

# How the FTT works in specific cases and other questions and answers

*This document is established by DG Taxation and Customs Union ('Taxud') on the basis of the Commission proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax (COM(2013) 71). Its purpose is to provide replies to question/examples based on submissions to the Commission by Member States, stakeholders and the general public on the actual application of the tax and other issues raised since the tabling of the proposal by the Commission. This document cannot be considered a 'legal guideline'; it is provided for purely illustrative purposes and does not in any way bind the Commission of the European Union. DG Taxud accepts no responsibility or liability whatsoever with regard to the information in this document.*

*For a better understanding of the examples it might be useful to know that the following eleven Member States are considered to be participating in the process of enhanced cooperation to set up a common system of FTT amongst themselves: Austria, Belgium, Estonia, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain, while all the others are not considered participating in this exercise.*

## Contents

1.	<i>Basic transactions</i> .....	3
2.	<i>Liable persons</i> .....	9
3.	<i>Other undertakings as a financial institution (Article 2(1) point (8)(j))</i> .....	11
4.	<i>Taxable amount</i> .....	12
5.	<i>No party to a transaction is established in the FTT jurisdiction</i> .....	13
6.	<i>Issuance principle</i> .....	17
7.	<i>Application of a territoriality principle</i> .....	19
8.	<i>Link between the economic substance of the transaction and the FTT jurisdiction</i> .....	22
9.	<i>Multiple parties and exercising options</i> .....	24
10.	<i>Unknown counterparty</i> .....	27
11.	<i>Financial intermediation and cascading effects</i> .....	31
12.	<i>Exchange of financial instruments and intra-group transfers</i> .....	32
13.	<i>Public debt management</i> .....	33
14.	<i>Repurchase agreements and the management of collateral</i> .....	35
15.	<i>Occurrences of double taxation</i> .....	38
16.	<i>Classification and tax treatment of some transactions</i> .....	39
16.	<i>Purchase and sale</i> .....	42
17.	<i>Cancellation and rectification</i> .....	43
18.	<i>Ensuring payment</i> .....	43
19.	<i>Recovery of unpaid tax and administrative cooperation</i> .....	51

## 1. Basic transactions

### Example 1:

A Danish bank sells a stock issued in Germany to a German bank. How much FTT would this transaction attract?

**Both parties are taxed according to the residence principle, and the Danish bank is deemed to be established in Germany as it interacts with a financial institution from a participating Member State (Articles 4(1)(f) and 3(1)), Germany in this case. The tax is due to the German authority (Article 10(1)) and has to be paid by both parties to the transaction.**

### Example 2:

A German bank sells a stock issued in Germany to a Danish bank. How much FTT would this transaction attract?

**Both parties are taxed according to the residence principle, and the Danish bank is deemed to be established in Germany (Articles 4(1)(f) and 3(1)). The tax is due to the German authority (Article 10(1)).**

### Example 3:

A Danish bank sells a stock issued in Denmark to a German bank. What kind of FTT would this transaction attract?

**This case is similar to the case in example 1, except the product traded: Both parties are taxed according to the residence principle because the Danish bank is deemed to be established in Germany (Articles 4(1)(f) and 3(1)). The tax is due to the German authority (Article 10(1)). In this case, it does not matter where the product traded has been issued.**

### Example 4:

A German bank sells a stock issued in Denmark to a Danish bank. What kind of FTT would this transaction attract?

**This case is similar to the case in example 2, except the product traded: Both parties are taxed according to the residence principle because the Danish bank is deemed to be established in Germany (Articles 4(1)(f) and 3(1)). The tax is due to the German authority (Article 10(1)). In this case, it does not matter where the product traded has been issued.**

### **Example 5:**

A Czech bank sells German government bonds to a Swedish pension fund. Would this transaction be taxed?

**Yes. According to the issuance principle (Article 4(1)(g)), both parties will be deemed to be established in Germany and taxed (Article 3(1)). The minimum tax rate would be 0.1% of the market price of the transaction (Article 6).**

### **Example 6:**

A Czech bank sells German government bonds to a Czech private household. Would this transaction be taxed?

**Yes. According to Article 4(1)(g), the Czech financial institution (bank), which is party to a financial transaction in a financial instrument issued in the FTT jurisdiction (in Germany), is deemed to be established in Germany and taxed (Article 3(1)). The tax is due from the Czech bank (sale side) to the German tax authorities (Article 10(1)). The minimum tax rate would be 0.1% of the market price of the transaction (Article 6).**

### **Example 7:**

A branch of a German bank operating in Russia sells Russian government bonds to a Russian bank. Would both sides of the transaction pay the FTT or can Article 4(3) be applied?

**If a financial transaction is carried out by a Russian branch of a German bank with a Russian bank, both acting in their own name and for their own account, as a rule both sides of the transaction are taxable (Article 3(1) in connection with Article 4(1)(a) or (c) and (f)), unless they prove that there is no link between the economic substance of the transaction and the FTT jurisdiction, i.e. in this case the German territory (Article 4(3)).**

**The tax is due to the German tax authorities, (Article 10(1)). The minimum tax rate would be 0.1% of the market price of the transaction (Article 6).**

If Article 4(3) can be applied, how can the fact that there is no link between the economic substance of the transaction and the territory of Germany be proved?

**It is up to the person liable for payment of FTT to prove that there is indeed no link between the economic substance of the transaction and the FTT jurisdiction, i.e. in this case the German territory (Article 4(3)).**

**The participating Member States might decide how to define more precisely what "no link between the economic substance of the transaction and the territory of the participating Member State" means.**

### **Example 8:**

A Swedish pension fund purchases U.S. securities from a Slovenian bank. How would this activity be taxed?

**Further to Article 4(1)(f), the Swedish pension fund is deemed to be established in the FTT jurisdiction when involved in financial transactions with parties established in the FTT jurisdiction (Slovenia in this case). Both financial institutions will be taxed in line with Article 3(1) and the tax will accrue to the Slovenian tax authorities (Article 10 (1)). The minimum tax rate would be 0.1% of the market price of the transaction (Article 6).**

### **Example 9:**

A German company (not a financial institution under the FTT) sells Finnish government bonds to a Finnish bank. Would this activity be taxed?

**Yes. The Finnish bank transacts with a party established in a participating Member State (Article 3(1) and 4(1) (f)). Only the buy side is taxable in Germany. The minimum tax rate would be 0.1% of the market price of the transaction (Article 6).**

### **Example 10:**

A Danish bank sells a derivative on a French trading platform to a German bank. Would this transaction attract FTT?

**It is assumed that the Danish bank uses its Danish authorisation to trade on the French platform. The Danish bank is then deemed to be established in France and would be liable to French FTT (Articles 3(1) and 4(1) point (b)). The German bank will be authorised to act as such in Germany and will be liable to German FTT (Articles 3(1) and 4(1) point (a)). The minimum tax rate for this derivative transaction would be 0.01% of the notional value underlying this derivative (Article 7).**

### **Example 11:**

A Private company incorporated in France issues its shares in the French central securities depository (CSD). A French bank, a direct participant in the French CSD, purchases these shares on the primary market and holds them on its account with the French CSD.

A Czech private household purchases shares of the French company through a Czech bank which itself buys these shares from another French bank (secondary market transaction) which itself has to first buy the shares from the French bank who holds them in the French CSD. How (i.e. in which Member State and through what technique) and how many times would the FTT be paid?

**As a general rule, the issuance of shares as a primary market transaction is not taxed (Article 3(4) (a)). This also holds for the activity of underwriting and subsequent allocation**

of financial instruments in the framework of their issue. It is assumed that the sale of the shares from the first to the second French bank forms part of the "subsequent allocation" referred to in Article 3(4)(a) in the context of a primary market transaction.

Transactions not qualifying as such primary market transactions would thus be taxed under the general rules.

The purchase of the shares by the Czech private household as well as the own-account transactions (purchase and sale) of the Czech bank and the sale of the shares by the French bank being counterparty to the Czech bank would be taxable. The minimum tax rate would be 0.1% of the market price of the transaction (Article 6). In all cases (purchase and sale by the Czech bank and sale by the second French bank), the tax would accrue to the French tax authorities (Articles 3(1) and 4(1)).

In case the French bank did not buy (and sell) for its own account but acted only in the name or for the account of the Czech bank it might be also relevant to check if Article 10(2) could be potentially applicable. In the affirmative, the purchase and sale by the French bank would not constitute a taxable event.

**Example 12:**

A Portuguese bank purchases, in its own name but on behalf of a Spanish bank shares in the amount of EUR 500 000 from a German bank. How would this transaction be taxed?

All three banks are financial institutions established in a participating Member State. According to the proposal, the German is party to a financial transaction with the Portuguese bank, and the Portuguese bank is party to a transaction with the Spanish bank. In principle all parties would be liable to FTT in their country of establishment (The Portuguese bank two times). However, in view of Article 10(2), the Portuguese bank is not liable to FTT and the liability of the Spanish bank covers the liability of the Portuguese bank. The Spanish bank is liable to FTT in Spain. Additionally, the German bank is liable to FTT in Germany. The taxable amount for the German bank is the consideration (price) obtained from the Portuguese bank for the transfer.

- a) Variation on basic case: The Portuguese bank buys the shares from the German bank on behalf of and in the name of the Spanish bank.

There is one transaction between the German and the Spanish bank (as the Portuguese bank acts in the name of the Spanish bank). In principle all three banks would be liable to FTT (Article 10(1)), but in view of Article 10(2) only the German and the Spanish bank are liable to pay FTT to the tax authorities in their respective countries. The chargeability occurs at the moment of the purchase/sale (Article 5) and the taxable amount is in both cases the price (consideration) (Article 6).

**Note also that where the tax due has not been paid within the time limit set out in Article 11(5) to the respective tax authorities, the other legal possibilities of tax collection have to be examined (including possible recourse to joint and several liability – Article 10(3)-(4)). This in particular includes joint and several liability of the Portuguese bank on account of that transaction.**

**Example 13:**

Private investor A living in Slovenia purchases from bank D, based in Slovenia, index certificates for the price of EUR 50 000 (with a nominal value of EUR 40 000).

**The index certificates seem to be transferable securities under MiFID (Article 4(1) point (18)) and thus not derivatives, but financial instruments for the FTT proposal (Article 2 (3)).**

**D would be liable to FTT in Slovenia on EUR 50 000 (Article 6) with chargeability at the moment of the sale.**

Modification of basic case:

- a) D is based in Ireland.

**D is liable to pay FTT in Slovenia (Article 3(1) and 4(1) point (f)).**

- b) A, living in Ireland, purchases the certificates from D based in Ireland. The certificates refer exclusively to the Italian share index FTSE MIB.

**FTT liability will as a rule depend on where the certificates are issued (Article 2(1) point (11) and 4(1) (g). In case the certificates are issued in Italy for example (by a person with a registered seat in Italy), D would be liable to Italian FTT.**

**Application of the anti-abuse rules of the proposal might need to be checked.**

- c) A, living in Ireland, purchases the certificates from D based in Ireland. The certificates were issued by a bank based in Italy.

**See answer to point (b).**

**Example 14:**

Private investor A residing in Belgium buys shares in an equity fund directly from investment company B based in Belgium for EUR 50 000.

**The units of UCITS are financial instruments and the sale/purchase thereof would be taxable under the normal rules of the proposal, i.e. B as a financial institution (Article 2(8) point (e)) would be liable to FTT in Belgium (the taxable amount is the price).**

Variations on the basic case:

- a) A, living in Poland, purchases shares not from B but from bank D, based in Poland.

**We suppose an own account transaction of D; D would be liable to FTT in a participating Member State if the units are issued in that participating Member States (supposedly BE).**

- b) B is based in Poland.

**Article 4(1) point (f) applies and in principle the FTT would be due in Belgium by B. However, account has to be taken of Article 3(4) (a) on primary markets transactions which include such transactions in shares and units of collective investment undertakings.**

- c) A and B are based in Poland. The shares in the fund are exclusively from undertakings based in Belgium.

**B would be liable to FTT in a participating Member State if the units are issued in that participating Member States (it does not depend on the assets of the fund). It would then also need to be checked whether the primary market transaction exception applies.**

**Example 15:**

Investment company B based in Luxembourg sells shares at EUR 50 000 from one of its equity funds to bank D, based in the UK.

