proposal have caused a lot of turmoil among non-participating Member States.¹² Another thing that has divided the parties supporting and opposing the proposal, is the impact assessment made by the Commission. The Commission states in the impact assessment that the objectives of the FTT are firstly to harmonise existing regulation in the area of financial transaction taxes within the EU. The second objective is monitor the market and products more closely, thereby bringing more stability to the EU markets. The third objective is to make sure that the financial institutions contribute towards the common budget.¹³ The Commission states in the impact assessment that the FTT would be the right approach to achieve these objectives.¹⁴ However, several sources have stated that the impact assessment made by the Commission is overly optimistic and therefore is not the most reliable source.¹⁵

⁵ For the purpose of this thesis, securities are to be understood as shares, equities, bonds, and convertibles.

⁶ James Tobin, 'A Proposal for International Monetary Reform' (1978) 4/3-4 *Eastern Economic Journal* 153, 153.

⁷ Commission, 'European Commission Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax' COM (2013) 71 final, art 9(2).

⁸ Levente Kovács, 'Bank Taxes in the European Union' (2012) LVII/3 *Public Finance Quarterly* 332, 337.

⁹ PriceWaterhouseCoopers, 'Review of Current Practices for Taxation of Financial Instruments, Profits and Remuneration of the Financial Sector' (2012) WP31 *European Commission Taxation Papers*, 6.

¹⁰ *ibid* 30.

¹¹ Adrian Cloer and Stefan Trencsik, 'Alive and Deadly – The European Financial Transaction Tax through Enhanced Cooperation: Current Progress' (2014) 54/7 *European Taxation* 307, 307.

¹² *ibid* 310.

¹³ Commission, 'Implementing enhanced cooperation in the area of financial transaction tax – Analysis of policy options and impacts' SWD (2013) 28 final, 11.

¹⁴ SWD (2013) 28 final, 50.

¹⁵ Anita Millar, 'A Financial Transaction Tax – Review of Impact Assessments' (2012) Report prepared for the International Regulatory Strategy Group 2.

The proposal still has a lot of issues, and those parties opposing the proposal are saying that it will cause too many legal and other problems. Most significant of these problems are the extraterritorial effect, double taxation, and tax evasion. These legal problems are not technically against the EU Treaties,¹⁶ and the Commission has received the permission from the Council to use enhanced cooperation.¹⁷ Therefore, if the participating Member States come to an agreement, the non-participating countries do not have a lot they can do to prevent the implementation.

These problems, especially the extraterritorial effect, are why certain countries, such as the UK, have been determinedly against the proposal. Understandably the FTT would affect significantly even the UK financial markets, even if the UK does not participate in the FTT, because of said extraterritorial effect.¹⁸ Therefore, with all the challenges the proposal is facing, it is interesting to see what will come of the FTT. The progress has been slow, but the participating Member States stated in December 2015 that they intend to have a decision by the end of June 2016.¹⁹ Considering how much this tax may affect even non-participating Member States, it is understandable why several interest groups are following closely what the outcome of that decision will be. Even more fascinating will be to see, what the actual impacts will be if the FTT is eventually implemented. However, the Commission seems to have a back-up plan if the FTT were to fail. The Commission has suggested that one method of executing this tax would be to implement a FTT with multinational agreements.²⁰

1.2 The Focus and the Scope of This Thesis

The main research question of this thesis is: “What legal problems is the proposed Financial Transaction Tax facing?” The proposal is facing several legal problems, so to

¹⁶ Commission Legal Services Working Paper, ‘Legality of the “counter-party principle” laid down in Article 4(1)(f) of the Commission Proposal for a Council Directive implementing enhanced cooperation in the area of FTT’ (March 2014) 1.

¹⁷ Cloer and Trencsik (n 11) 307.

¹⁸ Christiana HJI Panayi, ‘United Kingdom - The EU’s Financial Transaction Tax, Enhanced Cooperation and the UK’s challenge’ (2013) 53/8 *European Taxation* 358, 364.

¹⁹ Council, ‘Outcome of the Council Meeting’ (2015) 3435th Council meeting Economic and Financial Affairs Brussels, 4.

²⁰ SWD (2013) 28 final, 13.

narrow it down this thesis will mostly focus on the extraterritorial effect, tax evasion, and double taxation caused by the proposal.

The purpose of this thesis is to answer this question. Can this tax truly be something that will be genuinely permanent, or is this proposition just politically motivated and will be another one in a series of failed attempts to recuperate the European economy at the expense of causing new legal problems? To be able to answer this question, it is necessary to explore certain aspects about the proposition. Therefore in the second chapter it is important to describe the background of the proposition. This leads to the financial crisis in the EU, which frequently emerges as the driving force behind the FTT.

Even though the crisis is a key element behind the FTT, it will not be the focus of this thesis. It is still vital to depict the basics of the financial crisis, to help understand why this proposition is considered necessary. Even though the proposition is not the only instrument that has been suggested to alleviate the negative impacts of the financial crisis, those other propositions and actions are not going to be illustrated extensively in this thesis.

Moreover, to answer the research question, this thesis will introduce some other background information about current bank levies in Europe. Also, like previously mentioned, the FTT is not an original idea. Similar taxes have already been in place, and these models will be studied also. The main focus of this thesis is not to introduce these other models at length, but mostly to give the reader an idea, what other levies there are for banks these days, and to give also an insight into how this kind of tax has worked previously.

After the background is illuminated, the final part of the second chapter will focus on answering what steps has there been for the proposition to get where it is currently. Usually many of the propositions made by the Commission are to some extent compromises of the original idea, and therefore it is interesting to recount not only, what the current proposition is, but how have we gotten where we are currently. This chapter will demonstrate what the intentions and motivations are behind this proposition.

After the background chapter, the thesis will examine in more detail, what the proposition will entail. In the third chapter the more technical aspects of the proposition will be examined more closely, and also what impacts the proposition is expected to have. In this chapter this thesis will also get into the legal problems that the proposal is facing, such as the extraterritorial effect and tax evasion, among other issues.

The fourth chapter will study the proposition from various angles. In this chapter it is explained, why some parties are for and some are against the proposal. In said chapter the thesis will also investigate what the European Court of Justice (hereinafter referred to as the ECJ) has stated about the FTT. The most central case in this chapter is the United Kingdom of Great Britain and Northern Ireland v. Council of the European Union C-209/13 (30.4.2014).

The fifth chapter will be dedicated to what is planned next for the FTT. What are the next phases and when the planned implementation would be? It will also study whether the FTT is meant to be permanent or only for until the EU market has recuperated from the crisis.

1.3 Methodology and Sources

When I started to approach the problem of which methods of study I should use while exploring the topic, I picked up a book 'Minun metodini' (My methods) by Häyhä, who is a doctor of laws, and a Supreme Court justice in Finland. In this book, Häyhä has worked together with other legal minds and edited said book combining different legal methodologies.

In this book Aarnio has contemplated law as a science. According to him, law is ambiguous in a way. Law can be studied with several different methodologies, such as legal dogmatic, sociological legal method, comparative legal method, and historical legal method. The oldest and most significant of these methods is legal dogmatic. Its purpose

is to discover the content of the provision, and also to organise the provisions within the legal order.²¹

I also considered the historical legal method, since my research is, in a way, tied to an important turning point within the recent history of the European Union. Kekkonen stated in a chapter of the book authored by him, that when studying a significant legal change it is important to tie it to the current historical developments that happened at that time in the society.²² So even though my research is very much tied to the current developments happening in the EU, it is not the main focus of my thesis. But nonetheless, it is important to depict these developments, for us to better understand the political climate and mind-set of the lawmaker.

So to conclude my assessment on which method I should use in this thesis, I came to the conclusion that the method of study to be used is legal dogmatic since I will mostly be focusing on the content of the proposal and the legal problems caused by it. Legal dogmatic is definitely the main method used in my thesis. However, on top of said method I will also be using some comparative analysis, because there will be some comparing of different financial transaction taxation systems in various countries, supplementing the main themes of this thesis.

On top of these, because I will also consider what kind of legislative scheme could be effective to achieve the wanted outcome, the other method used is *de lege ferenda*. This is not the main method in this thesis as it will only be used in the final chapter of the thesis, where I will be drawing some of my own conclusions and assessing if a modified FTT or other type of tax would better achieve the sought outcome of the legislators.

I also had to consider what kind of sources I would be able to use while writing this thesis. Since the FTT is a very recent development and a current subject in the EU, there are not that many books that I can use in my thesis as sources, but luckily there are a lot of recent articles published in various taxation, economic, and legal publications, written by some of the best experts in this field of taxation.

²¹ Aulis Aarnio, 'Oikeussäännösten Systematisointi Ja Tulkinta' in Juha Häyhä (ed), *Minun metodini* (Werner Söderström Lakitieto Oy 1997) 36-37.

²² Jukka Kekkonen, 'Oikeudellisen muutoksen tutkimisesta – Minun metodini' in Juha Häyhä (ed), *Minun metodini* (Werner Söderström Lakitieto Oy 1997) 141.

On top of those articles my most central source, especially in chapter three, will of course be the Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax (also known as the COM(2013) 71). Also in this chapter, I will study the expected impacts of the FTT. The Commission has made an impact assessment report, the SWD (2013) 28, which will be the most important impact assessment source in this thesis, even though I need to consider the source, when assessing the expected impacts.

2. Background

2.1 The Eurozone Crisis

The latest financial crisis still affects almost everyone on a daily basis. The economy took a heavy hit during the financial crisis, and many of the Eurozone countries have still not recuperated from the aftermath. Everyday citizens can witness this for example with the still high unemployment rates,²³ or simply by the fact that it is much more difficult to get a loan from the bank than it was prior to the crisis.²⁴ This said, it feels like there are a lot of theories and opinions floating around as to what actually caused the crisis. Was it the fact that the EMU decided to endorse a single currency? Or was this a global crisis stemming from the US markets? Was this actually just something that was bound to happen, because, after all, economy is just one perpetually fluctuating organism? Is the correct answer all of the above?

The reason why I get into the financial crisis in this chapter is that you cannot discuss the proposed FTT without understanding the financial crisis first. The justification for the FTT revolves very heavily around the financial crisis. The banking sector was at the core of the financial crisis and one of the main reasons for the FTT is that the financial institutions should carry their weight in restoring the economic system in Europe. Also some have argued that this is a way to punish the banking sector for causing the crisis with irresponsible and unsustainable practices. Some have even nicknamed the FTT as “the Robin Hood tax”.²⁵ Trying to find the answer to the question of what ultimately caused the crisis, I have studied articles in an issue of the Journal of Macroeconomics focusing on the financial crisis, and I have focused on a few articles which I found the most interesting.

One noteworthy point that Constâncio makes in his article about the causes of the financial crisis is whether a crisis could had been avoided in the EU if there had not been

²³ Patrice Ollivaud and David Turner, ‘The effect of the global financial crisis on OECD potential output’ (2014) 1 OECD Journal: Economic Studies 41, 43.

²⁴ Robert DeYoung, Anne Gron, Gokhan Torna and Andrew Winton, ‘Risk Overhang and Loan Portfolio Decisions: Small Business Loan Supply before and during the Financial Crisis’ (2015) 70/6 The Journal of Finance 2451, 2483.

²⁵ Larking (n 1) 68.

a simultaneous international situation that threw the whole system off-balance. He wonders, whether the monetary union would had been enough for the euro area to gradually overcome its own vulnerabilities through a process of inter-regional rebalancing.²⁶ This is an interesting point, but when the economy is so globally connected, the thought that this international situation would not have had an effect is irrelevant. I do not think it matters whether there was an international situation going on also, because the interconnectivity of the global markets, therefore eventually the European crisis could have also sparked the international crisis. In my opinion quite pointless to go over all of the “what ifs” when there is no way to actually know what would have happened, if this or that had not affected the situation.

Although not everyone may agree with him, Constâncio does not believe that the Eurozone crisis was the result of the design of the EMU or the fact that certain Member States did not respect the Stability and Growth Pact before the crisis. As he points out, there was not a significant growth in government debt in the early years of the common currency in those countries most affected by the crisis. He shows that unlike the public debt, the private debt increased by 27% from the beginning of the common currency until 2007. He also points out that there it makes no difference whether the Member State had followed the Stability and Growth pack prior to the crisis.²⁷ He does admit though, that in certain cases the irresponsible fiscal policies did contribute to the economic imbalances.²⁸

One of the reasons why the private debt was able to increase so rapidly was that after the common currency was introduced cross-border transactions increased significantly. This means that the increased money flow made way for a massive credit boom in the countries which are now most affected by the crisis in the EU. When the money flow suddenly and unpredictably stopped, the banks found themselves struggling.²⁹ What I find interesting in Constâncio’s theory is that he claims that the design of the EMU was not the cause of the crisis, yet he admits that the very reason why the private debt was able to escalate so quickly was the introduction of common currency. In my opinion it can be therefore

²⁶ Vítor Constâncio, ‘The European Crisis and the Role of the Financial System’ (2014) 39 *Journal of Macroeconomics* 250, 250.

²⁷ *ibid* 251.

²⁸ *ibid* 252.

²⁹ *ibid* 251-253.

deduced that it was precisely the free flow of the common currency which ultimately led to reckless lending and was one of the root causes of the crisis in the EU.

The international financial crisis also affected the banks in the EU. According to Constâncio, European banks were affected by the international crisis in two major ways. Firstly, many European banks had invested heavily into the US housing market, and thus suffered substantial losses when the US housing market collapsed. Secondly, these banks that had invested into the US housing market, also took a heavy hit when the US subprime mortgage crisis occurred. The US subprime crisis was caused by irresponsible lending policies, in which they targeted the loans for people with low credit ratings. These people were eventually unable to make their payments and the mortgages defaulted. This meant that there was an influx of cheap houses on the market and thus the housing market suffered.³⁰

The conclusion that Constâncio arrives at, is that the original driver of the crisis was located in the financial sector. He summarizes:

“The financial and macroeconomic imbalances built up by the activities of European banks until 2007, together with the international financial crisis, were the prime movers of crisis in Europe. Without this, the sovereign debt crisis would not have been nearly so severe.”³¹

Although, as I previously mentioned, I do not agree with some parts of Constâncio’s theory, I agree with him on his conclusion. I also believe that the most plausible theories behind the Eurozone crisis are these two reasons he arrives at in his conclusion.

Unlike Constâncio, Polito and Wickens also argue in their article that the Eurozone crisis was not due to the US subprime crisis, even if it was the cause for financial crises in the US, the UK, and possibly even Germany and Switzerland.³² This stance that Polito and Wickens take is quite different from the one taken by Constâncio. I find this statement unconvincing, because as Constâncio previously stated in his article, the banks in the EU were heavily invested in the US housing market. Also, Polito and Wickens admit that the

³⁰ *ibid* 253.

³¹ *ibid* 254.

³² Vito Polito and Michael Wickens, ‘How the Euro Crisis Evolved and how to Avoid Another: EMU, Fiscal Policy and Credit Ratings’ (2014) 39 *Journal of Macroeconomics* 364, 373.

subprime crisis affected the UK, and possibly Germany and Switzerland. The fact that these major economies in the Europe would have been the only ones affected is unrealistic, because if the crisis were to hit only the economies in these countries in Europe, it is quite improbable that the crisis would have been contained merely to these countries.

