European Association of Co-operative Banks
Groupement Européen des Banques Coopératives
Europäische Vereinigung der Genossenschaftsbanken

2012 International Year of Cooperatives

Mr. Algirdas ŠEMETA
Member of the European Commission
B-1049 Brussels
Belgium
cab-semeta-commissaire@ec.europa.eu

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E-MAIL

EACB concerns with regard to enhanced cooperation in the area of Financial Transaction Tax

Dear Mr. Šemeta,

The Members of the European Association of Co-operative Banks (EACB) are following closely the developments regarding the Commission Proposal for a Council Directive on a common system of Financial Transaction Tax since last year.

Our members are seriously concerned that enhanced cooperation in the area of financial transaction tax (FTT) would not respect EU law and affect other Member States.

Should nevertheless a Proposal for a Directive on FTT be submitted, we would like to underline some aspects regarding the Proposal's substance.

We hope that you will find our comments helpful in your deliberations within the Council and kindly express our entire disposal to discuss our concerns further.

Should you have any questions, we would be happy to clarify the issues more precisely.

Yours sincerely,

Hervé GUIDER
General Manager

Volker HEEGEMANN
Head of Legal Department

Copy to:
European Commission
Mr. Manfred BERGMANN, Director Unit Indirect Taxation and tax administration
manfred.bergmann@ec.europa.eu

Conditions for enhanced cooperation

We have concerns that the legal conditions for enhanced cooperation according to Articles 326 and 327 of the Treaty on the functioning of the EU (TFEU) are not met.

- First, we see the considered measures conflicting with other EU law, what would create an obstacle for enhanced cooperation. In fact, the Capital Duty Directive concerning indirect taxes on the raising of capital 2008/7/EC generally bans indirect taxes on dealing with securities (see recitals[1] and article 5 and 6[2]). Any FTT would therefore not be in line with the Directive.

- Moreover we fear that the introduction of an FTT as enhanced cooperation would undermine the internal market, economic cohesion and constitute barriers to trade and competition between Member States (Article 326 (2)):

  - If there was an harmonised FTT within the group of participating Member States, competition vis-à-vis or with the non-participating Member States would be distorted. The divergence would create incentives to relocate business.

  - In this respect Recital 3 of Directive 2008/7/EC explicitly states that dealing with securities may distort competition.

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[1] See the following recitals of Directive 2008/7/EC concerning indirect taxes on the raising of capital, (Capital Duty Directive):

(2) The indirect taxes on the raising of capital, namely [...], the stamp duty on securities, [...], give rise to discrimination, double taxation and disparities -which interfere with the free movement of capital. The same applies as regards other indirect taxes with the same characteristics as capital duty and the stamp duty on securities."

(3) Consequently, it is in the interests of the internal market to harmonise the legislationon indirect taxes on the raising of capital in order to eliminate, as far as possible, factors which may distort conditions of competition or hinder the free movement of capital."

"(9) Apart from capital duty, no indirect taxes on the raising of capital should be levied. In particular no stamp duty should be levied on securities, [...]."

[2] Article 5 (2) (a) of this Directive stipulates that member states shall not charge any form of indirect tax whatsoever on the creation, issue, admission to quotation on a stock exchange, making available on the market (primary market transactions) or dealing in securities (secondary market transactions). This means that the imposition of any indirect tax on dealing in securities is explicitly prohibited. While Article 5 is headed "Transactions not subject to indirect tax", Article 6 deals with "Duties and value added tax". As a result, Article 6 - particularly also in view of the aforementioned recitals - can only be taken to mean that, notwithstanding Article 5, according to which no indirect taxes may be charged on dealing in securities, taxes other than indirect taxes, whether charged at a flat rate or not, may be levied on the transfer of securities. Otherwise, if Article 6 (1) (a) completely overturned Article 5 (2), there would have been no need for Article 5 (2) in the first place and the aforementioned recitals would also lose their meaning. This is also what the Commission itself said in a summary of the recast Capital Duty Directive published on its website: "However, Member States may charge certain transfer duties, duties in the form of fees or dues and value added tax (VAT)." Why else should the Commission have itself proposed, in its proposal for a Council Directive on a common system of financial transaction tax (FTT) and amending Directive 2008/7/EC (COM(2011)594), deletion of Article 6 (1) (a) of the Capital Duty Directive and insertion instead of a new Article 6a stating that the provisions of the Directive on a common system of financial transaction tax (FTT) should remain unaffected?