**No FTT would be due in a participating Member State (Art.3(1) – neither residence, nor issuance principle apply: Article 4(1)).**

Variations on the basic case:

- a) The shares sold come from an undertaking based in Portugal.

**The issuance principle would apply (Article 4(1) point (g)) and both parties would be liable to FTT in Portugal. However, the application of Article 3(4) (a) on primary markets transactions would need to be checked.**

- b) All the owners of shares in the equity fund live in Portugal.

**No relevance for the solution to the basic case.**

- c) A continuously changing section of the owners of shares in the equity fund is based in Portugal.

**No relevance for the solution to the basic case.**

**Example 16:**

Corporation X, based in Estonia, manages the assets of its shareholders, who live in Estonia. X purchases Finnish government bonds at the price of EUR 500 000 from bank A in Finland.

**Both X (assumed to be a financial institution) and A would be liable to FTT in Estonia to be calculated on the price (Article 3(1), 4(1) (f) and 6).**

Variations on the basic case:

- a) X moves its headquarters to Finland before the purchase.

**No FTT due in a participating Member State. However, the general anti-abuse rule might apply.**

- b) X moves its headquarters to Finland before the purchase. Shareholder B, who holds 95% of the shares in X, moves to Sweden before the purchase.

**See (a).**

**Example 17:**

Bank X, a limited partnership based in Germany (Gesamthandsvermögen – joint ownership), manages the assets of its shareholders, who live in Germany. X purchases Luxembourg government bonds at the price of EUR 500 000 from bank A in Luxembourg.

**Both X (assumed to be a financial institution) and A would be liable to FTT in Germany to be calculated on the price (Article 3(1), 4(1) – (f) in the case of bank A - and 6).**

Variations on the basic case:

- a) X moves its headquarters to Luxembourg before the purchase.

**No FTT due in a participating Member State. However, the general anti-abuse rule might apply.**

- b) X moves its headquarters to Luxembourg before the purchase. Shareholder B, who holds 95% of the shares in X, also moves to Luxembourg before the purchase.

**See (a).**

## 2. Liable persons

**Example 18:**

The definition of “Financial institution” should not lead to some distortionary effects or to some circumvention of the tax by shifting, to transactions where a financial institution is not involved. In case of listed instruments, there may be situations in which no “financial

institution” as defined in Article 2 of the Directive is involved in the transaction. In case of non-listed instruments, in many situations no “financial institution” is involved (but mainly Notary Public, or direct transaction between the parties, etc).

How would the FTT apply in these cases? Last, when shares are exchanged between two different entities with no intermediaries, sending the order to their depositary entity, would this transaction be taxed?

**The Commission proposed to tax only financial transactions (where at least one party to the transaction is established or deemed to be established in the territory of a participating Member State) and that a financial institution established in the territory of a participating Member State is 'involved'<sup>1</sup> in the transaction (Article 3(1) of the FTT proposal).**

**Thus, in particular, when shares are exchanged between different entities with no intermediaries, sending the order to their depositary entity, such transaction would be out of the scope of the FTT if there is no involvement of a financial institution as defined in Article 2(1) point (8) of the FTT proposal.**

**The condition of the involvement of a financial institution in the transaction subject to FTT stems from two of the objectives of the proposal:**

- **ensuring that financial institutions make a fair and substantial contribution to covering the costs of the recent crisis and**
- **creating a level playing field with other sectors from a taxation point of view.**

**In view of the broad definition of "financial institution" in the FTT proposal the above definition of taxable transactions should cover most of the financial transactions envisaged by the proposal and leave little or no room for substitution of a financial institution to a non-financial.**

**It has never been the aim to tax transactions directly between citizens or between enterprises with a limited volume of financial transactions or between citizens and these enterprises, without any involvement of a financial institution. Moreover, the bulk of transactions is between financial institutions themselves. It is also to be noted that as far as an important part of the taxable financial instruments is concerned (shares, bonds and related securities), the scope of the proposal is limited to "transferable" securities, meaning those classes of securities which are negotiable on the capital market (MiFID – EP and Council Directive 2004/39/EC, Section C of Annex I and Article 4(1) point (18)).**

---

<sup>1</sup> A financial institution is involved in a financial transaction where it acts as a party to the transaction, acting either for its own account or for the account of another person, or is acting in the name of a party to the transaction.

### 3. Other undertakings as a financial institution (Article 2(1) point (8)(j))

#### **Example 19:**

Company E based in France acquires shares at a purchase price of EUR 500 000 from Company F based in France.

**We understand that neither company E nor F is a financial institution in the meaning of Article 2(1) point (8). The transaction takes place with no involvement of a financial institution, there is thus no FTT due (Article 3(1)).**

Variations on the basic case:

- a) Through a correction of the balance sheet, the following comes to light after the transaction: In E, which specialises in the acquisition of holdings in undertakings, financial transactions accounted for over 50% of the net annual turnover in each of the last three years.

**E was not considered to be a financial institution at the date transactions occurred. Now E becomes one under Article 2 (1) point (8) (j) as of the date it is considered to be a financial institution in the meaning of the proposed directive. The FTT situation will have to be rectified as of this date following the general rules.**

- b) E, which specialises in the acquisition of holdings in undertakings, was considered a financial institution. Financial transactions accounted for over 50% of its average net annual turnover. This was no longer the case in the last two consecutive years. E did not request to cease being considered a financial institution.

**Without request, E will still be qualified as a financial institution (Article 2(3) point (d)). The request could however still be filed according to national rules.**

- c) E is based in China; financial transactions account for over 50% of its average net annual turnover.

**E is considered to be a financial institution (assuming Article 2(1) point (8) would apply and here it seems reference is made to Article 2(1) point 8 (j)). To conclude whether E would be liable to FTT, the other provisions of the proposal have to be considered. In case of the purchase of French shares from a French company, which is not a financial institution, E would be liable to pay French FTT (Article 3(1) and 4(1) point (f)).**

- d) E is based in China. Financial transactions account for over 50% of its average net annual turnover. E goes bankrupt before it pays the financial transaction tax.

See answer to point (c); in case E does not pay the FTT due to a participating Member State within the time limit set out in Article 11(5), the other legal possibilities of tax collection have to be examined (including possible recourse to joint and several liability – Article 10(3)-(4)).

- e) E and F are based in China. Financial transactions account for over 50% of E's average net annual turnover. The shares sold come from a company based in Austria.

**E and F are thus assumed to be financial institutions trading in shares issued in a participating Member State (in this case in Austria): both E and F would be liable to pay Austrian FTT based on the issuance principle (Article 3(1) and 4(1) point (g)).**

#### 4. Taxable amount

##### **Example 20:**

Bank A agrees on a rate swap with bank B, both banks being based in Slovenia. For the duration of the rate swap, A undertakes to pay B a fixed interest rate on the amount of EUR 500 000. In return, A receives a variable interest rate from B on the amount of EUR 400 000.

**A and B are both liable to FTT in Slovenia. The taxable amount is the notional amount and in case of more than one notional amount, the highest should be used (Article 7), i.e. 500 000 EUR. The FTT would become chargeable at the time of the conclusion of the contract (Article 5).**

##### **Example 21:**

Company C based in Slovakia signs a derivative contract having a nominal value of EUR 1 000 000 with bank X based in Slovakia.

**We assume that C is not a financial institution; X would be liable to FTT in Slovakia (Article 3(1)). The taxable amount is the notional amount (Article 7). The FTT would become chargeable at the time of the conclusion of the contract (Article 5).**

- a) C sells the derivative on to bank Y based in Slovakia for EUR 1 000.

**The purchase and sale of a derivative contract is a financial transaction (Article 2(1) point (2) (a)). Y would be liable to FTT in Slovakia. The taxable amount is the notional amount referred to in the contract (1 000 000 EUR). The FTT would become chargeable at the time of the purchase of the contract (Article 5).**

- b) Further scenario for (a): Thanks to an increase in the basic value, Y can sell on the derivative contract for EUR 50 000 to bank Z, based in Slovakia.

**See a): both parties are liable to FTT in Slovakia. The taxable amount is notional amount referred to in the contract (1 000 000 EUR). The FTT would become chargeable at the time of the sale/purchase of the contract (Article 5).**

- c) Variation of (a): Thanks to an increase in the basic value, Y, based in Luxembourg, can sell on the derivative contract for EUR 50 000 to bank Z, also based in Luxembourg.

**There is no mention of trading on an organised platform, consequently the issuance principle would not apply (Article 4(1) (g)), thus no FTT is due in a participating Member State on that transaction.**

**Example 22:**

Company C based in Greece issues a bond as an own issue and sells the bond with a nominal value of EUR 1 000 000 at the price of EUR 1 000 000 to bank X, based in Greece.

**We suppose that C is not a financial institution which issues bonds. In principle, X would not be liable to FTT in Greece to be calculated on the price paid or owed as this seems to be a primary market transaction. The sale of the corporate bonds issued in Greece to the first buyer is not subject to FTT (Article 3(4)).**

**5. No party to a transaction is established in the FTT jurisdiction**

**Example 23:**

A Danish person that is not a financial institution buys a Danish unquoted stock directly from a UK branch of a German financial institution. Would this transaction attract German FTT?

**The UK branch of the German financial institution would indeed be liable to pay German FTT, except if it proves that there is no link between the economic substance of the transaction and the territory of any participating Member State (Articles 3(1) and 4(1) and (3)).**

**Example 24:**

A Danish industrial company that is not a financial institution buys a stock from a Danish bank. The stock is issued in Germany. Would this transaction attract German FTT?

**According to the issuance principle, only the Danish bank will be taxed (Articles 4(1)(g), and Article 3(1)). The tax is due to the German authority (Article 10(1)).**

**Example 25:**

A Czech UCITS enters into credit default swap with Polish bank. According to EMIR the UCITS will have to clear this derivative contract through a CCP, e.g. based in France. The UCITS will have to enter into back to back transactions with e.g. British bank (which is a clearing member in the CCP). The British bank will clear the derivative contract as a principal (on behalf of the UCITS). The Polish bank will have to act similarly (back to back transaction with clearing member). How would these transactions be taxed?

**It is supposed that the transaction is OTC and that all clearing members are established outside the FTT jurisdiction.**

**The CCP is out-of-scope of this tax and the proposed directive (with some exceptions) does not apply to it. All other financial institutions are not established in a participating Member State. Consequently, no FTT would be due (Article 3(1) and a "look-through approach" for the transactions with the CCP applicable).**

**Example 26:**

A Danish bank sells over the counter a stock issued in Germany to a Polish bank. Would this transaction attract German FTT although both financial institutions are not established in one of the participating Member States and the transaction does not take place there either?

**Yes, this transaction would attract German FTT as the financial product traded has been issued in Germany (Article 4(1)(g)).**

**Example 27:**

A Danish bank issues and sells over the counter a derivative to a Polish bank that gives the latter the right to purchase until a given date shares of a German company. Would this transaction attract German FTT although both financial institutions are not established in one of the participating Member States and the transaction does not take place there either?

**This transaction does not attract German FTT as neither one of the financial institutions is deemed to be established in Germany nor has the product traded been issued there.**

**Example 28:**

A Polish bank has bought (over the counter) an option issued by a Danish bank that gives the former the right to purchase shares of a German company at a given strike price. The Polish bank now executes this option, i.e. it buys from the Danish bank these shares at the strike price. Would this execution of the option trigger German FTT?

Indeed, according to Article 4(1)(g) this execution of the option would trigger German FTT as it consists of a purchase and sale of a financial instrument issued in Germany.

**Example 29:**

Two US banks trade a stock in a French company. How would this transaction be taxed?

When the trade takes place OTC or on a trading venue outside the FTT jurisdiction, the two US banks are taxed according to the issuance principle (Article 4(1) (g)). In case the trade took place on a trading venue in France, the banks would be taxed according to the residence principle (probably according to Article 4(1)(a)). In both cases, the tax would be due to the French authorities (Article 10(1)). In case the banks traded the stocks from abroad (or with the help of a branch within the Member State where the transaction takes place) on a trading platform in another participating Member State the tax would be due in that Member State (Article 4(1)(b) or (e)).

**Example 30:**

A UK investment fund enters into an OTC contract for difference (CFD) with a UK bank using a French equity as the underlying reference security. The transaction is not hedged with the underlying equity.