Polito and Wickens argue that the crisis was already put into motion when a single currency was adopted. According to them, the crisis was inevitable when a single currency was set for several countries with different inflation rates. This meant that the countries with the highest inflation rates had exceedingly low official interest rates, which resulted in excessive borrowing which led to banking and debt crisis. This in turn caused loss of competitiveness compared with low inflation euro countries.³³ In an article written by Sideris, he comes to the same conclusion as Polito and Wickens. Sideris also argues that the difference in real interest rates has been the cause of the euro crisis, even though he acknowledges that there are also other causes to the crisis.³⁴

It is difficult to avoid the fact when reflecting all aforementioned consequences the single currency caused, that maybe the single currency was not the best solution for the EMU. When reading about all that has happened in the Eurozone lately, it is difficult to come to any other conclusion except that the crisis was predetermined when the decision on a single currency was made. Not everyone may agree with this statement, however the facts are that the lending increased after the single currency was adopted, and that the difference in inflation rates caused loss of competitiveness. Perhaps it can be admitted that single currency is not directly the only cause for the crisis and that the issue is not as simple as I have put it, but maybe we were not properly prepared for the ramifications of the decision to adopt a single currency, and that is where it all went awry.

Furthermore, Polito and Wickens state that monetary policy was too loose in the crisis countries.³⁵ For once Constâncio also agrees with Polito and Wickens. He also acknowledges in his article that some countries did have negligent fiscal policies, which

³³ *ibid* 364.

³⁴ Dimitrios Sideris, 'Comment on "How the Euro Crisis Evolved and how to Avoid Another: EMU, Fiscal Policy and Credit Ratings"' (2014) 39 *Journal of Macroeconomics* 375, 375.

³⁵ Polito and Wickens (n 32) 373.

contributed to economic imbalances.³⁶ Especially Greece is the embodiment of such a country which practiced irresponsible fiscal policies in the years leading up to the crisis. To name a few of the mistakes made by the Greek government, they firstly had up to 2009 significantly underestimated the national budget deficit, which in turn led to a lack of confidence in the Greek government.³⁷ Secondly the Greek government was short-sighted and was spending more money than the government could eventually afford.³⁸

In the book ‘The Eurozone Crisis – A Consensus View of the Causes and a Few Possible Solutions’ the editors Baldwin and Giavazzi have collected a consensus view of the root causes of the crisis. They also come to the same conclusions as those previously introduced in this chapter. To sum up the main causes of the crisis here, to be the amount of debt borrowed from abroad and the sudden ceasing of money flow when the crisis hit. It also did not help that the money borrowed was invested unwisely and were not able to pay back the original investment. This eventually led to loss of competitiveness. Baldwin and Giavazzi also give some of the credit to irresponsible fiscal policies practiced by certain governments in the EU.³⁹ The experts seem to be on the same page when it comes to which elements caused the crisis, but like to put different emphasis on the element that they seem to think had the most impact on the economy.

2.2 The History of the Financial Transaction Tax

2.2.1 Tobin Tax

The FTT is modelled after a so called Tobin tax, therefore this chapter will firstly examine his suggested taxation model. The Tobin tax was introduced by a Nobel winning⁴⁰ economist and Professor James Tobin in 1978.⁴¹ He originally introduced the subject in 1972 in his Janeway Lectures at Princeton. At this time his proposal was mostly

³⁶ Constâncio (n 26) 252.

³⁷ Michael G Argyrou and John D Tsoukalas, ‘The Greek Debt Crisis: Likely Causes, Mechanics and Outcomes’ (2011) 34/2 *The World Economy* 173, 174.

³⁸ *ibid* 176.

³⁹ Baldwin and Giavazzi (eds) (n 2) 19.

⁴⁰ William C Brainard, William D Nordhaus and Harold W Watts (eds), *Money, Macroeconomics, and Economic Policy: Essays in Honor of James Tobin* (Massachusetts Institute of Technology 1992) 1.

⁴¹ Tobin (n 6) 153.

dismissed.⁴² He re-introduced the subject in the 1978 conference of the Eastern Economic Association in Washington D.C., and his address was the published in the Eastern Economic Journal.⁴³ Tobin assessed that this time around the timing was more suitable for his proposal.⁴⁴

According to Tobin, in the 1970s, many economists had advocated floating exchange rates, determined by private markets without official intervention.⁴⁵ Exchange rates can be fixed or floating. Fixed exchange rates mean that the exchange rate for the currency is tied to the value of gold. Therefore all the currencies' values were fixed. This was the situation mostly until 1973, when the tie to gold was severed. Floating exchange rates, also known as flexible exchange rates, means that since 1973 the major currencies were tied to the value of each other, instead of gold.⁴⁶ Tobin remained sceptical about this development in the floating exchange rates, since according to him, it could not have been expected that governments could avoid all intervention in exchange markets. After this new system had been in place for a few years, it was soon discovered, that the flexible rates did not help eradicate international monetary problems, at least not to the extent as the most optimistic advocates had hoped.⁴⁷

Tobin states that the basic problem was not fixed with this new exchange rate system, because the initial problem persisted. Tobin identifies this problem to be the excessive international or inter-currency mobility of private financial capital.⁴⁸ According to Tobin, the speculation on exchange rates has concrete internal economic consequences. Tobin offers two solutions to this problem. The first solution involves introducing a worldwide common currency, common monetary and fiscal policy, and economic integration. The second proposal was to be later known more widely as the Tobin tax.⁴⁹

⁴² *ibid* 155.

⁴³ *ibid* 153.

⁴⁴ *ibid* 155.

⁴⁵ *ibid* 153.

⁴⁶ Joseph E Gagnon and Marc Hinterschweiger, *Flexible Exchange Rates for a Stable World Economy* (Peterson Institute for International Economics 2011) 9.

⁴⁷ Tobin (n 6) 153.

⁴⁸ *ibid* 153.

⁴⁹ *ibid* 154.

Tobin proposed a globally uniform tax on all spot conversions of one currency into another.⁵⁰ Spot conversions mean a single transaction from one currency into another at the set value, which is established at the time of the exchange.⁵¹ According to Tobin's proposal, the tax would be proportional to the size of the transaction. He justified his proposal by stating that this tax would discourage short-term currency exchanges. He proposed that the tax should be a low percentage, and suggested as an example a 1% tax.⁵² He also stated that the tax should be regulated by each government over its own jurisdiction. The country in question would be in charge of the taxation of all inter-currency transactions going through the financial institutions in its jurisdiction.⁵³

Tobin suggested that his proposal for the tax would apply to all purchases of financial instruments denominated in another currency. This means that the tax applies to anything from currency to equity securities. Tobin justified this by stating that for the tax to be efficient, it has to apply to all payments in one currency sold by a resident of another currency area. On the other hand, he wanted to be careful about adding any barriers for trade. But on the other hand he sees that it would be easy to disguise transactions as trade. Tobin even suggested that some countries could form certain areas where this tax would not apply. This would help avoid any cumbrance to trade between smaller countries that have closely related economies dependent on this trade.⁵⁴

Even Tobin realised that one of the biggest issues with his proposal would be tax avoidance. He predicted that this tax would be difficult to administer and to enforce. He also predicted that it would be likely that there would be at least some imaginative evasion schemes, but that these would be costly to the evaders.⁵⁵ Tobin was quite modest when it came to the effects of his proposal. He stated that the tax may restore some of the problems previously mentioned, that are caused by the short-term trading, but he also admitted that this tax could not be a general fix to most of said problems.⁵⁶

⁵⁰ *ibid* 155.

⁵¹ Monetary and Economic Department, *Triennial Central Bank Survey - Foreign exchange turnover in April 2013: Preliminary global results* (Bank for International Settlements 2013) 18.

⁵² Tobin (n 6) 155.

⁵³ *ibid* 158.

⁵⁴ *ibid* 159.

⁵⁵ *ibid* 159.

⁵⁶ *ibid* 159.

It can be seen that the technical aspects of his proposal are very similar to the FTT. The details may be different, but it is clear that the inspiration for the FTT can be found in the Tobin tax. The proposed FTT is not the first tax modelled after the Tobin tax. There are currently several countries in Europe, who have some internal model of an FTT in use, for example such countries as United Kingdom and Switzerland.⁵⁷ Although, some have pointed out that the Tobin tax is more of a currency transaction tax, and therefore should not be too closely associated with the proposed FTT.⁵⁸

2.2.2. Spahn Tax

Since the introduction of the Tobin tax, there have been many variations of this tax.⁵⁹ One of these variants was introduced by Paul Bernd Spahn.⁶⁰ In his paper, Spahn considers Tobin's proposed tax and finds certain difficulties in actually implementing this taxation model. He first claims that it is impossible to differentiate between normal liquidity trading and speculative noise trading. Thus the taxation of both could potentially be detrimental to the financial markets without actually deterring speculation, especially when the markets are in a period of distress.⁶¹

Spahn argues that the second problem with the Tobin tax is that it discriminates against different types of financial instruments. Spahn explains that it would put certain instruments at a disadvantage if they are taxed equally, when the actual payoffs differentiate between instruments. Thirdly, Spahn has pointed out that if there was a different tax rate for all these types of financial instruments, it would result in an administrative nightmare and it would be very cumbersome to implement.⁶² It does need to be taken into consideration that during the time Spahn argued his theory, computers were not as common as they are nowadays. Therefore his argument about it being cumbersome is no longer as considerable an obstacle as it was in the nineties.

⁵⁷ Cloer and Trencsik (n 11) 311.

⁵⁸ Larking (n 1) 68.

⁵⁹ Paul Bernd Spahn, 'International Financial Flows and Transaction Taxes: Survey and Opinions' (1995) International Monetary Fund Working Paper WP/95/60, 7.

⁶⁰ Spahn is a professor of public finance at the University of Frankfurt/Main.

⁶¹ Spahn (n 59) 25.

⁶² *ibid* 25.

Spahn has offered his own solution to modify Tobin's proposed tax. He suggests a two-tier rate structure. In his proposal, the tax rate would be extremely low for normal operations and high for speculative trading during periods when the trading is erratic and the price point fluctuates outside of the regular exchange rate spectrum.⁶³ Spahn suggested that a tax rate of 0.02% would raise significant tax revenues, but would not affect the markets considerably.⁶⁴

It is interesting to note that Spahn mocks the introduction of flexible exchange rates in the 70's, which at that time was considered to be a good method of encouraging investment and durable economic growth.⁶⁵ According to Spahn, it was "hailed by economists as a panacea to the ills of the Bretton Woods system".⁶⁶ What I find noteworthy here, is that even the economic experts seem to fixate on a certain solution to a problem, which when looked back on, is thought of as an unwise idea. It almost feels like all these kind of taxes that are proposed are mostly just on a trial and error basis. It is understandably hard to not know what impacts a proposed tax will have, but what I find the most significant here, is that these experts are so set in their opinions that they rarely like to admit that their proposal could turn out to be faulty in the end.

In 2004 Belgium drafted a law that was modelled after the Spahn tax.⁶⁷ The law imposes a tax on all exchange transactions involving foreign exchange that take place in Belgium.⁶⁸ The draft law would be very similar to Spahn's proposal. The draft law consists of a similar two-tier system, where the tax rate is 0.02% for foreign exchange transactions. The tax rate would be up to 80% for those transactions made at the price point that is outside the normal range of the spectrum. According to the draft law, the tax would only be implemented once all Member States of the EMU enact a similar tax scheme in their respective countries, or if EU legislation on this matter is adopted.⁶⁹ When the Belgian Ministry of Finance asked for the opinion of the ECB on this draft law, the

⁶³ *ibid* 25.

⁶⁴ *ibid* 26.

⁶⁵ Gagnon and Hinterschweiger (n 46) 9.

⁶⁶ Spahn (n 59) 1.

⁶⁷ European Central Bank, 'Opinion Of The European Central Bank At The Request Of The Belgian Ministry Of Finance On A Draft Law Introducing A Tax On Exchange Operations Involving Foreign Exchange, Banknotes And Currency' CON/2004/34 4.

⁶⁸ *ibid* 1.

⁶⁹ *ibid* 2.

ECB stated that they found this kind of draft law incompatible with the treaty, because it interferes with EU's exclusive competence in the field of exchange-rate policy.⁷⁰

It is interesting to find that even prior to the financial crisis Belgium among other countries saw the need for a financial transaction tax, and such a tax has already been thought out in the seventies. So even though there is a lot of talk that the financial crisis was the starting point for concrete planning of a FTT, maybe the reality of situation is actually that the FTT was already an appealing idea prior to the crisis, but the crisis just enabled the planning to finally be taken seriously.

2.3 Not Such an Original Idea after All - Previous Models of the FTT

There are many countries that have opted to install a FTT and even the United States has their own version of the tax. There is a so called Section 31 fee in place in the United States, which is a Securities Transaction Tax (hereinafter referred to as the STT). This tax is collected on the majority of stock transactions. This tax was established already with the Securities Exchange Act of 1934 and the income collected with the STT is used to cover the operating costs of the Securities and Exchange Commission (also known as the SEC) in the United States.⁷¹ However, a few countries have never had a levy on securities transactions. Most well-known examples of these non-FTT countries are Germany and Japan. But in this chapter I review a few countries that have an internal FTT in place. These countries are the United Kingdom, Switzerland and China. There is no reliable data on previous experiences of cross-border FTT and therefore this kind of system cannot be assessed here.⁷²

In the United Kingdom the FTT was implemented almost 30 years ago.⁷³ The UK model of the FTT has been considered to be one of the most successful ones. It has generated relatively minimal negative consequences for the local financial markets. The UK model is twofold; the financial transactions are subject to a Stamp Duty or Stamp Duty Reserve

⁷⁰ *ibid* 4.

⁷¹ Karl Habermeier and Andrei Kirilenko, 'Securities Transaction Taxes and Financial Markets' (2001) International Monetary Fund Working Paper WP/01/51, 27.

⁷² Vogel and Cortez (n 4) 78.

⁷³ *ibid* 79.

Tax (hereinafter referred to as SDRT). To sum up, the Stamp Duty is a tax on transactions involving shares, securities, bearer instruments and the transfer of partnerships. The difference between the Stamp Duty and the SDRT is that Stamp Duty is charged on paper transactions and SDRT is charged on electronic transactions.⁷⁴

The point of the FTT is to be only a marginal percentage of the transfer price, and even the Stamp Duty and the SDRT fit this description. The percentage charged from the value of the transferred share is 0.5%. There is an exception to this percentage. When a share is transferred to a depositary receipt scheme or a clearance service the tax rate is 1.5%. The Stamp Duty is applied when the share is transferred in UK incorporated companies. It is irrelevant where the trade takes place or where the acquirer of the share resides. The tax's applicability is related only to the incorporation country of the company; therefore the tax is not charged on securities issued by companies incorporated overseas.⁷⁵

One of the reasons why this UK model has had very minimal negative effects is that the tax is mostly easily collected through the electronic transaction system of the London Stock Exchange. This means that the administrative costs of the tax are marginal. The tax has also been very profitable for the UK. The duty amounted to approximately 4 billion euros in the fiscal period 2008/2009. Regardless of these positive effects, not all involved have been pleased with the Stamp Duty. The duty has caused substantial criticism, especially from the participants of the financial sector. These participants claim that the Stamp Duty and the SDRT have a negative effect on market liquidity and additionally reduces the price of stocks and bonds.⁷⁶

The other example country I use here is Switzerland, which unlike the UK, is a non-EU country. The Swiss FTT system is slightly more complex than the UK version. According to the Swiss Federal Stamp Tax Act, when a party to the transaction is a Swiss securities dealer, a stamp tax is imposed on transfer of domestic and foreign securities. According to the Act there are several exceptions, where it is irrelevant to the tax whether the issuer is incorporated domestically or abroad. For example when these securities are bonds or shares in investment funds et cetera. The Stamp Tax rate is 0.15% for domestic securities

⁷⁴ *ibid* 78.