  - Due to the "Capital Duty Directive", the legal provisions on indirect taxation of financial transactions are already harmonised today. The suggested measures of enhanced cooperation in the area of Financial Transaction Tax could therefore lead to a fragmentation of the internal market.

- In addition, if the upcoming Proposal maintains the same principles as the original Proposal, we assume that third countries might be affected by the FTT due to the resident principle, since transactions between resident of participating states and non-participating countries will be affected. Thus, enhanced cooperation under such a rule would affect the rights of non-participating Member States and thus would not respect Article 327 TFEU.

  This distortion becomes reality in the case when the major European financial centre, the United Kingdom belongs to the non-participating countries.

  We consider very important to further analyse the impacts of the implementation of an FTT in only 11 Member States defined on the basis of the residence principle. Therefore we would kindly ask Member States to be aware of the importance of this issue.

Substance of the New Proposal

With regard to the substance of the new Proposal, we would like to draw your attention to the following issues:

- Due to the cooperative banking structure with local banks which need to transfer customer's order to a central bank, a large number of clients related financial transactions are performed over the books of cooperative banks and financial institutions involved. Under the current Commission Proposal released in 2011, the FTT will be levied at each stage of the settlement chain leading to the so-called "cascading effects". The EACB therefore would like to make sure that only the last financial institution in the value chain should pay the tax in the case of all the other institutions before act in the name of the last institution. In order to not only avoid the cascading effect, the EACB recommends implementing the levy of FTT at the level of Central Counter Parties (CCP) and Central Securities Depositories (CSD) e.g., Clearstream, Euro-Clear etc.. The FTT would occur at the level of the stock exchange and not at the level of the financial institution.

- The EACB thinks that repurchase agreement transactions are essential for the liquidity of a financial institution and not of speculative character. They are largely used in bank refinancing, in pension funds in order to change fixed to floating and were useful for investments funds in the liquidity crisis. From an economic perspective such transactions are comparable to a covered loan. Although day to day activities (plain vanilla loan, house mortgage, insurance contract) are tax exempt under the current Proposal, Repos and securities lending are not. We are particularly worry in the fact that each transfer and re-transfer would trigger the FTT. For example, in some repurchase agreements contracts, the FTT will be triggered up to four times within 24 hours, twice for the transfer on the evening and twice for the retransfer on the morning. By imposing FTT on repurchase agreements, the EU would create a tax bias in favour of unsecured lending. This would counteract the intended diminution in risky transactions and could result in a shortage of liquidity in the markets. The EACB therefore calls for the introduction of the tax exemption of the liquidity management collateralized by securities.

- The EACB suggests the introduction of tax exemptions for investments designed as part of personal pension schemes. There are many pension schemes in place in most of the EU-member states as for example tax provisioned products for retirement provision or life insurance provisions. The FTT could have negative impact on the performance of financial instruments designed as part these schemes as the capital charge could be too high, the rentability of these funds would be then negatively affected. E.g., based on model calculations of fund management companies, for a typical long-term savings plan (for smaller investors), the FTT might translate into a more than € 10.000 Euro - reduction of the final payout (compared to the situation without the FTT).

- The EACB thinks that the regulation should differentiate between speculative (trading) transactions and risk-reducing hedging transactions. FTT should only tax specific derivatives as the French concept which applies a tax on short Credit Default Swap on Sovereign Debt. In October 2009 the Commission3 stated that

[3] http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/20091020_563_en.pdf

derivatives play a useful role in the economy. They can be used to transfer (all or part of) the risks inherent to economic activity from economic agents who are not willing to bear them to those who are. It must be seen that derivatives are essential instruments for issuers of financial instruments in order to cover the risks and to adopt the performance of the issued financial instrument. Depending on the lifetime of the financial instrument a large number of hedging transaction could be triggered. Every hedging transaction would trigger FTT causing multiple burdens. Furthermore, real economy seeks for specific derivatives, in order to cover pricing, currency, credit or interest risks. However, according to the Commission´s Proposal and the broaden tax base of derivatives, FTT would increase costs of such derivatives dramatically.

- According to the current proposal, every transfer of ownership will be taxed by a FTT. Therefore, transaction between corporations like mergers and demergers are subject to FTT. This could lead to an inappropriate taxation of restructuring activities. Furthermore, the liquidity management within group structures particularly within cooperative groups will be charged unreasonably. FTT on intra-group would seriously hamper the economic activity. The EACB therefore suggests exempting intra-group transactions from the scope of the tax.