Questions:

- a) Is there an FTT charge?

Financial contracts for differences (CFDs) are financial instruments as defined in Section C of Annex I to Directive 2004/39/EC (MiFID) and thus covered by Article 2(1) point (3). Transactions with those instruments are in the scope of the tax.

There is no FTT due because there is no financial institution deemed to be established in the FTT jurisdiction involved in the derivatives transaction (Articles 3(1) and 4(1)(a)-(g)). It is to be noted that the issuance principle does not apply as the instrument is not issued in the FTT jurisdiction (Article 2(1)(11) and Article 4(1)(g)). Here, only the underlying reference security appears to be issued in the FTT jurisdiction (France). Attention needs however to be drawn to the possible use of the general anti-abuse rule (Article 13).

- b) Does this change depending on the motivation for making the trade?

The motivation for making the trade is not in itself a determinant factor for the purposes of tax liability. However, the general and specific anti-abuse rule may be applicable (Articles 13 and 14).

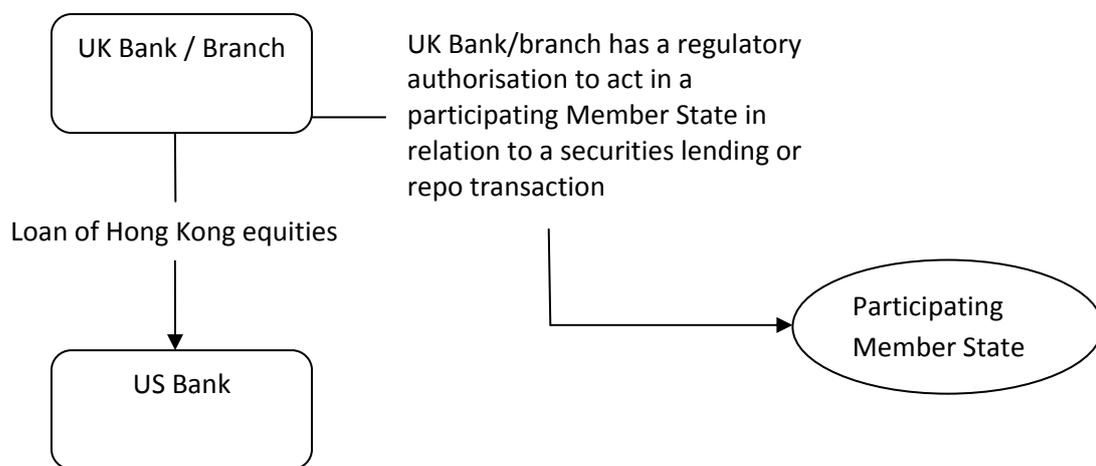
- c) Does this change if it is hedged with the underlying cash equity?

In this case, a financial transaction (e.g. a purchase/sale) in French equities between for example two UK financial institutions would be taxable at each side of the transaction (Articles 3(1) in connection with 4(1)(g) and 2(1) point (11)). Both financial institutions would be deemed to be established in France and liable to pay FR FTT (Article 10(1)).

**Example 31:**

Article 4 appears to suggest that a firm in a non-participating MS who exercises passporting rights in a participating MS through a notification under Art 31 MiFID will, to the extent that any services/activities permitted under that notification are performed by that firm, be caught by the FTT even where a transaction occurs outside of that, or any other, participating MS (e.g. where they are entitled to perform the same services/activities in the US).

Put another way, despite the fact that the transaction takes place between financial institutions outside the zone, using the non-FTT zone issued instruments, the present drafting of conditions (a) and (b) within Article 4 does not allow one to wholly conclude that such a transaction should remain entirely outside the scope of the Directive. This is because the UK bank has an authorisation to carry out that transaction via a branch within the zone.



Three cases: in case one a UK bank lends overnight equities issued in the Hong Kong to a US bank. In case two it would be a UK-based branch of a bank headquartered in Germany. In case three it would be the German branch of a bank headquartered in the UK.

Is the UK – US transaction subject to FTT? And if so: How much? Payable by whom? To who?

**Case 1: The financial institution with a headquarter in a non-participating Member State using "passport rights" needs to operate in a participating Member State for Article 2(1) point (2)(b) to apply. This requirement is referred to on p. 10 last paragraph of the Explanatory Memorandum to the proposal. As this is not the case in case 1, this transaction would not constitute a taxable event.**

**Case 2: As a branch in a non-participating Member State (UK) of a financial institution with a HQ in a participating Member State (e.g. Germany) transacts, Article 4(1) (a) or (c) will apply and, as a rule, FTT would be applicable according the normal rules (in that participating Member State: Germany). In that case, both the financial institutions will be liable to pay FTT to the German tax authorities (Article 10(1)), unless the financial institutions liable to pay the tax prove that there is no link between the economic substance of the transaction and the territory of any participating Member State (Article 4(3)).**

**Case 3: In case a branch in a participating Member State (Germany) of a financial institution with a HQ in a non-participating Member State (e.g. UK) transacts, and assuming there is no involvement of a trading platform in the transaction with the US bank, Article 4(1) (e) will apply and, as a rule, FTT would be applicable according to the normal rules (in that participating Member State: Germany). In that case, both the financial institutions (the German branch of a UK-headquartered financial institution and the US bank) will be liable to pay FTT to the German tax authorities (Article 10(1)).**

## **6. Issuance principle**

### **Example 32:**

Non-FTT FI buying USD bond issued by FTT-entity on the US-market based on an OTC-deal and recorded internally by a US custodian.

**According to Articles 3(1) and 4(1) (g), the non-FTT financial institution, which is party to a financial transaction in a financial instrument issued in the FTT jurisdiction, would be deemed to be established in the participating Member State in the territory of which such instrument was issued (where the reference entity for the bond is residing) and taxed there (assuming the counterparty is not established in the FTT jurisdiction).**

**The tax is due to the tax authorities of the participating Member State in the territory of which the financial institution is deemed to be established (Article 10(1)).**

**If the counterparty is however established in the FTT jurisdiction, the non-FTT financial institution would be deemed to be established in the participating Member State in the territory of which the counterparty is established and the tax will be due to the tax authorities of that State (Articles 4(1)(f), 10(1)).**

**According to Article 11(1), the participating Member States will lay down registration, accounting, reporting and other obligations intended to ensure that the FTT due to the relevant tax authorities is effectively paid. They would also adopt necessary measures to**

ensure that every person liable for payment of FTT submits to the tax authorities return setting out all the information needed to calculate the FTT due (Article 11(3)).

Recourse to mutual cooperation mechanisms with the administrations of non-participating States for the tax collection purposes might be envisaged. Negotiations with third countries and/or third country financial intermediaries could be needed.

Moreover, the proposal confers relevant delegated powers to the Commission, notably on taxpayer obligations (Article 11(2)) and the Commission may also adopt implementing acts providing for uniform methods of collection of the FTT due (Article 11(5)).

The FTT proposal does not provide rules on the matching of parties. However, for instance, the trading venue might want to apply relevant IT tools and other solutions to identify the FTT liability of the counterparty in the matching process.

**Example 33:**

Non-FTT FI providing UCITS or AIF funds in a non-FTT country containing 25%, 50%, 75% and 100% securities issued in FTT countries.

The question would require a clarification as to what is meant by "providing" (would it be a primary market transaction or not) and as to the country of establishment of the UCITS and AIF funds, as well as on the place of establishment of the counterparties.

**Example 34:**

Company C based in Greece issues a bond as an own issue and sells the bond with a nominal value of EUR 1 000 000 at the price of EUR 1 000 000 to bank X, based in Greece.

**We suppose that C is not a financial institution which issues bonds. In principle, X would not be liable to FTT in Greece to be calculated on the price paid or owed as this seems to be a primary market transaction. The sale of the corporate bonds issued in Greece to the first buyer is not subject to FTT (Article 3(4)).**

Variations on the basic case:

- a) X is based in Malta. After the purchase it sells the bond in a further transaction to bank Z based in Luxembourg, for the price of EUR 900 000.

**In principle, X would not be liable to pay FTT in Greece for the first transaction in case it was a primary market transaction (Article 3(4)). For the subsequent transaction, in principle both parties are liable to FTT in Greece (Article 4(1) point (g)) to be calculated on the price paid or owed (Article 6).**

- b) X is based in Malta. After the purchase (after the issue, C moved its headquarters to Malta), X sells the bond on to a bank based in Luxembourg, for the price of EUR 900 000.

**A strict literal interpretation of Article 4(1) point (g), "financial instruments (...) issued within the territory of that Member State", would imply that the bonds are considered to be issued in Greece. In this case, Greek FTT would be due.**

- c) C receives from its subsidiary D in the USA a loan of EUR 1 000 000 and does not issue a bond. Subsidiary D issues a bond with a nominal value of EUR 1 000 000 and sells it at a price of EUR 1 000 000 to a bank based in the USA.

## 7. Application of a territoriality principle

### **Example 35:**

A financial institution is deemed to be established in the territory of a participating Member State when the following priority condition is met in accordance with Article 4: a) it has been authorised by that country's authorities to act as such, b) it is authorised or otherwise entitled to operate, from abroad, as a financial institution in that country's territory.

- a) The financial institution is therefore first and foremost deemed to be established in the territory of the participating Member State that authorised it. What does that mean?

**A financial institution is deemed to be established in the territory of a participating MS when any of the conditions in Article 4(1) are fulfilled. The conditions apply in a descending order – starting with point (a).**

**The financial institution is deemed to be established in the participating MS where it has been authorised to act as such. It means that when the financial institution is liable to pay FTT (Article 3(1)), it will be liable to pay the tax to the tax authorities of the participating MS where its authorisation was granted (Articles 4(1) and 10(1)).**

- b) Is a financial institution that benefits from a sectoral equivalence regime (authorisation in the United States of America recognised by way of equivalence in Europe) considered to be authorised?

**Article 4(1)(a) refers explicitly to an authorisation granted by the authorities of a participating Member State.**

**An equivalence regime would in practice appear to require a kind of authorisation in the Member States where operations are made (current situation). In that case, Article 4(1)(a) would apply again.**

- c) What does 'from abroad' mean? From a non-participating Member State or from a third country?

**The term "from abroad" in Article 4(1)(b) refers to financial institutions with headquarters in a non-participating MS that operate on a basis of a "passport" in the FTT jurisdiction (cf. e.g. Article 31 of Directive 2004/39/EC). The financial institution acting from a third country would normally require an authorisation, as referred to in Article 4(1)(a). See also page 10 of Explanatory Memorandum to the FTT proposal.**

- d) A financial institution established in the United States is authorised to act as such in the participating Member States and acquires securities covered by the tax and its authorisation on behalf of a non-financial company established in Germany. On the basis of the priority principle of territoriality, is this financial institution considered to be established within the enhanced cooperation? And what if it acquires the securities for itself?

**We suppose that the US financial institution is authorised to operate as financial institution by the authorities of one (or different) participating MS (current situation). It will be deemed to be established in the territory of that (these) participating MS (Article 4(1)(a)). If it acts in its own name, as a rule it will be liable to pay FTT there.**

**Assuming the US financial institution acts in the name and for the account of a German company (non-FI), it will be also liable to pay FTT to the tax authorities of the participating MS of its authorisation (general rule: Article 10(1), as Article 10(2) does not apply if the transaction is the name or for the account of a non-financial institution).**

- e) To which participating Member State is it connected, since its authorisation is valid for any European country?

**The US financial institution will be deemed to be established in the territory of the participating MS of its authorisation under Article 4(1)(a).**

- f) If the answer is no, should it be deemed to be situated in Germany pursuant to Article 4(1)(f) since its client is a non-financial company located in Germany?

**The conditions in Article 4(1) apply in a descending order. The US financial institution will be deemed to be established in the territory of the participating MS of its authorisation (Article 4(1)(a)). Article 4(1)(f) would only apply when points (a)-(e) are not applicable, which here is not the case (current situation).**

- g) A financial institution is established in Italy and has been authorised by the Italian authorities to act as such. Its branch in Austria carries out financial transactions. Is the financial institution deemed to be established in Italy or in Austria for these transactions? Does the branch operate under the Italian authorisation which applies mechanically to all Member States?