⁷⁵ *ibid* 78-79.

⁷⁶ *ibid* 79.

and 0.3% for foreign securities. The tax is determined on the value of the transaction. There are numerous exemptions to the Swiss transfer tax, but even so, it managed to generate revenue of 2.95 billion Swiss Francs in 2008. This is a significant sum, since it amounted to 0.37% of the Swiss GDP.⁷⁷

The final example of a current financial transfer tax is the Chinese model. China is an Asian economic giant and obviously a non-EU country as well. There has been a transaction tax in place in China since 1990. The transaction tax is levied on securities trading. There are some exemptions to the Chinese Stamp Duty, such as bonds, options futures and other derivatives. The payable rate is 0.1% for all securities, except for loan contracts, where the rate is 0.005%. What this essentially means is that the tax can be easily avoided by using these tax free products, such as bonds or derivatives, instead of other taxable securities.⁷⁸

It is interesting to note that the Chinese system of shares is very unusual compared to other countries. In China the shares are divided into two categories. There are A-shares, which used to be denominated in Chinese currency and were mostly traded by Chinese citizens. The B-shares were denominated in US dollars or Hong Kong dollars, and were traded by foreign investors. This changed in 2001, when Chinese citizens were allowed to trade with B-shares, and in 2003 the foreign investors were allowed to trade with A-shares.⁷⁹

The tax rate imposed on securities has fluctuated slightly in the past two decades, but it has always been between 0.1% and 0.5%. These fluctuations have impacted the trading volume in China so that the trading volume has been inversely proportional to whether the tax rate was increased or decreased. This means that when the rate was increased, the trading volume has decreased, and other way around. What is most interesting to note about these fluctuations is that disregarding whether the tax rate has increased or decreased, the volatility of the market has always increased after the tax rate has been changed.⁸⁰ It is fascinating to observe that the reactions the markets have to a tax are sometimes very surprising.

⁷⁷ *ibid* 79.

⁷⁸ *ibid* 80.

⁷⁹ *ibid* 79.

⁸⁰ *ibid* 80.

It is difficult to compare or rank which of these three taxation systems has functioned the most successfully. All of these systems seem to work for the country in which they are in place. Switzerland, China, and the UK all have somewhat different markets and trading cultures and therefore what might work for one country, may end up being a failure in another. It is also impossible to state, which of these systems is objectively the best, even though the UK Stamp Duty has the most impressive track record. The UK Stamp Duty has worked well for almost three decades. This bodes well for the proposed EU FTT. On the other hand adding a cross border FTT for the EU might affect negatively to these countries which already have a domestic FTT and have this additional burden for transactions. One of the reasons why these domestic FTT systems have worked in these countries might be that these taxes are only applied to transactions made in a single, domestic market. These are significantly easier to regulate and implement than on an international level. Additionally, adding an international transaction tax on top of these domestic taxes may result in double taxation.

2.4 Current Taxation of the Financial Sector in the EU

The Financial sector is taxed by either corporate taxation of the financial sector, the value-added taxation of the financial sector, or by taxation of the financial instruments. When it comes to the corporate income tax (hereinafter referred to as CIT) rate, the banks in the EU countries pay the same tax rate as other companies.⁸¹ There is no separate tax rate specifically for banks compared to other types of companies.⁸² Also, none of the banks registered in an EU Member State have specific tax relief rules, such as paying less taxes or being able to make tax deductions on certain types of income received by banks compared to income received by different types of companies.⁸³ Therefore it can be concluded that when it comes to CIT, banks are not treated differently than dissimilar companies in other sectors.⁸⁴

⁸¹ PriceWaterhouseCoopers (n 9) 6.

⁸² *ibid* 7.

⁸³ *ibid* 9.

⁸⁴ *ibid* 25.

According to an EU directive⁸⁵ the financial sector in the EU is entirely Value-Added Taxation (hereinafter referred to as VAT) exempt.⁸⁶ This is uncommon and the financial sector in the EU is only one of the few sectors that are exempt from paying VAT. Especially after the severe effects caused by the financial crisis, there has been a demand for adding a new taxation scheme for the financial sector in lieu of VAT. Currently the financial sector is heavily under-taxed and the politicians in the EU are pressured to make the financial sector participate in contributing towards the common budget.⁸⁷

However, the aforementioned VAT Directive does give the Member States the option to permit taxable individuals a right to choose taxation of exempt financial transactions.⁸⁸ But even though this is an option offered to all Member States, only seven⁸⁹ have opted to implement it.⁹⁰ There are other taxes on financial transactions in place in several Member States to help compensate for the VAT-exemption. Only six Member States⁹¹ do not have any other taxes on financial services in place.⁹² These other taxes and levies which certain Member States have implemented are to name a few as an example stamp duties, bank levies, stock exchange taxes, etc. This in mind, it is important to note that the content of these taxes may vary significantly between Member States.⁹³

Because the process of adding an EU-wide FTT has been lengthy, many Member States have opted to impose their own bank taxes. Already 17 Member States have ended with varying types of taxes for the financial sector. There are three basic types of taxes introduced in these countries. The most widespread tax (used in 15 Member states) is based on specific balance sheet items. The other two types of taxes used are FTT- and FAT-type taxes.⁹⁴ Financial Activities Tax (hereinafter referred to as the FAT), which is a tax on sum of profits and remuneration of financial institutions. Here it differs from the FTT. FAT is basically the tax on net transactions of financial institutions, while an FTT

⁸⁵ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347 (VAT Directive), art 135(1)(a) to (g).

⁸⁶ PriceWaterhouseCoopers (n 9) 30.

⁸⁷ Giuseppina Cannas, Jessica Cariboni, Massimo Marchesi, Gaëtan Nicodème, Marco Petracco Giudici and Stefano Zedda, 'Financial Activities Taxes, Bank Levies and Systemic Risk' (2014) WP43 European Commission Taxation Papers, 1.

⁸⁸ VAT Directive art 137(1)(a).

⁸⁹ These seven countries are Austria, Belgium, Bulgaria, Germany, Estonia, France and Lithuania.

⁹⁰ PriceWaterhouseCoopers (n 9) 30.

⁹¹ These six countries are Slovakia, Romania, Poland, Lithuania, Estonia and the Czech Republic.

⁹² PriceWaterhouseCoopers (n 9) 32.

⁹³ *ibid* p. 33.

⁹⁴ Kovács (n 8)337.

taxes gross transactions.⁹⁵ However, since these taxes are not mutually exclusive, some member states even use a mix of these types of taxes. For example Hungary and United Kingdom uses two types of these taxes, while France uses three different models.⁹⁶

The final type of tax on the financial sector which is studied here is the taxation of financial instruments. Securities and derivatives are the financial instruments in question. Equities, bonds and convertibles are classified as securities.⁹⁷ These are also the instruments that will be taxed if the proposed FTT comes into force. Securities are taxed when a transaction from one owner to another takes place. This type of taxation of securities transaction is a so called indirect tax, because it is not a direct result of income. Therefore securities transfer taxation needs to be kept separate from different types of securities taxation situations, such as income tax, registration tax or capital duties.⁹⁸

As opposed to securities, certain derivatives are taxed directly. These types of derivatives in question here are equity swaps, financial futures and call options on stocks. The method of taxation of derivatives differs a lot between Member States. This is not merely because of the difference in legislation, but also because the types of derivatives can vary significantly making this a considerably more of a complex system.⁹⁹ To make matters even more complex, some countries treat identical types of derivatives in a different way, depending on several factors, such as if the derivative is listed, or if the transactions are speculative.¹⁰⁰

Examining these taxes it is very obvious that even though the current taxation arrangement of the economic sector is a pretty complex system, it is extremely advantageous for the financial players. The financial sector has somehow managed to hold on to its VAT-exempt position for surprisingly long. However, it remains to be seen whether or not it is a good idea to add the proposed EU-wide FTT, or if there actually was a solid reason for this tax break on the financial sector. Possibly to make the EU market more attractive place of business to financial institutions, it was necessary to give

⁹⁵ Sajid M Chaudhry, Andrew W Mullineux and Natasha Agarwal, *Balancing the Regulation and Taxation of Banking* (Edward Elgar Publishing 2015) 86.

⁹⁶ Kovács (n 8) 339.

⁹⁷ PriceWaterhouseCoopers (n 9) 51.

⁹⁸ *ibid* 50.

⁹⁹ *ibid* 53.

¹⁰⁰ *ibid* 54.

this sector these tax breaks. It is always difficult to legislate in the financial sector when the lawmaker has to take into considerations the possibility of relocation of companies or marketplaces when there are more advantageous tax schemes globally available elsewhere.

2.5 Development of the FTT

When the global economy was deep in the financial crisis, the issue of imposing a tax for financial transactions was raised at the 2009 Pittsburgh G-20 summit. The G-20 leaders asked the International Monetary Fund (hereinafter referred to as IMF) to research how the financial sector could contribute more into the recovery from the crisis, especially considering how significant role the financial sector played in causing the crisis.¹⁰¹ In preparation for the G-20 Toronto Summit, European Council gave the following statement on 17 June 2010:

‘The EU should lead efforts to set a global approach for introducing systems for levies and taxes on financial institutions with a view to maintaining a world-wide level playing field and will strongly defend this position with its G-20 partners. The introduction of a global financial transaction tax should be explored and developed further in that context.’¹⁰²

This was the first concrete step towards the planning of the FTT. As previously mentioned, the biggest driving force behind the FTT was the financial crisis. The Council recognised the need for a more stable economy in the EU. On top of this, other reasoning’s behind the FTT were budgetary needs for several upcoming developments regarding for example climate change and resource efficiency. The council perceived the FTT as a means to generate revenue to cover these future needs.¹⁰³ In the Explanatory Memorandum of the 2011 proposal, the Commission has also stated that the tax income created from the FTT would help ease the strain of the contributions made by single

¹⁰¹ Vogel and Cortez (n 4) 77.

¹⁰² Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Taxation of the Financial Sector’ COM (2010) 549 final, 2.

¹⁰³ *ibid* 2.

Member States towards the EU budget.¹⁰⁴ The Commission also stated that according to preliminary estimates, the revenues generated by the proposed FTT would be 57 billion euros per year in the whole EU.¹⁰⁵

After these developments, when it came time for the G-20 summit of 2011 in Cannes to meet, the wheels were set in motion and sides had been picked. It had become ever more apparent that launching a global FTT model was unrealistic at this time, because the idea of a global financial transaction tax had not gained enough popularity. Considering how much the EU FTT has divided the nations, it is difficult to take seriously the idea of a world-wide FTT. On a global scale the EU is such a small amount of nations, and even on this scale realising the FTT has proven highly problematic. Regardless of the failure of the global tax, the FTT in Europe had influential supporters in major EU Member States, such as France and Germany. On the other side of the trenches opposing the idea were UK and Sweden. Eventually on 28th of September 2011 the Commission issued its first proposal on the FTT.¹⁰⁶

The Commission's proposal in 2011 was quite drastic and caused a lot of uproar among the EU Member States.¹⁰⁷ With this proposal the Commission wanted to achieve several objectives. One of the biggest objectives of this proposal was to create a unified system for the EU, which would help also solve the problem of risky behaviour plaguing specifically certain financial sectors. Creating such a unified system would help prevent the fragmentation of the regulation regarding the financial sector, especially considering how currently many Member States have already implemented their own taxation for the financial sector.¹⁰⁸

Another objective is to deter harmful speculative trading. Speculative trading is analysing market risks and investing in higher risk products for greater profit. Speculative trading can be also done by using the method of high frequency trading, which means that the investment is bought and sold at quick intervals, only holding the investment for as little as seconds. To accomplish high frequency trading, complex computer programs are

¹⁰⁴ COM (2011) 594 final, 3.

¹⁰⁵ *ibid* 11.

¹⁰⁶ Vogel and Cortez (n 4) 77.

¹⁰⁷ Cloer and Trencsik (n 11) 307.

¹⁰⁸ COM (2011) 594 final 2.

required. Since the high frequency trading has usually small profit margins the proposed FTT would make this method much more unappealing to investors, since it would cut into those small profit margins making this method unprofitable.¹⁰⁹

According to the 2011 proposal the FTT is applied when at least one party to the transaction is established in a participating Member State.¹¹⁰ It is insignificant where the transaction takes place, the transaction is taxed based on where the financial actors are established. This is also known as the residence principle.¹¹¹ The proposal also stated several exemptions to the scope of the directive, for example the directive will not apply to primary market transactions,¹¹² and therefore initial issuance of shares, bonds and government bonds are exempt from the FTT.¹¹³ The proposed FTT will be applicable only between financial institutions, but again there are certain exceptions to this, for example transactions between central banks or similar entities will not be subject to the FTT.¹¹⁴

The 2011 proposal set minimum tax rates for Member States depending on the type of the financial instrument. The proposal stated that the tax rate should not be lower than 0.01% for derivatives, and 0.1% for other financial instruments, such as shares and bonds.¹¹⁵ Therefore this means that the Commission has left the decision of the final tax rate up to the individual Member States. Considering the fact that one of the key objectives of the proposal was to create a unified system, I find it rather illogical that the proposal leaves such an important item as the tax rate up to the individual Member States.

According to the Commission, the 2011 proposal has its legal basis on the Article 113 of the Treaty on the Functioning of the European Union (hereinafter referred to as the TFEU).¹¹⁶ According to the Article 113 of the TFEU:

¹⁰⁹ Vogel and Cortez (n 4) 83.

¹¹⁰ COM (2011) 594 final art 1(2).

¹¹¹ *ibid* 4.

¹¹² *ibid* art 1(4)(a).

¹¹³ Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards recordkeeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive [2006] OJ L 241/1, art 5(c).

¹¹⁴ COM (2011) 594 final art 1(4)(a)-(d).

¹¹⁵ *ibid* art 8(2).

¹¹⁶ *ibid* 5.

“The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.”

Nonetheless, the fact that this proposal has legal basis does not mean that the proposal is compatible with EU law. Also, as can be seen from this Article 113, it requires that the Council needs to be unanimous. However, this was not the case. In January of 2012 the Prime Minister of United Kingdom, David Cameron, publicly stated that they will veto the proposed FTT.¹¹⁷ Many of the Member States were sceptical of the 2011 proposal and eventually the ECOFIN Council came to the conclusion that reaching unanimity was not realistic.¹¹⁸

On 23 October 2012, the Commission decided to ask the Council to approve the use of enhanced cooperation, which was supported by 11 Member States.¹¹⁹ They received the approval of the Parliament on 12 December 2012, and eventually the Council gave the permission to use enhanced cooperation on 22 January 2013.¹²⁰ This was the first time ever that a limited number of Member States received the permission to use enhanced cooperation to create a common system for taxation.¹²¹ Finally, after these dramatic turns, the Commission submitted its most recent proposal for the FTT on 14 February 2013.¹²² This is the current proposition and it will be analysed more comprehensively in Chapter 3 of this thesis.

Enhanced cooperation is a legal instrument originally introduced in the Amsterdam Treaty, when it was still called ‘closer cooperation’.¹²³ The current rules for using enhanced cooperation can be found in Article 20 of the Treaty on the European Union

¹¹⁷ George Dietlein, ‘National Approaches towards a Financial Transaction Tax and Their Compatibility with European Law’ (2012) 21/4 EC Tax Review 207, 207.