**In respect of transactions carried out by an Austrian branch of the Italian financial institution, and covered by the Italian authorisation, as a rule Italian FTT would be due. The financial institution is deemed to be established in Italy (Article 4(1)(a)).**

h) What if it is established and authorised in Ireland?

**Assuming an Austrian branch of an Irish financial institution carries out financial transactions, covered by the Irish authorisation, as a rule Article 4(1)(e) would be applicable for the transactions carried out by the branch (assuming the financial institution does not operate from abroad).**

i) In the light of these examples, is there not a risk of the country of authorisation being chosen on tax grounds (institutions choosing to establish themselves outside the Financial Transaction Tax area/in a country with low rates)?

**Yes, there is a potential risk of such relocation, but the anti-avoidance (and abuse) measures embedded in the FTT proposal should tackle such relocation to the largest extent possible.**

**Example 36:**

Pursuant to Article 4(1)(f), a financial institution acting on behalf of a party to a transaction with another financial institution established in a participating Member State or with a party (not being a financial institution) established in a participating Member State, is deemed to be established. Apparently (f) does not lay down an order or priority among the connecting factors.

a) For example, a financial institution established in China acts for a Spanish financial company in a transaction with another financial institution established in France. Is the financial institution established in China considered to be established in China, Spain or France?

**The financial institution established in China is acting in the name of a financial institution established in Spain.**

**The transaction is thus between the financial institution in Spain and the financial institution established in France.**

**FTT due in Spain and France by both parties (Article 4(1)(a)). The financial institution in China is not liable (Article 10(2)).**

b) A financial institution established in Brazil acquires securities via a financial institution established in Portugal from a non-financial company established in Italy. Are the operations taxed at the Portuguese rate, or on the contrary at the Italian rate in view of the counterparty established in Italy? Or does part of the operation have to be subjected to the Italian rate and the other part to the Portuguese rate?

**The financial institution in Portugal acts in the name of the financial institution in Brazil (see introductory sentence). The transaction is between the financial institution in Brazil and the non-financial institution in Italy.**

**The financial institution in Brazil is liable to FTT in Italy (Article 4(1)(f)). The financial institution in Portugal is not liable (Article 10(2)).**

- c) A non-financial company established in Belgium sells securities via a financial institution established in Spain to a financial institution established in China. Is the financial institution established in China deemed to be established in Spain or in Belgium?

**The financial institution in Spain acts in the name of the non-financial institution in Belgium. The transaction is between the non-financial institution in Belgium and the financial institution in China.**

**The financial institution in China is liable to Belgian FTT (Article 4(1)(f)).**

**The financial institution in Spain is liable to Spanish FTT (Articles 4(1)(a) and 10(1)(b)).**

**Example 37:**

A group comprised of non-financial companies established in Greece, Estonia, Slovenia and Slovakia acquires securities via a financial institution established in France. The financial institution is liable for the tax, which is calculated at the French rate.

By basing the territoriality of the tax on the financial institution, the system is liable to limit the taxation to the rates of those participating Member States that have fewer financial institutions when the acquirers are not financial institutions or they do not carry out their transactions via a financial institution in a country that is not a participating Member State.

Does the Commission not think that this system has a distortive effect when viewed against the background of a freedom to fix rates? It incites clients to go through a financial institution located in the country with the lowest rate.

**It is tradition in indirect taxes (directives) to leave room for manoeuvre for MS and to fix minimum rates.**

**The Commission however believes that competition effects in financial markets will result in no or very small rate differences between participating MS.**

## 8. Link between the economic substance of the transaction and the FTT jurisdiction

### **Example 38:**

Non-FTT FI selling domestic shares to FTT FI's branch in non-FTT country over the counter (e.g. Nordea bank selling joint ICT company shares to Commerzbank in London) and who should in this kind of case deliver information and in which form regarding the potential "no economic link" situation.

**Further to Article 4(1)(f), a non-FTT financial institution is deemed to be established in the FTT jurisdiction when involved in financial transactions with a party established in the FTT jurisdiction (the FTT financial institution). Both FTT financial institution and non-FTT financial institution will be taxed and the tax will accrue to the tax authorities of the participating Member State in the territory of which the FTT financial institution is established (Article 10(1)).**

**Both parties will be taxed unless they prove that there is no link between the economic substance of the transaction and the FTT jurisdiction (Article 4(3)).**

**The participating Member States might decide how to define more precisely what "no link between the economic substance of the transaction and the territory of the participating Member State" means.**

### **Example 39:**

Non-FTT FI selling domestic shares to FTT FI's branch in non-FTT country over the counter (e.g. Nordea bank selling joint ICT company shares to Commerzbank in London) and who should in this kind of case deliver information and in which form regarding the potential "no economic link" situation.

**Further to Article 4(1)(f), a non-FTT financial institution is deemed to be established in the FTT jurisdiction when involved in financial transactions with a party established in the FTT jurisdiction (the FTT financial institution). Both FTT financial institution and non-FTT financial institution will be taxed and the tax will accrue to the tax authorities of the participating Member State in the territory of which the FTT financial institution is established (Article 10(1)).**

**Both parties will be taxed unless they prove that there is no link between the economic substance of the transaction and the FTT jurisdiction (Article 4(3)).**

**The participating Member States might decide how to define more precisely what "no link between the economic substance of the transaction and the territory of the participating Member State" means.**

#### **Example 40:**

Derivative agreement between non-FTT FI and FTT FI's branch in non-FTT country and who should deliver information in which form regarding the potential "no economic link" situation regarding following alternatives:

- a) euro- or euribor derivative,
- b) CDS for FTT entity, different cases(?),
- c) CDS for non-FTT entity, different cases(?),
- d) share (index) developments of FTT and non-FTT papers, both single papers and portfolios (25%, 50%, 75%, 100% FTT-country share),
- e) commodity derivatives.

**Further to Article 4(1)(f), all these sub-types of financial transactions are taxable as the non-FTT financial institution is deemed to be established in the FTT jurisdiction when involved in financial transactions with a financial institution established in the FTT jurisdiction – FTT financial institution (the FTT financial institution with its seat in a participating Member State (the branch is a part of the same legal person) here is a party to the transaction). Both FTT financial institution and non-FTT financial institution will be taxed and the tax will accrue to the tax authorities of the participating Member State in the territory of which the FTT financial institution is established (Article 10(1)).**

**Both parties will thus be taxed unless they prove that there is no link between the economic substance of the transaction and the FTT jurisdiction (Article 4(3)). It is for the persons liable to pay the tax (financial institutions) to prove – logically the collection of elements of proof would start with the FTT financial institution).**

**In the case of derivative contracts, the issuance principle could only apply where they are issued within the territory of a participating Member State and traded on an organised platform (Article 4(1) point (g)). In the latter case and where the derivative is issued in a participating Member State and the issuance principle applies, financial institutions trading in such instruments cannot prove the absence of a territorial link with the FTT jurisdiction.**

### **9. Multiple parties and exercising options**

#### **Example 41:**

An Austrian bank holds a financial instrument (an option) issued by an American bank which gives it the right to purchase a basket of shares of German, Japanese, Danish and Swiss

stock companies. The options are then exercised (over the counter) and the corresponding shares are then sold to a Greek bank. How would these two transactions (exercising of the option and selling on of the shares) be taxed?

**The exercise of the option by the Austrian bank will constitute a taxable transaction (Article 2(1)(2)(a)) and be taxed according to the normal rules (Articles 3(1), 4(1)). Thus, on its side the Austrian bank will be liable to pay the FTT due to the Austrian tax authorities (Article 10(1)). So would the American bank (Article 3(1), 4((1)(f)).**

**Any subsequent sale of the (taxable) financial instruments by the Austrian bank to the Greek bank will constitute a second taxable transaction and be taxed according to the normal rules (Articles 3(1), 4(1). In this transaction, both banks will be liable to pay the FTT due to respectively the Austrian and the Greek tax authorities (Article 10(1)).**

**Example 42:**

An American bank holds a financial instrument (an option) issued by another American bank which gives it the right to purchase a basket of shares of German, Japanese, Danish and Swiss stock companies. The options are then exercised (over the counter) and the corresponding shares are then sold to a Greek bank. How would these two transactions (exercising of the option and selling on of the shares) be taxed?

**The exercise of the option by the American bank attracts only insofar (German) FTT as it relates to the purchase/sale of the German shares in the basket, as these shares have been issued in Germany (Article 4(1)(g).**

**Any subsequent sale of the German, Japanese, Danish and Swiss stocks by the American bank to the Greek bank will constitute a second taxable transaction and be taxed according to the normal rules (Articles 3(1), 4(1). In this transaction, both banks will be liable to pay the FTT due to the Greek tax authorities (Article 10(1)), as the American bank would be deemed to be established in the territory of the participating Member State of its counterparty (Article 4(1)(f)).**

**Example 43:**

A Swedish financial institution buys 200 stocks in a Swedish car company on the Stockholm stock exchange. It turns out the sellers are: 50 stocks – a Greek bank, 40 stocks - a German real estate investor considered to be a financial institution according to Article 2(1) point (8), 30 stocks – a Swedish industrial company, 2 stocks – a Chinese private investor, 8 stocks a Polish bank, 20 stocks – a British company (financial institution) trading stocks in the name of a German and a French bank and 50 stocks – a Spanish bank. How would this transaction be taxed?

**As far as the stocks are bought from the Greek bank and from the German real estate investor, both parties to each transaction are taxable according to the residence principle**

and the tax is due to the Greek (transaction with the Greek bank) and German (transaction with the German investor) tax authorities (Articles 4(1) (a) or (c), 4(1)(f) and 10(1) in connection with Article 3(1)).

When the sellers are the Swedish industrial company, the Chinese private investor and the Polish bank, no taxation is due because there is no party from a participating Member State involved and the instrument is not issued in the FTT jurisdiction (Articles 3(1) and 4(1)(a)-(g)).

In the case of British companies trading stocks in the name of a German and French bank, both the French and German banks and the Swedish financial institution are taxed according to the residence principle and the tax is due to the French and German authorities respectively (Art. 4(1) (a), 4(1) (f) and 10(1)).

When the seller is a Spanish bank, both parties are taxed according to the residence principle (Article 4(1)). The tax is due to the Spanish authorities (Article 10(1)).

**Example 44:**

A branch in Norway of a bank with headquarter in Finland sells a warrant in a German company which is not a financial institution to a Portuguese leasing institution deemed to be a financial institution. The Portuguese institution exercises the warrant. How would these transactions be taxed?

As regards the sale/purchase of the warrant, both parties are liable to Portuguese FTT according to the residence principle because the Finnish bank is deemed to be established in Portugal (Article 4(1)(f)). The tax is due to the Portuguese authorities (Article 10(1)).

The exercise of the warrant itself would not be taxable in case it was combined with the issuance of new shares and, thus, constituted an exempt primary market transaction (Article 3(4)(a)).

In case it did not however constitute a primary market transaction it would be taxable at the side of the Portuguese party subject to the Portuguese rates while the German company would not have to pay the tax as it is not a financial institution (unless a financial institution established in the FTT jurisdiction intervenes in that transaction).