¹¹⁸ Cloer and Trencsik (n 11) 307.

¹¹⁹ These eleven Member States are Austria, Belgium, Estonia, France, Germany, Greece, Italy, Portugal, Slovenia, Slovak Republic and Spain.

¹²⁰ Cloer and Trencsik (n 11) 307.

¹²¹ Thomas Hemmelgarn, Gaëtan Nicodème, Bogdan Tasnadi and Pol Vermote, ‘Financial Transaction Taxes in the European Union’ (2015) WP62 European Commission Taxation Papers, 13.

¹²² Cloer and Trencsik (n 11) 307.

¹²³ Federico Fabbrini, ‘Enhanced Cooperation under Scrutiny: Revisiting the Law and Practice of Multi-Speed Integration in Light of the First Involvement of the EU Judiciary’ (2013) 40/3 Legal Issues of Economic 197, 198.

(hereinafter referred as the TEU) and Article 329 the TFEU. Minimum of nine Member States are required to make the request of enhanced cooperation to the Commission, which in turn assesses the request and submits the request to the Council, if it deems it justified. The Council has the authority to then approve or reject the request, after the Parliament has given its consent to the enhanced cooperation.¹²⁴ This procedure of enhanced cooperation makes it easier for some countries to work together on a specific project without needing the unanimity of all of the Member States to reach a certain objective.¹²⁵

Originally the 2011 proposal was supposed to enter into force in 1 January 2014, but this deadline was not reached. Several problems got in the way of reaching this goal, for example the aforementioned lack of unanimity which hindered the process. Furthermore, on top of the lack of unanimity, there were several countries downright against the proposal. Countries such as United Kingdom, Ireland and Luxembourg were worried for losing their financial position.¹²⁶ United Kingdom even filed a lawsuit with the ECJ to oppose the use of enhanced cooperation here.¹²⁷ This lawsuit will be closer examined in Chapter 4.

The current proposal was supposed to enter into force on 1 January 2016, but this deadline has already passed.¹²⁸ The talks between these countries have been dragging on since 2011. The latest news of developments came from the statement given by the Council on Economic and Financial Affairs after a meeting in Brussels on 8 December 2015. According to the statement Estonia had left the group of countries participating in the enhanced cooperation.¹²⁹ The statement also said that a decision about the current proposal will be reached by the end of June 2016.¹³⁰

Consequently it is undeniable that the development of the proposal for the FTT has not been straightforward and easy. It has understandably faced many issues, especially with reaching consensus among participating countries concerning the content of the proposal.

¹²⁴ *ibid* 200-201.

¹²⁵ *ibid* 198.

¹²⁶ Cloer and Trencsik (n 11) 307.

¹²⁷ *ibid* 309.

¹²⁸ *ibid* 310.

¹²⁹ Council (n 19) 4.

¹³⁰ *ibid* 5.

When trying to make such an EU-wide tax a reality, it can be expected that there will be some opposition and problems. However, I cannot help but lose faith in the proposal after reading all it has been through and how much the development is still stalling. It seems like the proposal has been through so many negotiations and there have been so many compromises, that perhaps the original objectives of the proposal can no longer be reached with the watered down compromise proposal. However, all this remains still to be seen.

2.6 Other Regulatory Proposals for the Financial Sector

In the Explanatory Memorandum of the 2011 proposal, the Commission has stated that The EU is currently in the middle of a massive renovation project aiming to reform many of the regulation concerning the financial sector. The Commission stated:

“The EU financial services reform is oriented around four strategic objectives, namely improving the supervision of the financial sector; strengthening financial institutions, and providing a framework for their recovery where necessary; making financial markets safer and more transparent; and increasing the protection of consumers of financial services. It is expected that this wide-reaching reform will bring back the financial services sector at the service of the real economy, in particular to finance growth. The FTT proposal is intended to complement these regulatory reforms.”¹³¹

As previously mentioned, most of the other regulatory measures have been implemented on a Member State level. Although the main theme in this chapter is the other proposals relating to the taxation of the financial sector, it is worth mentioning that on top of these, there were also other non-tax related proposals which aimed to alleviate the effects of the financial crisis. These are for example the Directive on Alternative Fund Managers, which affects hedge funds. As another example there was also the implementation of the European Systemic Risk Board and the European System Financial Supervisors, which both aim to make the financial markets stronger and more stable.¹³²

¹³¹ COM (2011) 594 final, 3.

¹³² Vogel and Cortez (n 4) 78.

There has been a lot of discussion in the European Union, whether the financial sector is under-taxed. One of the reasons for this allegation is that the financial sector is exempt from Value-Added Taxation. Especially recently there has been an eagerness to fill this void of VAT-free state has produced. On top of the FTT, another type of tax was considered by the Commission in 2010. This was the Financial Activities Tax (FAT).¹³³ FAT is a tax on the amount of profit and remunerations of the financial sector. Therefore this tax would be a good substitute for the VAT.¹³⁴ However, already in 2011, the Commission decided to drop their FAT proposal, and focus on the proposal for the FTT instead.¹³⁵ The Commission has stated in the Explanatory Memorandum of the 2011 proposal that after analysing the impact assessment of both the FTT and the FAT, they had found that the FTT would be the one more likely to help achieve the objectives of the tax.¹³⁶

Another suggestion presented by various sources, most notably the International Monetary Fund (hereinafter referred to as IMF), was the Financial Stability Contribution or Bank Levy. As previously mentioned, this type of tax has already been implemented by numerous countries. The reasoning behind this suggestion was that this model is supposed to reduce the risk of uninsured liabilities. On top of these suggestions, there are currently several regulatory proposals for the financial sector, which strive to accomplish a more stable and strong economic system. To name a few of such proposals for example are the Basel III (globally) and the Frank-Dodd Act (USA).¹³⁷ There is obviously enthusiasm to firstly increase contribution of the financial sector for the costs of the crisis, and secondly to prevent the possibility of contagion of failing banks to other financial institutions.¹³⁸

As can be seen, the FTT is far from being the only active proposal in the financial sector currently. It seems like the Commission was sincere when it stated in the Explanatory Memorandum of the 2011 proposal that the EU is in the middle of reforming the regulation in the financial sector. Furthermore, as previously mentioned, these

¹³³ Cannas, Cariboni, Marchesi, Nicodème, Petracco Giudici and Zedda (n 87) 1.

¹³⁴ *ibid* 4.

¹³⁵ Kovács (n 8) 333.

¹³⁶ COM (2011) 594 final 4.

¹³⁷ Cannas, Cariboni, Marchesi, Nicodème, Petracco Giudici and Zedda (n 87) 1.

¹³⁸ *ibid* 18.

reforms are not only limited to the EU. In my opinion these proposals are slow to implement, because firstly there is so much bureaucracy a proposal must go through before it can be implemented. It takes a long time to draft these proposals and an even longer time to reach a consensus with participating countries for the proposal eventually pass the legislation system. Secondly it is hard to draft these proposals, because there is so much current domestic and international legislation and ongoing proposals that needs to be taken into consideration, before the proposal can be drafted. These are just to name a few issues a proposal may be facing in the financial sector. It all seems so difficult that it is no wonder that it takes such a long time to get a new proposal in the financial sector to eventually pass. However, reform is necessary and even though it may be a difficult process, it is vital.

3. The Proposal - What Will It Change

3.1 The Current Proposal

The Commission proposal for a Council Directive on a common system of financial transaction tax was published on 14 February 2013. The current proposal is quite similar to the original proposal as the participating Member States tried to make sure that it will meet the same objectives as those set out in the original proposal.¹³⁹ As previously mentioned, the proposal was published after the participating countries were given the permission from the Council to use enhanced cooperation in this situation.¹⁴⁰ Currently there are only ten Member States participating in the enhanced cooperation after Estonia left the group in December 2015. The countries still participating are Austria, Belgium, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain. The participating countries need to reach a unanimous agreement for the proposal to pass.¹⁴¹ The negotiations are still ongoing on the content of the proposal and progress has been slow.

It is worth noting that the UK is not among the participating countries, as it is actually quite adamantly against the proposal. The London Stock Exchange is one of the largest financial centres in the world and not having the UK participate in the FTT means significant decrease of revenues generated by the tax. Even now, when the UK is not among those participating, the Commission has estimated that the UK would be one of the biggest contributors to the tax as a result of issuance and residence principles.¹⁴² However, there are other countries participating, who are important financial players in the financial markets, such as France and Germany. If none of these central financial countries in the EU were to participate in the FTT, and the proposal was led by ten smaller countries, I do not believe that the FTT would ever become a reality, or even come as far as it has come today.

¹³⁹ Hemmelgarn, Nicodème, Tasnadi and Vermote (n 121) 14.

¹⁴⁰ HJI Panayi (n 18) 364.

¹⁴¹ Council (n 19) 4.

¹⁴² HJI Panayi (n 18) 365.

One of the important things to understand about the proposal is which type of transactions are intended to fall within the scope of the financial transaction tax. The scope of the tax only applies to specific financial transactions. There are already several different types of taxation systems in existence that may overlap with said scope. To name a few of these, there is for example the securities transaction tax, which is a tax on transactions of securities. There is also the tax on international currency market called the currency transaction tax. Finally there is a tax on deposits and withdrawals, which are called banking transactions, and therefore are taxed with the bank transaction tax.¹⁴³ The Commission has in its proposal listed the financial instruments which will be taxed. These instruments are derivatives (at a tax rate of 0.1%) and other financial instruments, such as shares and bonds (at a tax rate of 0.1%).¹⁴⁴ As in the 2011 proposal, the Commission has defined in the 2013 FTT that the financial transaction is taxed if at least one of the participating financial institutions is established in a participating Member State.¹⁴⁵

The new proposal brought some changes, mainly because the legislators now had to take into account that the geographical area of the participating countries is significantly smaller than originally intended when it was still thought to affect all of the 28 Member States. The essence of the proposal remained, but there were some minor and a few more important changes, such as the general anti-abuse rule, which was inserted to prevent artificial measures taken with the specific purpose of avoid having to pay the financial transaction tax. Furthermore, some public bodies were left out of the domain of the proposal.¹⁴⁶

Perhaps the most significant change that was added to the 2013 FTT was the issuance principle. What this principle means is that the financial instruments which have been issued in any of the participating Member States will be subject to the tax. This principle was added to the latest proposal to prevent tax evasion, because with this change the transaction will be taxed even if the financial institutions participating in the transaction are not established in the participating Member States. This increases the scope of the tax considerably. It is important to observe that the issuance principle is not meant to replace

¹⁴³ Diogo Ferraz Lemos Tavares, 'Notes on the Conditions for a Corrective Financial Transaction Tax' (2014) 42/12 Intertax 788, 790.

¹⁴⁴ COM (2013) 71 final, art 9(2).

¹⁴⁵ COM (2013) 71 final, art 3(1).

¹⁴⁶ HJI Panayi (n 18) 364.

the residence principle, but to act as an addition to the fundamental principle of residence.¹⁴⁷

Consequently, as was demonstrated above, the new proposal is not in essence significantly different from the original proposal. However, especially the issuance principle caused turmoil, because it was thought to be somewhat discriminating towards the countries which were not participating. The issuance principle would mean that if the financial institutions participating in the transaction were based in China and Canada, but the instrument had been issued in Germany, then the transaction would be subject to taxation. Some have argued that this has extraterritorial effect.¹⁴⁸ Additionally, the issuance may cause tax evasion, because investors may be more inclined to favour those products, which will not be taxed under the issuance principle. This and other legal problems arisen from the proposal will be explored in more detail in Chapter 3.3 of this thesis.

3.2 Estimated Impacts

Accompanying the 2013 proposal, the Commission also published an impact assessment. The Commission stated that throughout its assessment it is crucial to keep in mind the objectives of the proposal. In the assessment the Commission maintained that the original objectives have not changed from the initial proposal. There are three main objectives, which are firstly to harmonise current legislation regarding financial transaction taxes within the EU. The second objective is to prevent unwanted market behaviour and to provide stability to the EU markets. The Commission states that the third objective is to ensure fair and substantial contribution of financial institutions to the costs of the recent financial crisis.¹⁴⁹

The Commission had already published an impact assessment in 2011 with the original proposal, but considering that the new proposal covered a much smaller geographical area and there were changes made to the original proposal, drafting a new impact assessment

¹⁴⁷ HJI Panayi (n 18) 364.

¹⁴⁸ Cloer and Trencsik (n 11) 310.

¹⁴⁹ SWD (2013) 28 final, 11.

was necessary. In the new impact assessment, the Commission first limited which areas deserved the most attention when they began assessing the impacts. The Commission stated that one of the biggest issues was especially the narrower FTT jurisdiction, and whether it would trigger unwelcome single-market effects, for example double taxation. Secondly, the Commission appreciated that adverse market reactions, such as the possibility of relocation, needed to be studied. Thirdly, the revenue for the smaller jurisdiction needed to be calculated.¹⁵⁰

When it comes to the first issue of unwelcome single-market effects, the Commission states that double taxation cannot be avoided if all EU Member states are not participating in the proposal.¹⁵¹ On a more positive note, the participating countries should be able to avoid double taxation within the FTT jurisdiction. The Commission assesses that these potential instances of double taxation should only comprise of a tiny proportion of all transactions, and it suggests that there are a few solutions to correct this problem after the implementation of the FTT. The first, and more preferable solution according to the Commission, would be that those Member States unwilling to currently join the participating Member States were to later on join the FTT-zone. The second solution would be a bilateral double-taxation agreements between participating and non-participating countries.¹⁵²

The proposition may cause several adverse market reactions, such as relocation. Relocation can be accomplished by either moving activities to a location not within the FTT jurisdiction, or moving to different products or business models which are not subject to the FTT, or by discontinuing the taxable activity. The commission claims in its assessment that it would be challenging and near impossible to geographically locate to a different location that would not be taxed, unless the financial institution is prepared to cease transactions or desert clients in the FTT jurisdiction.¹⁵³ Therefore the Commission comes to the conclusion that the risk of geographical relocation is minimal.¹⁵⁴ When it comes to the substitution of products or changing a business model, the Commission considers the FTT to have some effect, for example when it comes to low-margin

¹⁵⁰ SWD (2013) 28 final, 16.

¹⁵¹ SWD (2013) 28 final, 16.

¹⁵² SWD (2013) 28 final, 17.

¹⁵³ SWD (2013) 28 final, 18.

¹⁵⁴ SWD (2013) 28 final, 19.

transactions such as high frequency trading. The tax may end up decreasing these types of transactions.¹⁵⁵

The Commission re-estimated the revenues generated by the FTT due to the fact that the originally planned geographical jurisdiction of the FTT-zone has decreased significantly. According to the original impact estimation of 2011 the tax was estimated to bring 57 billion euros annually in the EU. This was divided to 19.4 billion generated from the taxation of transactions in securities, while 37.7 billion would have been generated from the taxation of derivatives.¹⁵⁶ The current revenue estimations are calculated when there were still eleven participating Member States, and therefore is no longer accurate.¹⁵⁷ According to the current estimation the total revenues of 34 billion euros, where 13 billion is generated from the taxation of transactions in securities, while 21 billion will be generated from the taxation of derivatives.¹⁵⁸

The Commission stated in the impact assessment concerning the objectives of the proposal, that none of these objectives can be met without some involvement from the EU legislators. Therefore the Commission comes to the conclusion that this taxation on an EU level is required to achieve its objectives. Although the Commission would consider the EU wide tax to be a more advantageous model, it believes that even with the current model those objectives can be met, even though there may be more adverse effects compared to the original proposal.¹⁵⁹

I may be either cynical or otherwise mistrusting, but nonetheless I find some of the things stated by the Commission in the impact assessment hard to believe. I cannot help but wonder whether their impact assessment is either biased or overly optimistic. There are definitely certain parties in the EU which would benefit from the FTT. A lot of governments in the EU would benefit greatly from the added income generated by this tax. For example, Greek economy is still heavily affected by the latest crisis. The revenue from the FTT would benefit the Greek government directly, as the country is still in dire need of capital and the economy is high. Additionally, considering the fact that there is

¹⁵⁵ SWD (2013) 28 final, 21.