**Example 45:**

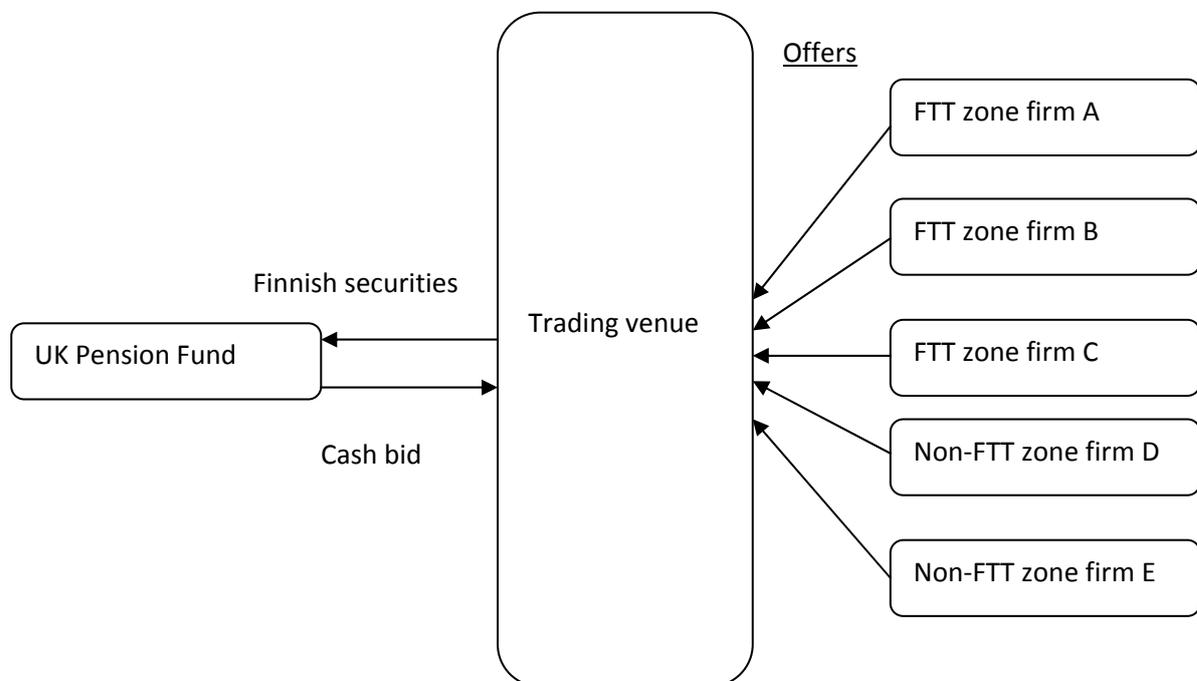
A French farmer who is not considered to be a financial institution according to Article 2(1)(8)(j) sells 300 crop future contracts on the OTC market. 100 contracts are sold to a financial institution in China. 100 contracts are sold to a food-processing company in the FTT-jurisdiction not being considered to be financial institutions according to Article 2(1)(8)(j) and 100 contracts are sold to a financial institution in France.

Only the transactions, respectively with the financial institutions in China and in France would be taxable at the side of the financial institutions (respectively Article 4(1) point (f) and (a) or (c)), because in the other case there is not a financial institution involved (Article 3(1)). The tax is due in France respectively by the Chinese and the French financial institution (Article 10(1)).

## 10. Unknown counterparty

### Example 46:

In this example, a UK pension fund wishes to purchase some Finnish securities and approaches a trading venue running an anonymous order book.



What rule does the trading venue follow in order to match the counterparties given that it will be more expensive for the pension fund to trade with an FTT zone counterparty?

The FTT proposal does not provide rules on the matching of parties. However, for instance, the trading venue might want to apply relevant IT tools and other solutions to identify the FTT liability of the counterparty in the matching process.

One possibility could be that the trading venue might provide – in collaboration with its trading parties – for some rules how those parties would deal with the FTT in case the party itself or the potential counterparty was a financial institution from the FTT jurisdiction or the product to be traded had been issued there. The trading venue might

then want to apply relevant IT tools and other solutions to facilitate the matching of individual buy and sell offers.

**Example 47:**

A non-FTT FI buys USD bond issued by an FTT-entity on the US-market in an anonymous trading platform.

**According to Articles 3(1) and 4(1) (g), the non-FTT financial institution, which is party to a financial transaction in a financial instrument issued in the FTT jurisdiction, would be deemed to be established in the participating Member State in the territory of which such instrument was issued (where the reference entity for the bond is residing) and taxed there (assuming the counterparty is not established in the FTT jurisdiction).**

**The tax is due to the tax authorities of the participating Member State in the territory of which the financial institution is deemed to be established (Article 10(1)) for as long as none of the counterparties was established in the FTT jurisdiction.**

**If the counterparty is however established in the FTT jurisdiction, the non-FTT financial institution would be deemed to be established in the participating Member State in the territory of which the counterparty is established and the tax will be due to the tax authorities of that State (Articles 4(1)(f) and 10(1)).**

**According to Article 11(1), the participating Member States will lay down registration, accounting, reporting and other obligations intended to ensure that the FTT due to the relevant tax authorities is effectively paid. They would also adopt necessary measures to ensure that every person liable for payment of FTT submits to the tax authorities return setting out all the information needed to calculate the FTT due (Article 11(3)).**

**Recourse to mutual cooperation mechanisms with the administrations of non-participating States for the tax collection purposes might be envisaged. Negotiations with third countries and/or third country financial intermediaries could be needed.**

**Moreover, the proposal confers relevant delegated powers to the Commission, notably on taxpayer obligations (Article 11(2)) and the Commission may also adopt implementing acts providing for uniform methods of collection of the FTT due (Article 11(5)).**

**The FTT proposal does not provide rules on the matching of parties. However, for instance, the trading venue might want to apply relevant IT tools and other solutions to identify the FTT liability of the counterparty in the matching process.**

**Example 48:**

Non-FTT FI trading domestic shares on anonymous platform on which some FTT traders are potential trading partners (e.g. Nordea bank trading Nokia shares during the day and during the same day Commerzbank has also been trading Nokia).

If, in practice, there are financial transactions carried out between the two, further to Article 4(1)(f), the non-FTT financial institution will be deemed to be established in the FTT jurisdiction when involved in financial transactions with a party, in this case a financial institution, established in the FTT jurisdiction – FTT financial institution. Both the FTT financial institution and the non-FTT financial institution will be taxed and the tax will accrue to the tax authorities of the participating Member State in the territory of which the FTT financial institution is established (Article 10(1)).

The FTT proposal does not provide rules on the matching of parties. However, for instance, the trading venue might want to apply relevant IT tools and other solutions to identify the FTT liability of the counterparty in the matching process.

**Example 49:**

How should the seller get the information regarding the FTT-status of its counter party in a long chain e.g. FTT FI using a branch of another FTT FI in a non-FTT country using a non-FTT FI on the buyer side when the non-FTT FI is only dealing with the buying non-FTT FI?

**If the seller is a FTT financial institution, he is anyway liable to pay the FTT on his sale of financial instruments regardless of the FTT-status of his counterparty. If the seller is non-FTT financial institution and he trades with non-FTT financial instruments, his liability to pay the FTT will depend on whether he is deemed to be established in the FTT jurisdiction, i.e. whether he is involved in a transaction with a FTT financial institution (party). He is then liable to pay the FTT due to the tax authorities of the participating Member State where his counterparty (the FTT financial institution) is established.**

It will be in the interest of the seller's counterparty to inform the seller of his FTT-status. This is because where the tax due has not been paid (by both the seller and the buyer) within the time limit set out in Article 11(5), each party to a transaction, i.e. also the buyer, will be jointly and severally liable for the payment of the tax due (Article 10(3)).

It is also to be noted that where a financial institution acts in the name or for the account of another financial institution only the latter is liable to pay the FTT (Article 10(2)).

Also, according to Article 11(1), the participating Member States will lay down registration, accounting, reporting and other obligations intended to ensure that the FTT due to the tax authorities is effectively paid.

Moreover, the proposal confers relevant delegated powers to the Commission, notably on taxpayer obligations (Article 11(2)) and the Commission may also adopt implementing acts providing for uniform methods of collection of the FTT due (Article 11(5)).

### **Example 50:**

How should FTT-liabilities be distributed among participants in batch-based trading and clearing where individual transactions are not matched and both non-FTT and FTT residents are involved e.g. how should the CCP net obligations be distributed to individual transactions when for example FTT-residents from several countries have bought 10% and sold 30% of the daily volume of a given paper (ISIN) and the non-FTT trading partners are several from several non-FTT countries with different gross and net volumes.

**Taxation is based on gross transactions.**

**As a rule: if a FTT financial institution or non-FTT financial institution is involved in a financial transaction with a financial instrument issued in the FTT jurisdiction, both seller and buyer are deemed to be established in the FTT jurisdiction and are liable for the payment of the tax (Articles 4(1) (a)-(g), 3(1) and 10(1)).**

**If one party in a financial transaction (regardless of where the instrument is issued) is a FTT financial institution, both parties (financial institutions) are liable to pay the FTT (Articles 4(1) (f), 3(1) and 10(1)).**

**There must be in place appropriate registration, reporting and other obligations of each financial institution party in a transaction. In principle, there would be information available at least at the level of the parties and, if applicable, at the level of the broker dealers and trading venues.**

**Further to Article 11(1), the participating Member States will lay down necessary obligations intended to ensure that the FTT due to the tax authorities is effectively paid.**

**The FTT proposal does not provide rules on the matching of parties. However, for instance, the trading venue might want to apply relevant IT tools and other solutions to identify the FTT liability of the counterparty in the matching process.**

### **Example 51:**

What kind of information/reference need to accompany transactions so that the different parties in the processing chain can provide the right reference with the tax payments and who will generate this reference at which point in the chain both in the case that the non-FTT seller/buyer knows beforehand the FTT liability and when it is only determined later along the trading chain.

**According to Article 11(1), the participating Member States will lay down registration, accounting, reporting and other obligations intended to ensure that the FTT due to the tax authorities is effectively paid.**

Moreover, the proposal confers relevant delegated powers to the Commission, notably on taxpayer obligations (Article 11(2)) and the Commission may also adopt implementing acts providing for uniform methods of collection of the FTT due (Article 11(5)).

However, in case financial institutions involved in a chain transactions want to benefit from the provisions of Article 10(2), i.e. where a financial institution acts in the name or for the account of another financial institution only that other financial institution is liable to pay FTT, they would have to signal this.

## 11. Financial intermediation and cascading effects

### **Example 52:**

A Romanian bank, a direct participant in the Romanian securities depository, purchases Romanian securities from a French bank, also a direct participant in the Romanian securities depository, via the Romanian central securities depository as an intermediary. How would this activity be taxed?

**The proposed directive does not apply to Central Securities Depositories (CSDs) where exercising their function (Article 3(2)). It means that the CSD side of the transaction between the Romanian bank and the Romanian CSD (supposedly acting as principal) will not be taxed and that again the CSD side of the transaction between the French bank and the Romanian CSD will not be taxed. FTT will be due from both the Romanian bank and the French bank on their respective sides of transactions. The Romanian bank will be deemed to be established in France as the proposed directive does not apply to CSDs ("look-through approach") and it is thus involved in a financial transaction with the financial institution established in France (Article 4(1) (f)). All tax will be due to the French tax authorities. The minimum tax rate would be 0.1% of the market price of the transaction (Article 6).**

### **Example 53:**

A German prime broker is facilitating a German client's order (client is a financial institution) by interposing its own account. The purchased securities are credited on the broker's own account and subsequently on its client's account. How would this activity be taxed? How many times would the FTT be paid?

**According to Article 10(2), where a financial institution acts in the name or for the account of another financial institution only that other financial institution is liable to pay FTT.**

**If the German broker acts in his own name and for its own account, not in the name or for the account of his client, then the broker will be liable to pay FTT. If he subsequently**

credits purchased securities on its client's account, the second time FTT will be due – this time from the broker (on its "sale" side) and from the client (on its "purchase" side).

**Example 54:**

Clearing members in the EU act as principals which means clients need to enter into back to back transactions to be able to clear derivatives. Example in accordance with EMIR: A French UCITS enters into a credit default swap with French bank. According to EMIR the UCITS will have to clear this derivative contract through a Central Counter Party (CCP), e.g. based in France. The UCITS will have to enter into back to back transactions with e.g. another French bank (which is a clearing member in the CCP). This other French bank will clear the derivative contract as a principal (on behalf of the UCITS). The first French bank will have to act similarly (back to back transaction with clearing member).

- a) Will these back to back transactions be the subject of the FTT?

**It might be relevant to check if Article 10(2) could be applicable: if a back to back transaction would be in the name or for the account of another financial institution, then only that other financial institution would be liable to pay FTT.**

**Subject to further explanation, as a general rule, only the CCP's side of transactions is out-of-scope of the proposed FTT, the other sides of transactions are taxed according to the normal rules (Article 3(1)). If all clearing members (supposedly acting on own account) are established in France, French FTT is due two times by the clearing members and one time by the French UCITS and the French C-1. The minimum tax rate would be 0.01% of the notional amount underlying the derivative contract (Article 7).**

- b) In the case of highly tailored OTC derivative contracts which cannot be cleared between two French financial institutions there will be only one taxable transaction. Is this result correct?

**Yes, except in case of a wide interpretation of Article 10(2).**

## 12. Exchange of financial instruments and intra-group transfers

**Example 55:**

A French financial institution and a Czech financial institution enter into a derivative contract. Both are member companies of the same group and the derivative contract is under the exemption of intra-group transactions in accordance with EMIR. Would this transaction be taxed?

**According to Article 2(1) point (2)(c) of the FTT proposal, a financial transaction means the conclusion of derivatives contracts before netting or settlement. There is no exception for**

intra-group transactions proposed. Thus, if the French and Czech financial institutions enter into a derivative contract, both parties will be taxed in France as the Czech financial institution will be deemed to be established in France because it is party to the financial transaction with the French financial institution (Article 4(1) (f)). Any exemption of intra-group transactions under EMIR does not imply a tax exemption under the proposed directive. The minimum tax rate would be 0.01% of the notional value underlying the derivative contract (Article 7).

**Example 56:**

A French insurance company is the owner of government bonds with a sub-investment grade and needs to provide a CCP with collateral for a financial transaction for three months. The CCP does not accept these bonds as collateral. The insurance company exchanges its sub-investment grade bonds for investment-grade government bonds with a French bank for the time period of three months. The insurance company pays a fee for this exchange. The investment-grade bonds are accepted as collateral by the CCP. In three months the bonds are – as foreseen - returned. How would this exchange of government bonds be taxed?

Exchanges of financial instruments (bonds in this case) are explicitly included as a financial transaction in the scope of the tax (Article 2(1) point (2)(d)). Exchanges of financial instruments outside repurchase agreements are considered to give rise to two financial transactions (Article 2(2)), and the tax shall become chargeable for each financial transaction at the moment it occurs (Article 5(1)). Thus, both parties will first be liable to pay FTT in France on the first transaction. After 3 months, the bonds are exchanged back (second financial transaction). Then, both parties will again be liable to pay FTT in France on the second transaction. The minimum tax rate would be 0.1% of the market price of the financial instrument concerned (Article 6(3)).

### 13. Public debt management

**Example 57:**

Finanzagentur GmbH is the central service provider for the Federal Republic of Germany's borrowing and debt management. In that capacity the agency signs a derivative contract with a nominal value of EUR 1 000 000 with a bank based in Germany.

Under the FTT proposal only Member States and public bodies entrusted with the function of managing public debt are out-of-scope of the proposed tax (except for certain provisions): Article 3(2) point (c). The GmbH is not a public body and under these circumstances the normal rules would apply (the GmbH would logically be a financial institution): both parties are established in Germany and would be liable to German FTT

to be calculated on the notional amount (Article 3(1), 4(1) and 7). The tax would become chargeable at the conclusion of the contract (Article 5(1)).

Should the manager of the public debt be a public body and in case this derivatives transaction is effectively part of the exercise of the function of managing the public debt, only the side of the German bank would be taxable.

**Example 58:**

What effects of the proposed FTT on liquidity and yield in EU sovereign bond markets does the European Commission expect? Can those effects be quantified?

In Raciborski, Lendvai, Vogel (2012): "Securities Transaction Taxes – Macroeconomic Implications in a General-Equilibrium Model", ECFIN Economic Paper No 450 it is assumed that the cost of capital will increase by 7 basis points due to the FTT, with negative impacts on the economic growth and employment over the long term. In the economic literature, securities transaction taxes were generally found to have a negative impact on the liquidity and yields of securities markets. The Commission services did not quantify specifically the impact the FTT would have on the liquidity of EU-11 government bond markets. In any case, liquidity should not be seen as an end in itself, which would lead to the claim "the more the better" but only as a means to an end which would be reducing volatility on markets to acceptable levels.

**Example 59:**

One possibility to reduce the disproportionate effect of the FTT on FX swap and forwards with short tenor would be to scale the tax rate according to the tenor of the transaction. What would be the Commission's views on such kind of proposal? Would this be operationally feasible?

For repos and derivatives with maturities lower than a year one could imagine scaling down the tax rates in order to mitigate the "excessive taxation" (e.g. for 240 overnight repos – to divide the 0.1% rate by 240). This is theoretically feasible, but in practice counting and application issues by tax authorities might arise. No change in rates could be provided for instruments with maturities longer than 1 year to promote the longer-term thinking.

**Example 60:**

Would the Commission consider additional exemptions (e.g. hedging activities, market making, pension funds, asset managers...) for transactions on markets for government bonds?

**No. The Commission opted for a broad based tax with few exemptions to generate revenue, to avoid distortions.**

Distinction according to the intention of transacting is difficult to apply, could result in avoidance, loopholes and could affect tax neutrality.

#### 14. Repurchase agreements and the management of collateral

##### Example 61:

How would tri-party repos be treated under the Commission proposal?

**If the third party acts as a pure agent (for the parties in the transaction), this repo is treated as between two parties only.**

##### Example 62:

How would open repos be taxed? Only at the start or at each daily rollover?

**If repo with open expiration (maturity) and no modification of contract: taxed only at start.**

##### Example 63:

How would floating-rate repos be taxed? Only at the start or at each rate re-fixing?

**If the (parameters of the) rate is known upfront, but the calculation thereof comes only later (e.g. repo rate linked to indexes) the repo constitutes one contract with no modification, taxed at start only.**

##### Example 64:

How would forward repos be taxed? Only at the start of the forward period?

**Forward repos settle in the future (in a longer timeframe than same day settlement): repo is taxed at the moment it occurs, i.e. at start – at the moment of the conclusion of the contract.**

##### Example 65:

What alternatives to repos that are not within the scope of the proposed FTT are at the disposal of banks as legal instrument to secure money market loans? What are the advantages and disadvantages of those alternative instruments?

**The alternative might be a pledge of collateral (see comparisons with the legal regime in the US).**

For the short term there are no obvious untaxed alternative besides the deposits, unsecured lending and central bank liquidity provision. On the long term, emphasis should be put on the essential role of equity capital in financing the credit and other financial institutions. The financial crisis has demonstrated that the reliance on short-term financing (e.g. through commercial papers or through repos) is not viable.

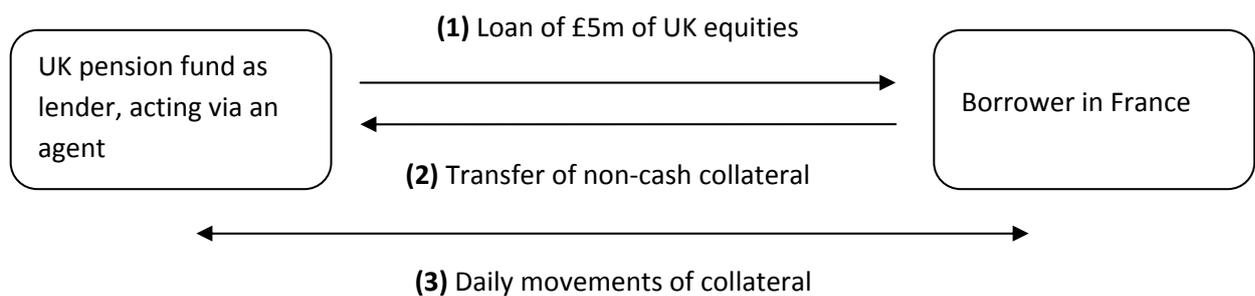
**Example 66:**

How would collateral movements (e.g. collateral substitution) be taxed? Would this be a material modification and thus be taxed?

**A pure pledge of collateral is not taxable.**

**However, an exchange of collateral, if financial instruments for the sake of the proposal, is taxable.**

**Example 67:**



In this example, a UK pension fund loans securities via an agent. (This type of transaction is exempt from UK Stamp Duty Reserve Tax.) Typically, we understand that a loan of this type would earn a pension fund a per-annum fee of 10bps on a pro rata basis. So in this example a three week loan would earn the pension fund GBP 300 ( $£5m \times 0.1\%/52 \text{ weeks} \times 3$ ), less agent fees.

For the purposes of FTT we think legs (1) and (2) of the transaction count as one transaction and incur a single charge at 10bps. Typically, non-cash collateral will be transferred/moved on a daily basis for the duration of the loan (3), so fifteen times in this example. We understand that the entirety of the collateral may be replaced each day.

- a) Is the daily transfer of collateral subject to tax? In the affirmative: how much tax is due and to whom?

**First it would have to be checked in how far such collateral is a financial instrument in the meaning of Article 2(1)(3) or not. In the affirmative, it would then have to be clarified**

what the exact meaning of "transfer of collateral" is. Where such daily transfer of collateral is: (i) neither a purchase and sale of a financial instrument (ii) nor an exchange of financial instruments (iii) nor a transfer of securities in the context of a repurchase agreement (iv) nor a transfer between entities of a group of the right to dispose of a financial instrument as owner or any equivalent operation implying the transfer of the risk associated with the financial instrument, this transfer of collateral would then appear not to qualify as a financial transaction in the meaning of Article 2(1)(2), and it would, thus, not be subject to FTT.

- b) Is FTT due when the loan is settled and the borrower returns the equities to the pension fund?

The conclusion of a securities' lending and borrowing agreement is a financial transaction under the proposal (Article 2(2) point (e)). This operation is considered to give rise to one single transaction (Article 2(2)). It will be taxable under the normal rules (Article 3(1)). The securities loan between a financial institution (assuming the borrower is a financial institution), deemed to be established in France, and a UK financial institution deemed to be established in the France (on the basis of Article 4(1) point (f)) would be taxable in France one time at each side. It is assumed that the agent referred to is acting in the name of the UK pension fund and is thus not liable to FTT (Article 10(2)).

The tax shall become chargeable at the moment the transaction occurs, i.e. at the time of conclusion of the contract (Article 5). The return of the equities by the borrower would thus not be taxable.

**Example 68:**

Repo transactions: The Commission's proposal will result in a flat 10 bp tax for overnight repo transactions. Over a 250 business-day year this tax amounts to around 25% of the nominal value.

- a) What would be the liability in this case over the course of a year of a Czech based firm making EUR 100mm repos of German bonds on an overnight basis for the year? This is not an unusual case – rolling overnight repo is commonplace as longer term repo implies greater liquidity risk.

The Czech firm (here: financial institution) will be deemed to be established in Germany and taxed there as it is party to a financial transaction (repo) in a financial instrument issued in Germany. In this example, the tax liability to be paid by the Czech firm over a 250 business-day year will be:  $10 \text{ bp} \times 250 \text{ business days} = 25\% \times \text{EUR } 100 \text{ mn.} = \text{EUR } 25 \text{ mn.}$  (assuming the minimum tax rate of 10 bp applies). In case the Czech firm only borrowed (or lent) the amount in successive overnight transactions and the German bonds were only pledged as collateral than no tax will be due.

- b) Furthermore, how often would the tax be collected – would the Czech firm be required to remit the tax on a daily basis each time the trade rolls?

According to Article 11(5), the FTT is to be paid for each overnight transaction to the accounts determined by the participating Member States at the moment when the tax becomes chargeable in case the transaction is carried out electronically (i.e. further to Article 5(1), at the moment the transaction occurs, thus each time the trade rolls) or within 3 working days from that moment in other cases. The Commission proposed that it may adopt implementing acts providing for uniform methods of collection of the FTT due.

## 15. Occurrences of double taxation

### Example 69:

A German financial institution with a branch in Taiwan buys Taiwanese futures from a Taiwanese bank. Taiwan levies transaction tax on the transaction. Would this transaction also attract German FTT?

If the transaction is made by a branch of a German financial institution in Taiwan, both financial institutions would be liable to pay German FTT according to the residence principle (Article 4(1) point (f) in the case of the Taiwanese bank), except if they prove that there is no link between the economic substance of the transaction and the territory of any participating Member State (Articles 3(1) and 4(1) and (3)).

If the transaction is made by the German financial institution itself, both parties are taxed according to the residence principle (Article 4(1) (a) or (c) and (f)). The tax is due to the German authorities (Article 10(1)).

In the absence of a double taxation agreement between Germany and Taiwan there might be an occurrence of double taxation.

### Example 70:

Other jurisdictions within and outside the FTT jurisdiction also levy taxes on the trading financial instruments. How can occurrences of double taxation be avoided?

Indeed, "double taxation" might become an issue, notably with respect to those countries (presently) outside the envisaged FTT jurisdiction that already now levy some kind of tax on financial transactions as they are hosting important financial centres themselves, such as the United Kingdom, Luxemburg, Switzerland, Hong Kong, Singapore or China.