¹⁵⁶ SWD (2013) 28 final, 21.

¹⁵⁷ SWD (2013) 28 final, 22.

¹⁵⁸ SWD (2013) 28 final, 25.

¹⁵⁹ SWD (2013) 28 final, 50.

so much opposition of the proposal, it may be that the participating countries are tempted to make the impact assessment look more appealing. The Commission may not be falsifying the results of the impact study, but instead are using the more positive end of the spectrum of estimation. I especially noticed that for example the problem concerning the double taxation, the Commission merely dismisses it with the solutions being that the rest of the EU Member States should join the FTT, or they should all make bilateral double-taxation agreements. Both of these solutions seem quite extreme to me, and therefore the issue of double taxation is more real than the Commission maybe would like to admit.

Furthermore, upon additional research I found that there have been several experts who have criticised the Commission's impact assessment. There have been a lot of analyses and independent impact assessments, and various sources have come to the conclusion that the Commission's impact assessment is not reliable.¹⁶⁰ As an example, the Commission claims there to be positive correlation between the trading volume and price volatility. The issue with this statement is that while there are some studies, which have aimed to prove this, there is no actual empirical evidence or economic theory that could back this statement.¹⁶¹ Therefore I would recommend reading the impact assessment critically.

3.3 Legal Problems Facing the Proposal

As I previously mentioned, the Commission has stated that the legal basis for the proposal is the Article 113 TFEU. This article gives the Council the right to adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.¹⁶² Soone wrote an article for the journal *Intertax* claiming that said legal basis of the proposal should be questioned. According to him there are a few issues when

¹⁶⁰ Millar (n 15) 2.

¹⁶¹ John Grahl and Photis Lysandrou, 'The European Commission's Proposal for a Financial Transactions Tax: A Critical Assessment' (2014) 52/2 *Journal of Common Market Studies* 234, 237.

¹⁶² COM (2013) 71 final, 7.

basing the proposal on this article. There are four requirements that need to be met when relying on Article 113 TFEU. According to Soone these four requirements are that firstly the proposal needs to ensure harmonisation, can only affect the field of indirect taxation, has to ensure the establishment and the functioning of the internal market, and avoid distortion of competition.¹⁶³

According to Soone, the proposal needs to ensure harmonisation. Considering that the proposal was brought forth with the enhanced cooperation, it somewhat goes against the idea of EU wide harmonisation. However, the proposal would harmonise existing legislation in the participating Member States. Soone states in his article that the problem with this is the fact that not all participating Member States have imposed a domestic financial transaction tax, but another type of tax only resembling a financial transaction tax. These taxes resemble more closely a levy or a state fee, and therefore would not be covered by this harmonisation.¹⁶⁴ This is something I find the Commission should not overlook. Considering the fact that these kind of different domestic taxes imposed on financial transactions could end up burdening the financial institutions in some countries excessively and be too much of an unjust solution to some countries' financial institutions, cutting too deep into the revenues of the entities. Moreover, it would be quite unfair that in some FTT-zone countries there would only be the zone-wide FTT, which would replace these domestic financial transaction taxes, while in other FTT-zone countries the FTT would be added on top of the domestic tax burden. This would put these two countries' financial institutions at an unequal balance and therefore cause distortion of competition. In my opinion, the participating Member States must discuss and consider, which domestic taxes should be replaced by the proposed FTT.

Furthermore, Soone points out that the proposal can only affect the field of indirect taxation. According to him, a tax is indirect when it is created by the consumers consuming goods or services. He claims that because this tax will be imposed on financial institutions and not created by consumers, therefore this tax is not an indirect tax.¹⁶⁵ Soone also states that the proposal must avoid distortion of competition. According to him, the mere fact that this tax would be implemented only in participating Member States

¹⁶³ Ants Soone, 'Some Legal Issues with Implementing Commission Proposed Financial Transaction Tax in Estonia' (2014) 42/1 Intertax, 44, 44.

¹⁶⁴ *ibid* 45.

¹⁶⁵ *ibid* 45.

already distorts competition, because non-participating Member States would thereby end up having a more appealing tax environment.¹⁶⁶

I admit that Soone does convey some valid opinions, but on certain issues I feel that his arguments are somewhat farfetched, especially when it comes to whether FTT is an indirect tax or not. The issue of the legal basis of the FTT has caused a lot of debate among tax lawyers, yet the Commission remains adamant that the legal basis derived from the Article 113 TFEU under enhanced cooperation is solid. However, the fact that the proposal has legal basis in a TFEU Article does not signify that the proposal is compatible with EU legislation. This is where the proposal has faced its biggest challenge. There are several aspects about the proposal which have been challenged by those parties opposing the proposal. The opponents have been questioning the numerous legal problems that have arisen. The most noteworthy legal problems facing the proposal are double taxation, extraterritorial effect, and tax evasion.

3.3.1 Extraterritorial Effect

Extraterritorial effect means that when a country has its own sovereignty, no other country or international entity can establish legislation within that country's domestic jurisdiction that will infringe a country's sovereignty without the consent of said country.¹⁶⁷ Therefore the EU should not be able to draft any legislation that will affect Member States, without their consent. The Member States have given the EU a mandate to legislate on certain issues when they joined the Union, but even those regulations should not go too much to the core of the countries' sovereignty.¹⁶⁸ This is why especially the residence and issuance principles have caused an outburst of objections among opposing parties of the proposal, because these principles are argued to have extraterritorial effect.

¹⁶⁶ *ibid* 46.

¹⁶⁷ Robert Dover and Justin Frosini, *The extraterritorial effects of legislation and policies in the EU and US* (Directorate-General for External Policies of the Union 2012), 7.

¹⁶⁸ Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (5th edn, Oxford University Press 2011), 267.

The EU is not the only jurisdiction where extraterritorial effect has manifested. Another great example is the Alien Tort Statute in the United States, which was implemented already in 1789. According to the Statute:

“District courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹⁶⁹

Therefore any foreign citizen may bring a claim to a US court, even if the claim is not based on US law. It is also possible even when the violation did not take place within the geographical jurisdiction of the US.¹⁷⁰ This type of jurisdiction the US has given itself undeniably causes extraterritorial effect, because by implementing this Statute, the US has legislated on a matter that involves the international jurisdiction of tort cases.

According to the residency principle any financial transactions outside of the FTT-zone would be subject to taxation if either of the financial institutions participating in the transaction is considered to be established in any of the participating Member States. Furthermore, according to the issuance principle, a financial transaction is taxed if the financial instruments have been issued in any of the participating Member States. These two principles are the cause why the FTT proposal agreed upon by the participating Member States will undeniably also affect non-participating Member States.¹⁷¹ The Commission has stated that these principles were added to prevent tax avoidance, but considering how much this may end up affecting non-participating Member States, it is impossible not to wonder, whether this was added as a tool to add incentive for those countries to eventually join the FTT zone. The current proposal would levy taxes on the financial institutions in non-participating countries, without generating revenues for said countries, and therefore eventually it may seem more logical for said countries to just give in and join the FTT-zone.

The EU Council legal services (hereinafter referred to as the CLS) issued a legal opinion on the legality of the counterparty-based deemed establishment of financial institutions.

¹⁶⁹ Kenneth C. Randall, ‘Federal jurisdiction over international law claims: Inquiries into the alien tort statute’ (1985) 18/1 N.Y.U. Journal of International Law and Politics 1, 3.

¹⁷⁰ *ibid* 22.

¹⁷¹ R. P. C. Adema, ‘Financial Transaction Tax: Pan-European Market for Master-Feeder Structures – or Part of It – Smothered?’ (2014) 42/10 Intertax 653, 657.

The legal opinion sought to answer especially whether the residency principle (Article 4(1)(f) of the FTT proposal) was compatible with Article 327 TFEU¹⁷², which states:

“Any enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it. Those Member States shall not impede its implementation by the participating Member States.”¹⁷³

The CLS came to the conclusion that the residence principle would have extraterritorial effect, since the directive adopted under enhanced cooperation would enter the jurisdiction of those countries not in the FTT-zone.¹⁷⁴ The CLS also considers whether the violation can be justified by the objectives of the proposed FTT, which are to raise revenue, make financial sector contribute to the costs of the crisis, and discourage risky activities in the financial sector. To the first objective, the CLS merely states that raising revenue is obviously not sufficient justification. Secondly the CLS states that the majority of the financial institutions that would be subject to the FTT had no part in causing the financial crisis, therefore it would be unacceptable as a justification. Thirdly the CLS notes that even though the objective of the FTT is to reduce risky activities, the discouraging effect would also affect activities with authentic economic value, and regardless, the CLS finds that the third objective is not a valid justification for the extraterritorial effect caused.¹⁷⁵

The CLS also considers whether the extraterritorial effect caused by the issuance principle can be justified by the fact that this provision was added to the proposal to help inhibit tax evasion and fraud. The provision is meant to prevent migration of financial transactions to non-participating Member States, which without the provision would become relatively effortless. The CLS came to the conclusion that such an anti-fraud and anti-evasion measure is not compatible with the proportionality principle,¹⁷⁶ which means that the legislative action taken by the EU should not exceed what is necessary to achieve the objectives of the Treaties.¹⁷⁷

¹⁷² Opinion of the legal services department of the Council of the European Union, ‘Legality of the counterparty-based deemed establishment of financial institutions (Article 4(1) point f) of the proposal)’ 2013/0045 (CNS) 2.

¹⁷³ TFEU, art 327.

¹⁷⁴ 2013/0045 (CNS) 6.

¹⁷⁵ 2013/0045 (CNS) 7.

¹⁷⁶ 2013/0045 (CNS) 8.

¹⁷⁷ Craig and de Búrca (n 168) 95.

In its opinion the CLS deliberates whether the proposal would impede those rights of non-participating Member States protected by the Article 327 TFEU. According to the CLS the Member States have the right to decide on their own tax system and do not have to be subject to any tax legislation stemming from outside parties which would infringe upon its domestic tax system.¹⁷⁸ The CLS claims that the proposed FTT would cause precisely this outcome, because the participating Member States would draft a directive that would affect even those Member States which are not participating in the enhanced cooperation, thereby taking away the right of non-participating Member States to legislate their own tax system.¹⁷⁹

The European Commission's legal services came out with their own rebuttal a few months after the CLS had published their opinion. According to this working paper, the Article 4(1)(f) abides by the obligations of international law concerning the application of tax jurisdiction and does not generate unwanted extraterritorial effects. The Commission has rationalised the residence principle by explaining that even if the financial institution is located in a non-participating Member State, it enters into the FTT jurisdiction by participating in a transaction with a financial institution from a participating Member State. Therefore the financial institution's own actions lead to it entering a foreign jurisdiction.¹⁸⁰

The Commission also claims that the Article 4(1)(f) has not infringed upon the rights of non-participating Member States as stipulated in the Article 327 TFEU, because the provision has no effect on the right of those countries to decide their own tax system nor does it result in the use of FTT in their jurisdictions.¹⁸¹ The Commission justifies this statement by claiming that the financial institution enters into the FTT-zone jurisdiction by merely taking part in the transaction and thus acting within the FTT-zone, and therefore no rights are infringed. The Commission also states that this type of cross-border double-taxation is a common occurrence which simply happens to occur whenever there are coinciding tax legislations in place. There are no provisions in international law that

¹⁷⁸ 2013/0045 (CNS) 11.

¹⁷⁹ 2013/0045 (CNS) 12.

¹⁸⁰ Commission Legal Services Working Paper (n 16) 1.

¹⁸¹ *ibid* 1.

would forbid double taxation. While the proposed FTT aims to remove said double taxation, it cannot accomplish removing it completely.¹⁸²

Both these arguments made by the CLS and the Commission raise valid points. When assessing these arguments, I find that the CLS brings forth several issues, which should be taken into consideration before enacting the FTT. I understand that the Commission can claim that the adoption of an FTT using enhanced cooperation does not violate any EU regulation, but in my opinion that is a feeble justification for all the problems the FTT is causing. The mere fact that something is legal, if it causes this many problems to other non-participating Member States, does not mean that it is decent and fair, which needs to be taken into consideration. Therefore I side with the arguments made by the CLS, but the ECJ disagrees. In the case *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union C-209/13*, the ECJ sided with the Commission on this matter, at least currently while the FTT is still only being drafted.¹⁸³ This case will be further analysed in Chapter 4 of this thesis.

3.3.2 Tax Avoidance

The Commission modified its original proposal to add more preventive measures to help eradicate tax avoidance as much as it is possible. Especially the residence and issuance principles were designed to prevent tax avoidance and double non-taxation. Double non-taxation means that the financial institution may be able to avoid taxation in both countries when a cross-border transaction takes place.¹⁸⁴ Especially now, tax avoidance is a current issue globally. There has always been tax havens, where people and companies have hidden their assets, but now that the so called Panama Papers leaked and revealed a massive scale of tax evasion, there seems to be even more international pressure to legislate these loopholes.¹⁸⁵ Recently there have been a several new international agreements, which have been drafted for the purpose of eradicating tax

¹⁸² *ibid* 2.

¹⁸³ *C-209/13 United Kingdom of Great Britain and Northern Ireland v Council of the European Union (UK v Council)* [2014], para 40.

¹⁸⁴ Sean Rosenthal, 'The OECD's International Tax Proposal: The Action Plan' (2013) 33/1 *Review of Banking & Financial Law* 20, 23.

¹⁸⁵ Commission, 'Introducing public country-by-country reporting for multinational enterprises - Questions & Answers' (12 April 2016) Press release, 2.

avoidance globally. As an example of said agreements are the Foreign Account Tax Compliance Act (hereinafter referred to as FATCA) and Common Reporting Standard (hereinafter referred to as CRS).

FATCA and CRS are both multinational agreements which are meant to help tax officials internationally share income and asset information. FATCA is a bilateral agreement countries have with the US to share account information about the countries' respective citizens.¹⁸⁶ FATCA was first implemented in 2014¹⁸⁷ and already fifty-five countries are participating in it.¹⁸⁸ The FATCA is executed by the financial institutions in FATCA compliant countries, using a system where the financial institutions collect the information about their clients which are US citizens, and are thereby reported to the US tax officials. The FATCA agreement stipulates that if the clients do not want to give the required information, the financial institutions must withhold a tax of 30% on any payments from the US made to the account of the client.¹⁸⁹

On top of FATCA, The Organisation for Economic Co-operation and Development (hereinafter referred to as the OECD) recently introduced the CRS, which would implement a system of Automatic Exchange of Information (hereinafter referred to as the AEOI). The European Council adopted a directive on 15 December 2014 to assimilate the AEOI system,¹⁹⁰ which will enable the participating countries to share all the information which is relevant to the taxation of their citizens. Currently already eighty-nine countries have committed to the enactment of the AEOI. The first information exchange is scheduled to start in 2017, which means that the collecting of information has already started. The US is not one of the participating countries of the AEOI, probably since they have decided to opt for the FATCA instead.¹⁹¹

In addition to these, only recently the Commission stated that they will be amending the Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on

¹⁸⁶ Jane G. Song, 'The End of Secret Swiss Accounts?: The Impact of the U.S. Foreign Account Tax Compliance Act (FATCA) on Switzerland's Status as a Haven for Offshore Accounts' (2015) 35/3 *Northwestern Journal of International Law & Business* 686, 700.