The systematic avoidance of occurrences of double taxation and double non-taxation would require agreements with different non-FTT jurisdictions. Such treaties should preferably also foresee some provisions on administrative cooperation, an automatic exchange of information so as to facilitate voluntary tax compliance of financial

**institutions also from these jurisdictions. Bilateral agreements could be one solution or alternatively, multilateral ones.**

**Example 71:**

Double imposition: What is foreseen in case the same transaction is subject to taxation outside the EU-11?

**Nothing in the proposal in this respect; proposal avoids double taxation in the FTT jurisdiction through tax harmonisation.**

**Best solution seems to be to strive for agreements per participating MS or covering the whole participating 11 MS.**

**16. Classification and tax treatment of some transactions**

**Example 72:**

Does the mere fact that a transaction is carried out on a stock market in Germany mean that the transaction should attract German FTT when e.g. a financial institution from USA purchases financial instruments issued in Switzerland from a financial institution from Singapore?

**At first glance, there is neither financial institution from a participating Member State involved in the transaction (Article 3(1)) nor is the instrument issued in the FTT jurisdiction (Article 4(1)(g)).**

**However, in practice, to act as financial institutions on the German exchange, it would appear that these third country institutions would normally need to be authorised by Germany to act as such, and Article 4(1) point (a) would thus apply. If they were doing so from abroad, Article 4(1)(b) might apply. This means that the institutions would be liable to pay the German FTT (Article 10(1). It is referred to p.10, last paragraph, of the explanatory memorandum in this respect.**

**Example 73:**

Is a sale of the units of the UCITS to be considered a (tax exempted) primary market transaction or would it actually be a (taxable) secondary market transaction?

**The units of UCITS are financial instruments and, thus, the sale/purchase thereof would be taxable under the normal rules of the proposal. However, account has indeed to be taken of Article 3(4) (a) on primary markets transactions: as a rule issue of the instrument and sale to the first buyer should be considered a tax-exempt primary market transaction**

while any subsequent sale, including the sale through redeeming the units of UCITS to the issuer would be considered a (taxable) secondary market transaction.

**Example 74:**

Should foreign exchange swap transactions be considered as one transaction only or as two separate transactions?

**As a rule the conclusion of a derivative contract should be considered as one transaction.**

**Actually, in the case of a foreign exchange swap transaction the spot currency transaction part does constitute a taxable event as currencies are not financial instruments in the meaning of the proposed directive.**

**However, the "forward" part of the conclusion of a foreign exchange swap agreement, giving the right to swap currencies at a given forward price, is taxable in the meaning of the proposed directive.**

**The conclusion of the contract at issue constitutes one taxable transaction (Article 2(2) point (c)). FTT will be payable by both financial institutions involved in the transaction (Article 10) if they are established or deemed to be established in the FTT jurisdiction (Article 4).**

**Example 75:**

Should transfers of financial instruments from collective to separate trust accounts that are carried out on the account of the client by a settlement agent or a financial intermediary be taxed with FTT although there is no transfer of an ownership of the financial instruments?

**For a transaction to be taxable it should be one as defined in Article 2(1) point (2). A simple transfer of instruments already owned by the client from one account to another with a settlement agent does not seem to constitute a taxable transaction.**

**The details of the case might need to be examined.**

**Example 76:**

How often would a derivative agreement that constituted a swap transaction (for example: interest rate swap) be taxed?

**The conclusion of derivative agreements and the trading of derivatives are taxable transactions. However, an interest rate swap agreement does not constitute an exchange of financial instruments in the meaning of Article 2(1)(2)(d) but a conclusion of a derivative agreement in the meaning of Article 2(1)(2)(c). The conclusion of one contract constitutes one taxable transaction (Article 2(2) point (c)). FTT will be payable by both**

**financial institutions involved in the transaction (Article 10) if they are deemed to be established in the FTT jurisdiction (Article 4).**

**Example 77:**

A French broker purchases (for his own account) 1000 shares for one price and sells (for his own account) 1100 shares of the same company for a higher price on a French exchange during the same day. At the end of the day only the net balance of the purchases/sales, i.e. 100 shares, are delivered into settlement. Would the FTT apply to 1100 shares, 1000 shares, 2100 shares, or only to 100 shares?

**According to Article 2(1) point (2), a financial transaction means any of the following: the purchase and sale of a financial instrument before netting or settlement. Thus, in this case there would be two financial transactions: (i) the purchase of 1000 shares subject to the FTT applicable to 1000 shares and (ii) the sale of 1100 shares subject to the FTT applicable to shares, thus, 2100 shares in total, and payable by the broker as he acted as a proprietary trader.**

**In case, the broker acted as an agent only for two different French banks, it would be the latter that would have to pay the tax (Article 10(2)).**

**Example 78:**

A French Pension Fund holds units in a Fund based on the Cayman Islands. At a certain point in time it redeems them to the issuer. What will be the FTT treatment of this transaction?

**Both the pension fund and the Cayman fund (the latter because of Article 4(1) (f)) will be deemed to be established in France and liable to pay FTT (Article 3(1)). The tax will accrue to the French tax authorities (Article 10(1)). The redemption of shares and units in collective investment undertakings is not a primary market transaction as referred to in Article 3(4) point (a). The taxable amount is the market price of the units (Article 6(2)). If no such market price existed it would be the full amount that would have been paid as consideration in a transaction at arm's length (Article 6(3)).**

**Example 79:**

A Russian Pension Fund holds units in a fund based on the Cayman Islands. At a certain point in time it redeems them to the issuer. What will be the FTT treatment of this transaction?

**No FTT will be due unless the redemption is in a financial instrument issued in the FTT jurisdiction. Then, both the Russian pension fund and the Cayman fund will be deemed to be established in the participating Member State where the instrument was issued (Article 4(1) (g) and 10(1)).**

### **Example 80:**

A French Pension Fund holds units in a Fund based on the Cayman Islands and the units have been issued there. At a certain point in time the French Pension Fund redeems the units to the issuer via the UK-based Cayman Fund's Investment Manager who acts for the account of the Cayman Fund. What will be the FTT treatment of this transaction?

**Both the pension fund and the UK-based Investment Manager (the latter because of Article 4(1) (f)) will be deemed to be established in France and liable to pay FTT (Article 3(1)). The tax will accrue to the French tax authorities (Article 10(1)). The redemption of shares and units in collective investment undertakings is not a primary market transaction as referred to in Article 3(4) point (a). The taxable amount is the market price of the units (Article 6(2)). If no such market price existed it would be the full amount that would have been paid as consideration in a transaction at arm's length (Article 6(3)).the investment manager is not clear.**

## **16. Purchase and sale**

### **Example 81:**

Article 2, par. 1. (2) (a) mentions "the purchase and sale of a financial instrument before netting or settlement". A common definition of "purchase and sale" is essential in order to have: (i) certainty in the legal basis for both taxpayers and tax administrations; (ii) uniformity in the application of the tax among participating MS. Considering that from a legal perspective the different MS may have different interpretation of a "sale" or of a "purchase", it is considered it as essential to agree on a common definition.

What is the meaning of "purchase" and "sale" based on the Commission's Proposal?

**There is a plethora of financial transactions all having different features and characteristics as regards the products being object of the transaction, the status of the parties involved, the kind of consideration paid or due etc. For the purpose of the harmonisation of the FTT, the Commission has proposed (in Article 2(1) point (2)) to cover the world of financial transactions by establishing five clusters.**

**Besides the "purchase and sale of a financial instrument (...)" as referred to in Article 2(1) point (2)(a), there are four other clusters of financial transactions referred to in the proposal, i.e. "the transfer between entities of a group of the right to dispose of a financial instrument as owner and any equivalent operation implying the transfer of the risk associated with the financial instrument (...)" (Article 2(1) point (2)(b)), the "conclusion of derivatives contracts (...)" (Article 2(1) point (2)(c)), the "exchange of financial instruments" (Article 2(1) point (2)(d)) and "a repurchase agreement, a reverse**

repurchase agreement, a securities lending and borrowing agreement" (Article 2(1) point (2)(e)).

Some differences between these clusters are e.g.:

- the status of the parties, e.g. the seller and the buyer in the case of "purchases and sales" as compared to the borrower and the lender in the case of "lending and borrowing agreements", or simply a party (not closer defined) in the case of "the conclusion of derivatives agreements",
- the kind of counterparty obligation, e.g. consideration paid in cash or money in the case of "purchases and sales" as compared to the transfer of another financial instrument in the case of "an exchange of financial instruments".

An essential part of the definition of a financial transaction for the sake of the proposed FTT refers to "the purchase and sale" of a financial instrument (Article 2(1) point (2)(b)).

The scope of the terms "purchase and sale" is not limited to the transfer of ownership but rather represents the obligation entered into, mirroring whether or not the party concerned assumes the risk implied by a given financial instrument<sup>2</sup>. This meaning of the terms "purchase and sale" is partly derived from their concept in the MiFID legislation<sup>3</sup>.

## 17. Cancellation and rectification

### Example 82:

Article 5 of the Proposal states that "subsequent cancellation or rectification of a financial transaction shall have no effect on chargeability, except for cases of errors". How should this provision be interpreted, in particular what does it mean that a financial transaction is rectified?

**Under the FTT proposal, cancellation of a financial transaction would mean the annulling of that transaction in full or in part. A rectification of a financial transaction would refer to its modification, in particular as regards the parties to the transaction, the object or scope, the consideration agreed upon, the timing etc.**

**The provision of Article 5(2) stipulates that the subsequent cancellation or rectification of a financial transaction shall have no effect on chargeability of the initial transaction, except for cases of errors. It means thus that such cancellation or rectification does have**

---

<sup>2</sup> See also: Explanatory Memorandum to the proposal: p. 8.

<sup>3</sup> EP and Council Directive 2004/39/EC and its level 2 legislation (Commission Regulation (EC) 1287/2006).

no effect neither on the taxability of the initial transaction nor on the tax base and tax rate applied, except for cases of errors.

## 18. Ensuring payment

### **Example 83:**

Would it be feasible to implement in more detail the general and common principles of collection and declaration of the tax in the Directive? More specifically, which kind of legal acts and which procedure could allow them to work together on the definition of the details, forms, etc. for a common collection and declaration system?

The obligations referred to in Article 11 of the proposal aim at ensuring the effective payment of the tax and the collection methods. They were not spelled out in detail in this proposal.

However, the Commission has proposed to be empowered to specify the various obligations intended to ensure proper payment of the FTT, and to adopt implementing acts providing for uniform methods of collection. The intention was to make sure that technical details in these areas are provided for, to the extent appropriate, while maintaining adequate flexibility in case modifications are needed. Whilst the Commission remains convinced, for the reasons given, that such empowerments provide the adequate solution, it is also true that the detailed rules in the areas concerned could, legally speaking, be foreseen in the directive itself.

The following could for example be specified in the directive:

- that financial institutions (FIs) established in the FTT jurisdiction need to be identified for the purposes of the FTT Directive and when they have to use this specific ID-number. The format of this number could be also defined;
- which information is to be provided on the counterparty in a financial transaction (to define residence for the proposed FTT), on the role of financial institutions in a transaction (to define the liable person), to whom, by whom, when?;
- how to identify a person liable to pay FTT where a financial institution acts in the name or for the account of another FI (i.e. when Article 10(2) of the FTT proposal applies);
- which type of information and how FIs have to keep it for FTT purposes;
- when, how and what they have to report to the tax authorities;
- more precisely what information the FTT return has to contain, how to be filed;
- how and when the tax will be collected in practice within the FTT jurisdictions: centrally or per financial institution (and depending on the type of trade/instrument)

- for instance, possible separate data keeping and reporting obligations for the central collection points,
- whether or not the tax should be charged and paid by market-infrastructure operators (where applicable),
- how the non-compliance regime should look like and how it has to be enforced.

In case of need, further details of the rules or their implementation could then – and in accordance with the Treaty rules on delegated and implementing acts - be defined through such acts.

**Example 84:**

A Czech bank sells German government bonds to a Czech pension fund. How will the competent tax administration (the one responsible for collecting the FTT, in this case the one of Germany) find out that a transaction subject to FTT has occurred?