¹⁸⁷ *ibid* 701.

¹⁸⁸ *ibid* 703.

¹⁸⁹ *ibid* 702.

¹⁹⁰ Stephen Phua, 'Convergence in global tax compliance' (2015) July *Singapore Journal of Legal Studies* 77, 92.

¹⁹¹ *ibid* 91.

the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, also known as the ‘Accounting Directive’. This directive is meant to ensure tax transparency, and to make sure that large international corporations pay taxes where they make their profits. This type of tax avoidance costs the EU an estimated 50 to 70 billion euros per year and affect around 6500 companies. So it is understandable that the Commission is interested in amending this regulation. The Commission also stated that this amendment is not likely to damage the companies’ competitiveness. The proposal would ensure that the companies make an annual report which states how much profits they generated and which countries they paid the taxes to from those profits.¹⁹²

There are several different methods of tax avoidance that may be utilised after the implementation of the FTT. These methods are for example switching financial instruments or market migration.¹⁹³ Firstly, the financial institution will probably search for alternative instruments where possible if those instruments do not fall within the scope of the FTT. This may cause issues when other products may become more popular than other, and there is a damaging market shift in this aspect. This may therefore end up harming several companies, which have issued certain securities which are taxed under the FTT. Secondly, the implementation of the FTT may result in the territorial relocation of the financial activities. The financial institutions will be more inclined to carry out its financial transactions in a region where there is no taxation on financial transactions, or if there is, said tax is significantly lower.¹⁹⁴

However, since relocating a financial institution is both expensive and difficult, this might not be the best method of tax evasion. The obvious solution to the market migration problem would be to eventually introduce a global FTT, but this is currently not likely to happen in the near future.¹⁹⁵ If it is not possible to impose a global FTT, this may lead to inequality between markets that have chosen to impose a tax and those that have not. This may end up harming those locations that have chosen to implement the tax. Additionally,

¹⁹² Commission, ‘Introducing public country-by-country reporting for multinational enterprises - Questions & Answers’ (12 April 2016) Press release, 1.

¹⁹³ Vogel and Cortez (n 4) 83.

¹⁹⁴ Vogel and Cortez (n 4) 83.

¹⁹⁵ Vogel and Cortez (n 4) 84.

although at first it may seem beneficial to those markets where the financial institutions seeking tax exile have taken refuge, eventually the situation may result in a heightened risk in those markets by adding instability with such artificial relocations.¹⁹⁶

To prevent tax evasion, the proposal stipulates that participating Member States must ensure that artificial activities carried out with the purpose of avoiding paying taxes need to be ignored and the tax levied regardless. The Commission calls this the principle of substance over form.¹⁹⁷ However, there is a grey area when it comes to tax avoidance. Sometimes it is difficult to differentiate between tax avoidance and standard corporate tax planning, especially considering there are several national systems even within the FTT-zone which recognise different characteristics for illegal tax planning.¹⁹⁸ When there are two options for a tax payer to choose between tax exempt transaction and taxed transaction, the tax payer is not obligated to the state to choose the transaction which would result in tax liability. CJEU has also asserted this in the case *Halifax* by stating in its judgment that taxpayers are allowed to choose to conduct their business in a way that will minimise their tax liability.¹⁹⁹

The Commission stated in the impact assessment that for the FTT to have the least unwanted effects when it comes to tax avoidance, the proposal should be enacted in the participating Member States at the same time, because this way the harmonisation will take effect immediately everywhere and not gradually throughout the FTT-zone. The Commission had nicknamed this simultaneous enactment as the ‘big bang’.²⁰⁰ Additionally, as an anti-avoidance measure the Commission also sought the tax to have a broad base and to cover most types of securities to minimize tax evasion through the utilisation of alternative financial instruments.²⁰¹

The Commission has tried in the latest proposal to ensure as much as feasible to close those tax avoidance loopholes by having the FTT scope cover all possible financial institutions and instruments. In the impact assessment it was suggested that on top of the

¹⁹⁶ Tavares (n 143) 796.

¹⁹⁷ SWD (2013) 28 final, 12.

¹⁹⁸ Soone (n 163) 49.

¹⁹⁹ Case C-255/02 *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v Commissioners of Customs & Excise (Halifax)* [2006] I-1609, para 73.

²⁰⁰ SWD (2013) 28 final, 12.

²⁰¹ SWD (2013) 28 final, 25.

issuance and residence principles, it would be even more effective if the FTT were to cover financial transactions which take place within the FTT-zone, even if the financial institutions which partake in the transaction are not located in the FTT-zone.²⁰² The issuance principle specifically has been added to the latest proposal as an anti-avoidance measure.²⁰³ In the impact assessment the Commission estimated that the issuance principle would help gather around 10% of the transactions in shares and debt securities issued by the entities located in the participating Member States. It should be noted that at the time of the impact assessment participating Member States included Estonia, which has later left the group. According to the Commission the issuance principle would bring revenues of 0.39 billion euros from taxation of shares and 0.83 billion euros from taxation of bonds and bills.²⁰⁴

So as we can see, tackling the issue of tax avoidance is truly a current issue. The global cooperation and financial transparency has increased in the recent years, and seems to be still growing. It is understandable that the governments are tempted to tackle this issue, since they may end up losing billions in tax revenues due to tax avoidance. On the other hand, the Commission needs to evaluate are the benefits from adopting the proposal greater than what negative impacts the tax avoidance may have on the European market.

3.3.3 Double Taxation

The CLS stated in its opinion that while the residence and issuance principles may prevent tax avoidance, it does trigger double taxation. Additionally, although within the FTT-zone there is a system of tax relief on a reciprocity basis, there is no such system in place when it comes to the transactions between participating Member states and non-participating Member States or third countries.²⁰⁵ The tax relief system between the participating Member States operates on the basis that the taxing powers are allocated to the Member State where the financial institution is located.²⁰⁶

²⁰² SWD (2013) 28 final, 12.

²⁰³ COM (2013) 71 final, 5.

²⁰⁴ SWD (2013) 28 final, 40.

²⁰⁵ 2013/0045 (CNS) 10.

²⁰⁶ 2013/0045 (CNS) 12.

The Commission admitted that there may be some double taxation or double non-taxation that will unavoidably occur, as is the case of all cross-border transaction taxes that are enacted. The Commission also expresses that customary international law does not prohibit double taxation. CJEU has also on several occasions held that EU primary law does not forbid it. Nonetheless, the Commission also claimed that the very purpose of the proposal is to decrease existing double taxation. The proposed FTT would in fact harmonize and thus eradicate national systems of financial transaction taxes, and therefore it would decrease double taxation within the FTT-zone.²⁰⁷

When reading the impact assessments made by the Commission, it seems evident that the Commission does not see a genuine problem with double taxation, because it can be so easily solved with simply making all Member States in the EU participate in the FTT, when there would only be one model of taxing financial instruments. Currently there may be only ten countries participating in the enhanced cooperation, but if the proposal becomes a directive, other countries may not have any other option but to join the FTT jurisdiction. Perhaps this has been the desired outcome all along. By first starting with a small group of Member States and establishing the FTT-zone, and then eventually other Member States will be forced to join. The Commission also claimed that another possible solution to prevent double taxation would be a bilateral agreement between participating and non-participating countries.²⁰⁸

Soone rebuts these claims made by the Commission in the article he wrote for Intertax, arguing that these are not effective solutions. Firstly he reasons that even if all the Member States participate in the FTT and there were a single taxation model, the model would still not cover all types of transactions. The FTT has left out certain financial transactions, and therefore participating Member States may have another type of tax in place in its jurisdiction. This might lead to double taxation even if the country is participating in the FTT and the FTT-zone was EU-wide. Secondly he states that the bilateral agreements suggested by the Commission would not work, because Soone claims that these agreements can only concern taxation of income and capital, and that

²⁰⁷ Commission Legal Services Working Paper (n 16) 2.

²⁰⁸ SWD (2013) 28 final, 17.

the FTT is undoubtedly not a tax on income or capital. Given that the FTT is an indirect tax, this type of bilateral agreement would not solve the problem of double taxation.²⁰⁹

3.3.4 Other Legal Problems

On top of those three major problems the proposal is facing, there are several less significant yet still important issues generated if the FTT is enacted. One of these issues is for example the issue of liability. If the FTT happens to have negative economic effect on the non-participating Member States, somebody may end up suing for damages. The core of the problem is figuring out who is going to be liable for said damages.²¹⁰ According to Article 340 TFEU the EU shall cover any damage caused by one of its institutions in the performance of its duty.²¹¹ According to the judgment in the case *Dubois* the liability of the EU can only be attained if the breach concerns a higher-ranking rule of law for the protection of individuals.²¹² Considering that the several issues facing the FTT are allegedly in breach of TFEU, which is a higher-ranking rule of law than the proposed directive, it can be deduced that there may be some Member States that will be entitled to damages.²¹³ Therefore some might argue that it is not fair to non-participating Member States that a directive legislated by ten Member States may result in damages paid by the whole EU.

Additionally, there is the issue concerning whether the FTT will achieve the wanted outcome concerning negative speculative trading. As previously mentioned, one of the objectives of the FTT is to deter negative speculative trading. It cannot be proven that the FTT will actually achieve such an objective, or if this tax will only effect negative speculative trading, or also speculative trading, which can have a positive effect on the market. There are some hypothetical models for determining whether speculative trading is undesirable or not, and thereby direct the tax towards these negative transactions. However, there are no guarantees that such a model actually works.²¹⁴ There are some

²⁰⁹ Soone (n 163) 48.

²¹⁰ Soone (n 163) 50.

²¹¹ TFEU, art 340.

²¹² Case T-113/96 *Edouard Dubois et Fils SA v Council of the European Union and Commission of the European Communities (Dubois)* [1998] II-125, para 59.

²¹³ Soone (n 163) 50.

²¹⁴ Tavares (n 143) 792.

theories that claim that by increasing transaction costs the volatility will decrease, thereby the assets which would have been used for speculative trading will be instead used towards investments which are more beneficial to the market. Alternatively, there are also theories that introducing an FTT would lead to a shift towards negative net effect, leading to lower transaction volumes, higher volatility, lower liquidity, and higher costs for the economy.²¹⁵

Furthermore, the FTT may have an undesirable impact on the efficiency of the financial market. There are a number of reasons why efficiency is crucial to the functioning of the financial markets. Firstly the tax can discourage the investors from selling overpriced instruments, which leads to the deficiency of said instruments on the market, thereby making that instrument all the more overpriced. This in turn leads to a so-called speculative bubble, which means a circumstance where the instrument is valued at its peak before the figurative bubble bursts, which again may result in a financial crisis. Secondly, if the market is inefficient, it may be more attractive for an investor to move to a different, more efficient market, especially if in this market a financial transaction tax is not imposed.²¹⁶

Moreover, this proposed tax would be removing assets from financial markets by taxing financial institutions, which would lead to lower liquidity of the financial market. This can affect other actors, for example the consumer, by increasing the prices of credit or adding supplementary fees imposed by the financial institutions to cover the cost of the tax. Also, taxing financial instruments may damage their recovery from the recent financial crisis.²¹⁷ I find it also naïve to think that financial institutions would simply suffer their losses from the tax and lose revenue. I think the most likely outcome is that the financial institutions will trickle these costs to the consumers by imposing new fees or increasing the existing fees.

The tax would also lead to unequal treatment of primary and secondary markets. Primary markets mean the transaction of newly issued securities directly from the issuer. Secondary market means that the financial instrument is an existing security and the

²¹⁵ Hemmelgarn, Nicodème, Tasnadi and Vermote (n 121) 3.

²¹⁶ Tavares (n 143) 792.

²¹⁷ Tavares (n 143) 793.

transaction takes place in a stock exchange.²¹⁸ The current proposal has stipulated that primary market transactions, including issuing securities, are left outside of the scope of the FTT.²¹⁹ The proposal therefore puts listed and non-listed issuers at an unequal balance.²²⁰

Furthermore, in the opinion it published, the CLS It came to the conclusion that due to the residence principle, the proposal will result in distortion of competition and obstruct the free movement of capital within the EU. This is firstly due to the fact that the financial institution residing in a non-participating Member States would have to pay different FTT rates, while the financial institutions residing in a participating Member State would always be subject to said State's rate. Secondly the CLS states that these financial institutions residing in third countries which would be subject to the FTT cannot be enforced the same way as the non-participating Member States, which could result in distortion of competition between institutions established in third countries and financial institutions in non-participating Member States.²²¹

The European Commission's legal services rebuts the claim made by the CLS by stating that the provision 4(1)(f) does not cause distortion of competition nor does it obstruct the free movement of capital, since the mere fact that a tax affecting the cross-border transactions is established is not in itself a restriction of free movement. It can be admitted that this type of taxation may reduce the amount of transactions and thereby the flow of capital. However, this cannot be seen as a restriction of free movement in itself, otherwise it would not be possible to legislate on international taxation interminably as all this type of taxes are likely to have similar outcomes.²²²

All things considered, the proposal is facing quite a number of problems. Legislating within the EU can cause differences of opinions, but this much dissention between the Member States is quite uncommon. However, compared to other proposals, this specific one is facing much more legal problems than usual. Many of these problems the Commission has justified with the fact that it is acting within the realm of the law. As I

²¹⁸ Adema (n 171) 658.

²¹⁹ COM (2013) 71 final, art 3(4)(a).

²²⁰ Adema (n 171) 658.

²²¹ 2013/0045 (CNS) 13.

²²² Commission Legal Services Working Paper, (n 16) 2.

previously mentioned, I do not think the mere legality of the proposal makes it a sound idea. I think the Commission should sincerely reconsider whether all the objectives are worth these problems the proposal will generate.

4. Supporting and Opposing Arguments

4.1 Supporting Arguments

When I started studying the supporting and opposing arguments on the FTT, I quickly noticed that I found significantly more opposing than supporting opinions. Especially after reading many legal journals, it seems like the majority of the legal experts have sided against the FTT. Even between the EU institutions there are different opinions, for example there are significant differences on how the Commission and the Council Legal Services view the proposal. However, countries like France and Germany have remained adamant and have been the biggest supporters of the FTT from the beginning. They truly want to make the EU-wide FTT-zone a reality.²²³

Additionally, According to a recent Eurobarometer survey, the majority of the European Union citizens are in favor of the proposition. According to the survey, more than 61% of support the introduction of a tax on financial transactions.²²⁴ Then again, most of the citizens may not have the capability to fully grasp the consequences of the FTT, nor what the tax will actually mean especially for the economy. In the aftermath of the Eurozone crisis, most of the citizens find the banks to be in the blame and want to make them pay their share of the fallout, and not only rely on the taxpayers' money or funding from the bailouts. This is one of the key points the supporters of this tax have emphasized, the sharing of the financial burden caused by the financial crisis. In a slightly propaganda-esque move, even some of the newspapers have given the proposed tax the nickname 'The Robin Hood Tax' which would indicate that this money takes from the rich and gives to the poor.²²⁵ For me this just seems like the governments have wanted to implement more taxation on the financial sector for some time now, but this extensive support from the citizens has given them finally the opportunity and momentum to actually push this tax through. The FTT would be extremely beneficial for governments trying to accumulate more revenues from taxing the financial sector.

²²³ Dietlein (n 117) 207.

²²⁴ Eurobarometer Survey 74, 'Economic Governance in the European Union' (January 2011), 13.

²²⁵ Larking (n 1) 68.

Furthermore, the supporters of the FTT argue that the FTT would promote more sustainable activities in the financial markets. If enacted, the proposed FTT would help diminish especially the harmful kind of trading, such as speculative transactions. Thereby the proposal would end up making the markets more stable and prevent future crises. Even if the tax did not end up having such an outcome, at the minimum the tax will bring revenue for the participating countries. Additionally, even if the tax were to create tax avoidance or geographical relocation, the governments can easily monitor the effects of the tax and react to these loopholes by making the necessary amendments to the legislation.²²⁶

The supporters also claim that the lack of evidence on what will be the impacts of the FTT if enacted is not enough to reject the proposal. As an example, prior to the crisis there were many new financial products introduced to the market, which were thought to help complete the market. This type of new product is for example the so called Special Purpose Vehicles (hereinafter referred to as SPV), which bought housing loans and divided them into smaller portions channelling those to investment portfolios.²²⁷ When the housing market crashed in the US, the SPV's were susceptible to significant losses, when the portfolios were composed mostly of these products. Therefore, many of these new products actually ended up causing the crisis. Therefore it is usually too difficult to actually know the real impacts of new legislation prior to the enactment.²²⁸

The FTT aims to decrease the amount of transactions in the financial market to make them more stable. The supporters claim that the tax will only truly burden those high activity transactions, where the profits from the asset is low and the trade frequency high. These are precisely those type of transactions the FTT is meant to reduce. The FTT will not affect excessively those transactions where the trading activity is low, because the tax collected on those transactions is marginal.²²⁹ Some supporters also claim that the Stamp Duty of UK is actually not as well-designed as the proposed FTT. I find this a bold claim considering that the Stamp Duty has proven to be successful already for decades. The argument is that the Stamp Duty basically only applies to corporate shares and bonds, whereas the FTT has a much broader base. Therefore the FTT would also be more

²²⁶ Dorothea Schäfer, 'The financial transaction tax -- Boon or bane?' (2012) 47/2 *Intereconomics* 76, 76.

²²⁷ *ibid* 80.

²²⁸ *ibid* 77.

²²⁹ *ibid* 78.

effective in eliminating speculative and other trading deemed harmful to the financial markets.²³⁰

The introduction of the FTT would also bring a new central depository systems which would significantly help prevent tax evasion. While a substantial amount of securities are traded on official stock exchanges, the majority of trading is done over-the-counter. Usually this type of over-the-counter transactions are arranged with private agreements between the parties, where the terms and the price of the transaction are usually not public knowledge. Therefore there is an absence of transparency in this type of trading which could be fixed with a central depository system, where even these over-the-counter trades would have to be registered when determining how much tax is levied on the transaction. This theory has already been proven to be successful with the central depository system established for the collection of the Stamp Duty, which has proven to be highly effective.²³¹

Furthermore, even if the FTT ends up raising the costs of capital, the raise is not significant. The very idea of a financial transaction tax is to keep the tax burden at a minimal amount. Also some have argued that the FTT would impede the process of the investor trying to find out the actual price point of securities. However, this argument is based on the fact that markets are assumed to be efficient. The efficiency of markets has become uncertain, because the trading carried out with the common systems usually bases the value of financial instruments on past information, and therefore the FTT will not actually be the one factor that will be the downfall of an otherwise working system when trying to figure out the price points.²³²

The parties opposing the FTT state that the derivatives should not be included in the scope of the proposal, because it would ultimately lead to an increase in hedging costs. However, it would be easy to create a system, where the transactions may be implemented in a way that the system recognises these specific type of transactions, which would be exempt from the FTT. When it comes to another argument made against the proposal, which is that the proposal will result in geographical relocation of financial transactions,

²³⁰ *ibid* 83.

²³¹ *ibid* 83.

²³² *ibid* 86.

the issue is not as simple as it seems. There are already a lot of financial activities, which have relocated to more favourable markets, these so-called tax havens. In those locations the tax burden is usually significantly lower and thus the market place more desirable for investors. However, there are certain activities which are not very easily relocated. For example in high frequency trades, the investors must trade on certain markets, which are organised derivatives exchanges, such as the Eurex in Frankfurt. Additionally, considering that in these high frequency trades speed is very important, the investors need to have their servers as close as possible to the servers of the actual marketplace, otherwise they may lose valuable time when making these trades.²³³

Another point made for the FTT is that if there is going to be a new tax added to the financial sector, the FTT is one of the best models introduced so far. If compared to the other proposed model, the financial activities tax (FAT), the current FTT proposal is estimated to meet its objectives much more likely than the FAT would have. Compared to the FAT, the FTT is likely to be more efficient, to have less negative effects on market development, and have better anti-avoidance measures. Additionally, if there is a new tax introduced to the financial markets, a bank levy such as the FTT seems to be the best way to implement it. The reasoning behind this is that out of all these different type of taxation models, the FTT is the one most likely to be enacted, since there is so much public opinion backing this tax.²³⁴

Moreover, I find it interesting to note that Greece is among the participating Member States. The economy of Greece is still one of the most impacted after the recent crisis, so it might be logical that the Greece government would like to implement this tax to help them generate revenue. On top of generating revenue, the participating countries have emphasised on several occasions that the aforementioned objectives of the proposal are enough to justify the enactment of the FTT. However, I have not yet found reasonable justifications for all the all the problems the proposal would create, such as the tax evasion, extraterritorial effect and double taxation. These are by no means slight problems, but will have very real consequences to the sovereignty and economies of non-participating Member States. Especially extraterritorial effect is something that should not be taken lightly. I do not believe that the objectives are enough to rationalise the

²³³ *ibid* 89.

²³⁴ *ibid* 95.

proposed tax, considering how many harmful ramifications it may have. Additionally, as previously mentioned as an example, even the Council legal services believed that the extraterritorial effect cannot be justified with any of the objectives of the proposed FTT.²³⁵

4.2 Opposing Arguments

When I began writing this thesis I was curious to know what local Finnish financial institutions thought about the proposed FTT. The financial institutions I contacted to ask this question were reluctant to give their own opinion, but instead they referred to the official statements given by the Federation of Finnish Financial Services (hereinafter referred to as the FFI). The FFI is an organisation which advocates Finnish financial institutions. Since the first proposal in 2011 the FFI has given several statements regarding the issue and all of these statements have conveyed that the FFI is strongly opposed to the FTT. According to the FFI, the FTT would have several negative impacts on the functioning of both the Finnish economy and the financial institutions operating within Finland.

Due to the global nature of the financial markets, the FFI believes that a global participation in the tax is required in order for a financial transaction tax to succeed. The FFI deems it near impossible for the FTT to reach its objectives if the tax is implemented without global participation. However, considering that already in 2011 the crucial developed countries expressed that they are not interested in implementing a global FTT, it is very unlikely that this will become a reality in the near future. The FFI is not merely certain that the proposed tax is unlikely to reach its objectives, but it also believes that the tax will actually impact negatively on the economy and hinder the recovery from the latest financial crisis. They also stated that this proposal has a severe risk of being implemented at a critically wrong time, and at this point the proposal would be likely to do more harm than good. Additionally, the proposal should take into consideration other pending legislation or international agreements, which may tighten the current legislation on the

²³⁵ 2013/0045 (CNS) 7.

rules concerning capital and liquidity requirements of financial institutions, for example the Basel III proposal.²³⁶

The FFI especially considers the proposed FTT to be harmful to the Finnish economy for numerous reasons. The cost of the tax will inevitably fall on the customers of financial institutions, which ultimately are Finnish companies and households. The tax will also hold a significant risk that it will result in tax avoidance, since it would be much more profitable to carry out the transactions in countries where there is no tax levied on financial transactions. This in turn would harm the infrastructure of the domestic financial markets, because the volume of trade would significantly decrease. The FFI specifically considered that the FTT will most likely not be implemented in the UK and Sweden, and therefore the markets would probably shift to the UK especially. The FFI cautions the Finnish legislators that if Finland were to implement the FTT and Sweden in turn did not, there is a significant risk that the trading which takes place in the Helsinki Stock Exchange would shift to Sweden, and thereby make Stockholm the leading Nordic financial centre.²³⁷

Sweden is among the strongest parties opposing the FTT and this is mainly due to the fact that they had implemented their own financial transaction tax from 1984 to 1991, which they still consider to have been a huge failure. Sweden ultimately had to abandon after nearly half of their securities trading relocated during this time from Stockholm to London.²³⁸ Some have claimed that since the UK has their own version of a financial transaction tax it would not make economic sense to relocate investment activities to London. However, the Stamp Duty applies only to trading on stocks, and the tax is not levied on intra-day trading nor on major trading clients. Therefore only an estimated 35% of all trading on shares is taxed under the Stamp Duty.²³⁹

Furthermore, the FFI has deemed it unwise for Finland to partake in the enhanced cooperation in the area of the FTT, because it would impact on the way the Finnish financial institutions could operate on a daily basis. It would create a legal uncertainty,

²³⁶ FFI 'Lausunto – Ehdotus Neuvoston direktiiviksi yhteisestä finanssitransaktiojärjestelmästä' (22 November 2011) 1.

²³⁷ *ibid* 2.

²³⁸ FFI 'Kannanotto – Mikä on rahoitusmarkkinaverot?' (18 October 2012) 1.

²³⁹ *ibid* 2.

which would make it even more difficult for companies to receive foreign financing, thereby increasing unemployment even further. The Finnish Government estimated in an official recommendation letter to the Finnish Parliament that implementing the tax using the enhanced cooperation with a limited number of participating countries would have an adverse impact on the Finnish economy and it will greatly diminish the efforts to recover the economy from the latest crisis.²⁴⁰

Additionally, if implemented, the tax will also have a direct effect on the Finnish pension provisions, because the tax would be levied on certain pension funds. The tax would thereby reduce the proceeds which are meant to finance the payment of pension provisions. The Finnish Pension Alliance TELA estimated that the cost of the taxation of these proceeds would be approximately 450 to 530 million euros per year.²⁴¹ Even if the Commission were to limit certain pension funds outside the scope of the proposed tax, the FFI states that the phrasing of the proposal is ambiguous and open for interpretation when it comes to these pension funds. However, the FFI has assessed that Finnish pension funds will not be among those pension funds which are left outside of the scope of the tax.²⁴²

Moreover, the FFI noted that even though if one of the main objectives is to discourage speculative trading, it is impossible to focus the proposed tax in a way that it would only impact speculative trading. The FFI claims that this kind of tax cannot differentiate between the motives behind a transaction. Additionally, even the experts on economy have different opinions on whether speculative trading is harmful to the economy. Others believe it discourages economic development while others think it equalises economic growth. The FFI also deems that the Commission has severely overestimated the positive impacts the tax would have, especially how much revenue the tax was estimated to generate. As an example, the unbiased research facility Oxera has estimated that the Commission's impact estimate is inadequate in various aspects. The revenue collected from the tax is dependent on how the actors of the financial markets react to the FTT. The Commission has not adequately taken this into account when it published the impact assessment.²⁴³

²⁴⁰ *ibid* 1.

²⁴¹ *ibid* 1.

²⁴² *ibid* 2.

²⁴³ *ibid* 2.

The FFI concludes that it opposes the FTT because the current proposal would increase the costs of the distribution of financing products, diminish the liquidity of the financial markets, and distort the functioning of the internal market of the EU.²⁴⁴ Although this was just an example of how the FFI thinks about the FTT, this is the general idea that can be found among other non-participating Member States. Many of these countries are not satisfied with the current proposal, because the financial institutions within their jurisdiction would be taxed. Therefore non-participating Member States would contribute to the budget of participating Member States even though the transaction takes place in their jurisdiction. This is also said to have extraterritorial effect, which the biggest reason why the UK decided to challenge this proposal in the ECJ. This case will be studied in the next chapter.

The UK has understandably been among those most opposed to the proposal. London is one of the largest financial centres in the world and the UK does not want this tax jeopardising the position it has attained. Additionally, the UK has got their own system of taxing financial transactions which has proven to be very profitable. It is reasonable that the UK does not want the same products to be taxed with another system, which may end up causing significant tax revenue losses for the UK. After the current proposition was published, on 26 March 2013, The House of Lords European Union Committee published a letter to the Secretary of Her Majesty's Treasury pleading him to challenge the proposal. In said letter the House of Lords Committee heavily criticized the proposed FTT and also the UK government for being too passive when it came to opposing this proposal.²⁴⁵ The UK is legitimately concerned about the impacts of the proposal considering that the majority of the revenues produced by the tax would be generated by the UK.²⁴⁶

The obvious legal arguments against the proposal are all the legal problems introduced in chapter three of this thesis. I will not be going over those again here, but I would like to state that those legal problems are one of the main reasons why, even though I have tried to assess impartially all these arguments supporting and opposing the proposition, but I cannot come to any other rational conclusion but that this proposal is not well-thought-

²⁴⁴ FFI 'Kannanotto – Rahoitusmarkkinaverot' (September 2014) 1.

²⁴⁵ HJI Panayi (n 18) 364.

²⁴⁶ *ibid* 365.

out enough that it should be implemented. There are too many adverse effects the tax may cause, which in my opinion are not worth the risk of trying whether this tax would work or not. For me this tax just seems like an ill-disguised lobbying effort by various participating governments to increase the taxation of the financial sector with the excuse of making the financial institutions participate in the costs of the latest financial crisis. However, there is not much anyone can do about the issue if the participating Member States come to an agreement and start implementing the FTT. They already have the Council's approval and although all EU countries are welcome to give their opinions during the drafting of the proposal, they do not have any actual influence if they want to oppose its enactment. I for one find it very dangerous for the European economy that such a small group of countries are allowed to legislate on this matter effecting the whole of the EU.

4.3 The European Court of Justice

Shortly after the House of Lords Committee published the aforementioned letter criticising the proposed FTT, on 18 April 2013 the UK submitted an application to the ECJ challenging the legality of enacting the FTT under enhanced cooperation.²⁴⁷ In its application to the Court the UK sought the Council decision authorising the use of enhanced cooperation in this instance to be annulled.²⁴⁸ The preamble to the decision made by the Council on 22 January 2013 states that the decision allows the participating eleven Member States to use enhanced cooperation in order to establish a mutual system of FTT, by utilising the pertinent provisions of the Treaties.²⁴⁹

The UK relied on two main arguments in the case. Firstly it claimed that the proposal infringes on Article 327 TFEU and the adoption of the FTT would cause extraterritorial effects. According to the Article 327 TFEU, those countries participating in enhanced cooperation must respect the competences, rights and obligations of non-participating Member States.²⁵⁰ Secondly the UK pleaded that the proposal infringes on Article 332

²⁴⁷ *ibid* 366.

²⁴⁸ C-209/13, para 1.

²⁴⁹ *ibid* paras 7-9.

²⁵⁰ TFEU, art 327.

TFEU, because the FTT would impose costs on non-participating Member States.²⁵¹

According to Article 332 TFEU:

“Expenditure resulting from implementation of enhanced cooperation, other than administrative costs entailed for the institutions, shall be borne by the participating Member States, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise.”²⁵²

The UK argued that the residence and issuance principles of the proposal would cause extraterritorial effect and therefore the decision made by the Council is in breach of Article 327 TFEU.²⁵³ The application of these two principles would result in taxation of financial institutions residing within the jurisdiction of a non-participating Member State, and therefore it would harmfully impact the competences and rights guaranteed in Article 327 TFEU to those non-participating Member States.²⁵⁴

The UK justifies its claim by stating that customary international law allows legislation to cause extraterritorial effects only when there is a sufficiently close connection between legislating party and the subject of the legislation. Only then the legislating counterparty can justify entering the sovereign jurisdiction of another country.²⁵⁵ However, the UK claims that applying those principles in this circumstance cannot be justified with the aforementioned exception given by the customary international law.²⁵⁶ Furthermore, the UK bases its second plea on the fact that it is undeniable that if the FTT is implemented, there would be costs to non-participating Member States. According to the UK’s claim, the implementation of this proposal would result in the application of the Council directives concerning the common system of tax collection within the EU, and therefore there would be costs to non-participating Member States.²⁵⁷

Even though the defendants in the case support the admissibility of said claims, they find the pleas unfounded.²⁵⁸ The defendants rebut the first plea by claiming that the UK cannot oppose to the proposal which at this stage is still hypothetical. Therefore the accusation

²⁵¹ *ibid* para 16.

²⁵² TFEU, art 332.

²⁵³ C-209/13, para 18.

²⁵⁴ *ibid* para 19.

²⁵⁵ *ibid* para 20.

²⁵⁶ *ibid* para 21.

²⁵⁷ *ibid* para 22.

²⁵⁸ *ibid* para 25.

of the alleged extraterritoriality of the FTT are premature and speculative.²⁵⁹ Secondly the defendants invoke the same argument, stating that because the contents of the proposal are not yet agreed upon, the UK cannot argue that there will be costs to non-participating Member States.²⁶⁰

The Court came to the conclusion that the pleas made by the UK must be rejected and the action dismissed.²⁶¹ Firstly the Court justifies the judgment by stating that the first plea the UK made claiming the Council decision breached EU law was based partly on the issuance principle. However, this principle was introduced in the proposal which was published after the Council decision.²⁶² Secondly the Court states that the Council decision does not stipulate the costs stemming from the proposal, and additionally it is impossible to base its decision on a tax when the contents of the proposal are yet to be decided.²⁶³

I agree with the fact that the judgment made by the Court is legal and that the Court could not have possibly come to any other decision under the EU treaties while the contents of the proposal are still to be decided upon. However, I disagree on the principles of the matter, because I find that the decision made by the Council was made too thoughtlessly, without truly thinking what consequences the decision will have for the non-participating Member States. For me it seems like the defendants currently have the strong argument they can hide behind without actually having to take a stance on or answer to any of the actual claims made by the UK. The only argument they currently have to make was that the proposal is not final, so there no sense in responding to the arguments made by the UK. It is actually quite interesting that the UK decided to make these claims in the ECJ, considering that the enactment of the proposal is still very uncertain. It is not a very efficient way of receiving answers. While I understand that the UK made its claim prematurely, and this was probably merely a political means to make their opinion clear, I find that they raised valid questions which remain unanswered. Perhaps the UK thought this to be a good way to display their firm stance on the issue, or if this was actually their last measure to receive answers to their unanswered questions. If the proposed FTT were

²⁵⁹ *ibid* para 26.

²⁶⁰ *ibid* para 27.

²⁶¹ *ibid* para 40.

²⁶² *ibid* para 36.

²⁶³ *ibid* paras 37-38.

to be enacted, then maybe the UK or another non-participating Member State can bring this action to the ECJ again, and perhaps this time receive actual answers to the claims they have made. However, until the proposal possibly is enacted, there is not much any of the non-participating Member States can do.

5. What Is Next for the FTT?

In the impact assessment released in 2013, the Commission discloses that there were four different alternatives by which the FTT could have been implemented. The Commission has named these alternatives as options A, B, C and D. Option A is the global FTT, option B is the EU-wide FTT, option C is the FTT through enhanced cooperation, and option D is adopting the FTT outside the framework of the EU treaties.²⁶⁴ As previously mentioned, at current time option A is not realistic, and option B likewise has failed only a few years ago. Presently the Commission is trying to make option C succeed. Nevertheless, it was curious to find that the Commission had the option D as a back-up plan all along.

The Commission analysed in the impact assessment that in order for the option D to be successful, it is crucial that a critical mass of Member States would participate in the system of taxation outside of the EU treaties. Firstly there has to be a large enough geographical area of countries participating, and secondly there has to be enough of these countries which represent essential countries in the financial markets. The problem with this plan is that the 11 Member States participating in the enhanced cooperation at that time showed no interest in such a system outside the EU treaties. Therefore the Commission comes to the conclusion that the option C is currently the only option left to achieve the wanted objectives.²⁶⁵ However, who can say what will happen in the future if the enhanced cooperation were to fail. Perhaps at present time the participating Member States would not be enthusiastic to enter such an agreement outside the EU treaties, but if option C fails, they may be willing to reconsider this alternative proposition.

At the beginning of 2015 the participating Member States vowed to improve their cooperation when trying to come to an agreement about the FTT. The participating Member States also wanted to do their best to keep the discussion EU-wide, enabling all EU Member States to contribute their opinions.²⁶⁶ There are several principal issues of the proposal still under negotiation. The first issue is about the territorial application of the FTT. The participating Member States still need to fine-tune certain details about the territorial application, because this is one of the most significant basis for determining

²⁶⁴ SWD (2013) 28 final, 13.

²⁶⁵ SWD (2013) 28 final, 14.

²⁶⁶ Hemmelgarn, Nicodème, Tasnadi and Vermote (n 121) 15.

which country acquires the revenue from the transaction tax. As an example, something that still needs to be figured out is the order in which the tax basis is determined. For example if the share is issued in Germany, but according to the residence principle France would be collecting taxes from the transaction, which of these two principles has priority.²⁶⁷

The second issue the Commission is still working on is the scope of the tax. The most important elements that the Commission has to keep in mind when determining the scope of the tax is the issue of liquidity of shares and bonds, and additionally the impact the tax would have on public debt. The ministers of the participating Member States even issued a statement in May 2014 indicating that they are considering excluding public bonds from the scope of the tax to make sure that the negative effects on public borrowing costs and investors are kept at a minimum. Therefore, to limit these negative effects to public financing costs, the Commission is considering excluding derivatives linked to public bonds. Adding an exclusion of these instruments to the FTT would have to be done expertly to prevent tax avoidance which would in turn lead to losses in tax revenue.²⁶⁸

Thirdly the Commission is still negotiating the taxable amount. There are certain short-term financial instruments that the Commission is considering to have a lower tax rate, such as repos, money market instruments, and certain derivatives. These could be taxed at a different rate by for example dividing the taxable amount with a time-dependent factor. Another issue about the taxable amount under consideration is whether it would be more beneficial to tax derivatives with a notional tax amount. Additionally another issue still under contemplation is whether the tax should be levied on gross transactions or on net positions at the end of a trading day. In their national financial transaction taxes some of the participating Member States, such as Belgium and Greece, have opted to go with gross taxation, while France and Italy have implemented an FTT using net taxation.²⁶⁹

Fourthly the excludable counterparts in a transaction chain are still under negotiation. What this means is that the principle rule of the FTT is that all transactions are taxed.

²⁶⁷ Hemmelgarn, Nicodème, Tasnadi and Vermote (n 121) 16.

²⁶⁸ Hemmelgarn, Nicodème, Tasnadi and Vermote (n 121) 16.

²⁶⁹ Hemmelgarn, Nicodème, Tasnadi and Vermote (n 121) 17.

However, in practice sometimes a single transaction is siphoned through a distributor and therefore there are technically two transactions which take place, first from the origin to the distributor, and then from the distributor to the investor. The Commission wants to avoid this type of double taxation within one transaction and is trying to come up with a sensible solution, possibly excluding these distributors from the scope of the FTT.²⁷⁰

Lastly the mode of tax collection is still under deliberation and the Commission is assessing a few different options. They could opt for a simple model, which would be based on self-administration and delegation of collecting responsibilities. Alternatively, they could base the tax collection on financial infrastructure, which would be a more centralised approach. The first model would be easy to implement quickly, and it would be cheap for the governments, but on the other hand there would not be a reliable monitoring system in place, which would in turn possibly lead to revenue losses. The second model would be expensive to implement at first, because the model would be implemented with an automated process. However, the possibility to monitor the transactions is much more reliable than with the first model.²⁷¹

The most recent meeting the participating Member States held was in December 2015. They discussed all the aforementioned unresolved issues, but several articles still remain unsettled. However, since the directive requires unanimous agreement of all the participating countries, there are still a lot of struggles ahead for them before unanimity can be reached. In the statement published in the press release in December 2015 the participating Member States declared that they intend on resolving all of the issued by the end of June 2016.²⁷² All in all, it can be said that this type of taxation is not meant as a temporary system of taxation, until the European economy has recuperated. If this tax is implemented, it will likely spread to other European countries. Who can tell if eventually this tax will spread globally, especially if the Eurozone implementation proves to be successful?

However, as can evidently be seen, the Commission still has several issued that need to be figured out before the participating Member States can come to an agreement about

²⁷⁰ Hemmelgarn, Nicodème, Tasnadi and Vermote (n 121) 18.

²⁷¹ Hemmelgarn, Nicodème, Tasnadi and Vermote (n 121) 19.

²⁷² Council (n 19) 5.

the final draft. To an outsider it may seem like there is little to no progress, but there has been a lot of thought and effort that has gone into the minor details of the proposal. However, it still remains to be seen, what the ten participating Member States will be deciding later this year. It does seem like they are at a crucial crossroads when it comes to the development of the FTT under enhanced cooperation. They have postponed the actual decision-making and enactment so many times already that the time to decide the future of the FTT is at hand. I find it hard to believe that this project can be postponed anymore and hopefully the decision about the FTT will actually be made by the end of June, whether the decision is about annulment of the proposal or about the participating Member States have finally reaching unanimity. With any luck the decision will not be another in a long line of postponements, so that the proposal can finally come to a resolution, one way or another.

6. Conclusions

There has been a trend lately to promote transparency in the area of taxation, and make international corporations pay their fair share. Especially recently, a lot of people are angered by the Panama Papers scandal, which unearthed significant tax evasion. Even prior to this there are already the multinational tax evasion agreements CRS and FATCA which have entered into force in recent years. So it seems that the legislators globally want to make the taxation of the financial sector both transparent and add taxation levied on financial transactions.

For the legislators lobbying for additional taxation, this political and economic climate is the opportune moment to do so. The economy is still recovering from the latest financial crisis and this effects even ordinary citizens daily. The financial institutions and investors are seen as rich entities who are seedily evading taxes, and should finally have to contribute their fair share. Even according to the latest survey, the participating Member States have the support of the European Union citizens backing them. However, sometimes the public opinion is easily influenced and the voters cannot always understand the wide-ranging consequences the so-called 'Robin Hood Tax' may have. Additionally, some have argued that this proposal has a significant risk of being implemented at a critically wrong time, and currently the proposal would be likely to be more damaging than beneficial.

The Commission has stated that one of the most important objectives of the FTT is to make the financial sector more stable and thereby prevent future crises. However, the issue may not be as simple as this. It is really uncertain whether the financial crisis is even preventable with the instruments implemented with the proposed FTT. History has proven that economic and legal experts have sometimes been near certain that a new legislation will have a specific effect. However, when this new legislation has been implemented the new regulation will actually not achieve the wanted outcome, but additionally it will end up causing additional problems on top of the existing ones. Therefore, even though the objectives may seem sincere, the legislators should always be careful and avoid being overly optimistic when assessing what type of impacts a new legislation may have. Therefore here it is very difficult to assess the impact the proposed FTT may have,

considering that the impact assessment published by the Commission seems to be somewhat overly optimistic.

It cannot be denied that the financial sector in the EU does seem under-taxed, especially considering the fact that it is exempt of VAT. The current taxation arrangements of the financial sector is fairly advantageous for the financial players and this has been the case for a long time. The politicians have been pressured to make the financial sector contribute more towards the common budget and now the political climate has shifted enough that they actually can finally make this change. I cannot blame them for being tempted to introduce additional taxation considering that the current proposal is estimated to bring total revenues of 34 billion euros. I find it also naïve to think that financial institutions would simply suffer their losses from the tax and lose revenue. I think the most likely outcome is that the financial institutions will trickle these costs to the consumers.

The financial transaction tax is by no means a new idea, but now it has merely been re-introduced because especially after the recent financial crisis there is currently a concrete reason to start adding taxation to the financial sector. So even though there is a lot of talk that the financial crisis was the starting point for concrete planning of a FTT, maybe the reality of situation is actually that the FTT was already an appealing idea to the governments prior to the crisis, but the crisis just enabled the planning to finally be taken seriously. Even in the Explanatory Memorandum of the 2011 proposal, the Commission has stated that The EU is currently reforming a lot of the regulation concerning the financial sector. However, it is difficult to assess whether the FTT would end up making the EU too unattractive to possible investors and there would be significant geographical relocation of the markets.

Relocation of the market place is just one of the several problems the FTT is estimated to face if it is implemented. The main problems caused by the FTT are extraterritorial effect, tax evasion, and double taxation. The Commission has belittled these problems and stated that they are acting within the limits of the EU Treaties. This has been proven by the case *UK v Council*, that until the FTT is implemented, the non-participating Member States will not have any means to apply for an annulment in the ECJ. Perhaps one of the reasons for this is that the Commission thinks that if they merely push the implementation of the

FTT through, the non-participating countries will not simply stand to tolerate these problems caused to them, but will have no other option but to join the FTT-zone. Thereby the Commission would get what it originally wanted, which is the implementation of an EU-wide FTT.

I suggest that another mode of implementation of a global FTT may be more successful than the current proposal. I would call it 'an almost global FTT'. Even though trying to reach an agreement on the current proposal has been lengthy and difficult, it is not impossible to find enough nations in the world to reach a nearly global agreement. Additionally, considering that recently there have been successful multinational agreements on sharing taxation information, such as the CRS and FATCA, it is not a completely precluded option that a majority of the countries may come to a similar agreement in the future concerning a nearly global financial transaction tax. In my opinion this type of model has the potential of being the most successful. The requirement for this model to succeed is that there needs to be the critical mass of significant countries participating in the agreement. These necessary countries are for example the United States, the UK, Germany, Hong Kong, and Singapore, since these countries host the biggest financial centres in the world.

However, it is still too soon to know what conclusion the participating Member States will come to by the end of June 2016, which is only a few months away. If the enhanced cooperation will fail, then maybe the planning towards a global or intra-EU multinational agreement is likely to begin. The Commission has already done a lot of work in planning the proposal for the past five years, and also there seems to be too much momentum for this type of taxation to stop the planning here. There have to be considerable reasons why even the participating Member States have not yet even after all these years given up on the idea of the FTT, but stayed committed to the proposal.

However, trying to remain impartial to the current proposal has been difficult. I believe that there are simply too many negative impacts and legal problems the FTT may have. All the legal and economic problems stated previously have too many and too extensive consequences for ten Member States to decide upon. I find it reckless that a minority group of EU countries are given permission to implement taxation that will effect non-participating Member States so severely. Therefore I come to the conclusion that the only

reasonable decision the participating Member States should come to in June is that either the current proposal needs to be altered significantly, or the planning of implementation must cease.