**According to Article 11(1), the participating Member States will lay down registration, accounting, reporting and other obligations intended to ensure that the FTT due to the tax authorities in Germany (in this case) is effectively paid. Moreover, the Commission may adopt delegated acts specifying the measures to be taken to this end by the participating Member States (Article 11(2)).**

**Example 85:**

CSDs as well as CCPs are apparently considered as entities capable of “ensuring the payment of the tax to the tax authorities”. How could CSDs ensure the payment, if they do not have direct access to the trading activity information (due to the netting effect between the trading and the settlement process) on which the tax is to be applied?

**The collection methods are still under examination, and the Commission services are looking for the most effective and efficient methods. The Commission services are aware that CSDs do not overlook all transactions in the scope of the proposal.**

**Example 86:**

Article 11 establishes that the Commission may adopt implementing acts providing for uniform methods of collection of the FTT. How firm is the intention of the Commission to effectively do so?

**The Commission services await the Council's decision in this respect, as collection methods might also be included in the Council Directive.**

### **Example 87:**

How can the successful implementation and tax collection be ensured as far as non-participating Member States and non-EU countries are concerned?

**One should firstly recall that the collection of national taxes falls in the competence of the Member State levying this tax. This also holds for national FTTs. The policy initiative of establishing a common framework of FTT is not about introducing a European tax but about harmonising national taxes.**

**Only subsidiary to this general context, the following has to be taken into account:**

- **The systematic and centralised collection of FTT outside the FTT jurisdiction would require the support by the authorities of the States concerned. Bilateral agreements could be one solution or alternatively, multilateral ones.**
- **The exchange of information between Member States is the subject of separate EU legal instruments such as Directive 2010/24/EU<sup>4</sup> and Directive 2011/16/EU<sup>5</sup> that would also apply to FTT.**
- **The exchange of information with third countries is partly the subject of existing instruments, such as the OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters (referred to above) and possibly bilateral Tax Treaties. It might be useful to establish new agreements or to extend existing ones in the framework of FTT.**
- **Making tax compliance a "business case" for persons liable to pay the tax (i.e. financial institutions deemed to be established in the FTT jurisdiction), e.g. with the help of the "joint and several liability" provisions of Article 10(3)-(4), would be the most promising avenue for encouraging voluntary tax compliance, as it would be in the economic interest of all financial institutions to facilitate and guarantee the actual collection and payment of the tax.**
- **This "business case" for financial institutions from the FTT jurisdiction when interacting with financial institutions from non-FTT jurisdictions could be enabled by the provisions of Article 10(3)-(4) on "joint and several liability". The same holds for trading platforms, clearing houses, central counter parties, central securities depositories and international central securities depositories in the FTT jurisdiction in case Member States provided for their joint and several liability. Financial institutions**

---

<sup>4</sup> Council Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (OJ 2010 L 84, p.1).

<sup>5</sup> Council Directive 2011/16/EU on administrative cooperation in the field of taxation (OJ 2011 L 64, p.1).

from the FTT jurisdiction would have every incentive to mostly, if not only, interact with tax-compliant counterparties and with market-infrastructure providers that facilitate the tax collection, be these financial institutions and market-infrastructure providers established within the FTT jurisdiction or not.

- Such "business case" for tax compliance for financial institutions from the FTT jurisdiction might – in turn – also facilitate a "business case" for trading venues etc. in jurisdictions outside the FTT zone for as long as they want financial institutions from the FTT jurisdiction to use these infrastructures as well. The financial institutions from the FTT jurisdiction might not be inclined to trade on such trading venues in case these infrastructures were not to be considered facilitating FTT compliance.

**Example 88:**

A Russian bank sells German securities to a Chinese bank.

- a) How would this activity be taxed and how should the tax be collected?

The transaction is in the scope of FTT further to Article 3(1). According to Article 4(1)(g), both Russian and Chinese financial institutions (banks), which are parties to a financial transaction in a financial instrument issued in the FTT jurisdiction (in Germany in this case), are deemed to be established and taxed in Germany. The tax is due from both Russian and Chinese banks to the German tax authorities (Article 10(1)).

According to Article 11(1), the participating Member States will lay down registration, accounting, reporting and other obligations intended to ensure that the FTT due to the tax authorities is effectively paid. Moreover, the proposal confers relevant delegated powers to the Commission, notably on taxpayer obligations (Article 11(2)) and the Commission may also adopt implementing acts providing for uniform methods of collection of the FTT due (Article 11(5)).

- b) How would a German tax administration get the information that the transaction has occurred?

Germany (together with other participating Member States) will lay down registration, reporting and other obligations intended to ensure that the FTT due to their tax authorities is effectively paid. In particular, they would have to adopt necessary measures in cooperation with non-participating Member States and third countries or their financial institutions to ensure that every person liable for payment of FTT submits to the tax authorities return setting out all the information needed to calculate the FTT due (Article 11(3)). They may also make reference to measures involving mutual assistance in tax matters with non-participating Member States and third countries.

- c) If the purchaser is a Czech bank instead of a Chinese bank, are there any additional reporting or other obligations imposed on the Czech bank or Czech authorities due to the fact that the Czech Republic is an EU Member State, although not participating in the enhanced cooperation?

**See answer to letter (b). Recourse to mutual cooperation mechanisms with the administrations of non-participating Member States might be envisaged.**

**Example 89:**

A German bank sells Czech corporate bonds to a French bank. The bonds are not traded on an organized platform; they are traded very rarely and have low liquidity. The parties are under the duty to determine whether the consideration is not lower than the market price under Article 6(2). The FTT shall be paid within three working days from the moment the transaction occurs. How could the parties be able to determine the market value within such a short time period?

**Financial institutions liable to pay the FTT have to check the market price of a traded financial instrument other than a derivative contract determined at the time the FTT becomes chargeable (Article 6(2)). It applies in practice if there is a risk that the consideration paid or owed might be lower than the market price. The proposal does not specify how the market price of such financial instrument is determined, especially in case of OTC transactions. Such determination would have to be done to the best of the parties' knowledge, experience and efforts (also e.g. by comparison with alternative trading of this instrument in a transaction at arm's length, by using current valuation techniques). According to Article 6(3), the market price is the full amount that would have been paid as consideration for the financial instrument concerned in a transaction at arm's length. The participating Member States when implementing the directive may lay down more detailed rules on how to determine a market price of financial instruments traded rarely and with a low liquidity, based on practice and experience.**

**Example 90:**

Clearing members in the EU act as principals which means clients need to enter into back to back transactions to be able to clear derivatives. Example in accordance with EMIR: French UCITS enter into credit default swap with French bank C-1. According to EMIR the UCITS will have to clear this derivative contract through a CCP, e.g. based in France. The UCITS will have to enter into back to back transactions with e.g. French bank C-2 (which is a clearing member in the CCP). C-2 will clear the derivative contract as a principal (on behalf of the UCITS). C-1 will have to act similarly (back to back transaction with clearing member).

- a) Will back to back transactions be the subject of the FTT?

It might be relevant to check if Article 10(2) could be applicable: if a back to back transaction would be in the name or for the account of another financial institution, then only that other financial institution would be liable to pay FTT.

Subject to further explanation, as a general rule, only the CCP's side of transactions is out-of-scope of the proposed FTT, the other sides of transactions are taxed according to the normal rules (Article 3(1)). If all clearing members (supposedly acting on own account) are established in France, French FTT is due two times by the clearing members and one time by the French UCITS and the French C-1.

b) How would these transactions be taxed?

See reply to letter (a).

However, in the case of highly tailored OTC derivative contracts which cannot be cleared between two French financial institutions there will be only one taxable transaction. Is this result correct?

Yes, except in case of a wide interpretation of Article 10(2).

**Example 91:**

Will a CCP be liable to pay the FTT under Article 10(3)?

It is explicitly mentioned in Article 3(2) that the proposed directive shall not apply to CCPs and CSDs where exercising their function, but with the exception of Article 10(3)-(4). Thus, where the tax due has not been paid within the time limit set out in Article 11(5), each party to a transaction, i.e. also a CCP or CSD (unless they act as pure intermediaries in the name and for the account of another party), shall be jointly and severally liable for the payment of the tax due on account of that transaction (Article 10(3)). To avoid the risk of being held liable the CCP or CSD might want to withhold the tax due at the source and transfer it to the relevant tax authorities.

a) If the answer to the first question is no, can the participating Member State make the CCP liable under the provision of Article 10(4)? The quantity of contracts cleared through a CCP is enormous. Such a liability may send a CCP directly into insolvency.

The CCP can be jointly and severally liable under Article 10(3) – see answer (a). Article 10(4) applies to a person other than those liable for payment of FTT under Article 10 (1)-(3).

If participating Member States had provided so, Article 10(4) could be applicable to CCPs in cases where Article 10(3) does not apply.

b) Are there any limits of the provision of Article 10(4)? For example, would it be in line with the proposal if a participating Member State provides that a person not

established in that Member State is to be held jointly and severally liable for the payment of the FTT (including persons established in a non-participating Member State or a non-EU country)?

**This is to discretion of the participating Member States to provide that a person other than the persons liable for payment of FTT under Article 10(1)-(3) is to be held jointly and severally liable for the payment of the tax. The participating Member State may decide what kind of persons would be liable but would have to respect Treaties' provisions and international public law.**

- c) If a person established in a non-participating Member State is to be held jointly and severally liable for the payment of the FTT (according to Article 10(3) or, if applicable, Article 10(4), would there be any cooperation of the non-participating Member State authorities required?

**As mentioned, it is to be examined, but normally such cooperation between participating and non-participating Member States would be needed.**

**Example 92:**

Bank Y based in Germany buys shares at a purchase price of EUR 500 000 on the Frankfurt stock exchange via the central counterparty there, EUREX Clearing AG based in Germany.

**On the basis of the information provided, Y would be liable to FTT in Germany to be calculated on the price (Articles 3(1) and 4(1) and 6). The CCP where it exercises its function of CCP is out-of-scope of the proposed tax and the FTT would not apply to its side of financial transaction.**

Variations on the basic case:

- a) Y goes bankrupt before the financial transaction tax was paid.

**In case Y does not pay the FTT due in Germany, the other legal possibilities of tax collection have to be examined (including possible recourse to joint and several liability, as this would also apply to the CCP: Article 3(2) first sentence).**

- b) Y is based in the Netherlands.

**Y would normally use its Dutch authorisation to operate in the Frankfurt exchange and would thus be deemed to be established in Germany (Article 4(1) point (b)). Y would be liable to FTT in Germany.**

- c) Y is based in the Netherlands. The sale takes place via the London Stock Exchange, where D, a bank based in Italy, buys the shares.

**Both banks would be liable to FTT in Italy (Articles 3(1) and 4(1), in particular 4(1) point (f) in the case of Y).**

d) Y is based in the Netherlands. The shares purchased are securities from an undertaking based in Germany.

**See (b).**

e) Y is based in the Netherlands. The shares purchased are securities from an undertaking based in Germany. The purchase takes place on the London Stock Exchange.

**Suppose the seller is a financial institution established in Belgium, then Y would be liable to FTT in Belgium (as well as the seller) - Article 3(1) and 4(1) point (f). In case the seller would not be established in a participating Member State, Y would be liable to FTT in Germany (as well as the seller) – Article 4(1) point (g).**

### 19. Recovery of unpaid tax and administrative cooperation

#### **Example 93:**

How would any costs, borne by a non-participating Member State in the enforcement or collection of FTT be made good? Does the Commission have any specific proposals or observations on this aspect of the discussions?

**The question appears to be based on the premise that Member States not participating in the FTT enhanced cooperation bear costs in the enforcement or collection of FTT and that these costs must be considered as "resulting from implementation of enhanced cooperation" within the meaning of Article 332 TFEU.**

**The Commission notes that the question does not give any detail as to what precise costs it refers to.**

**In any event, the Commission takes the view that the enhanced cooperation does not lead to costs that would be borne by non-participating Member States.**

**In particular, possible costs incurred by the non-participating Member States for the purposes of collection of FTT, within the limits of administrative cooperation under Directive 2010/24/EU, cannot be considered as "resulting from implementation of enhanced cooperation".**

**Any cost of possible administrative cooperation between Member States results from the existence of national taxes, whose collection may present a cross-border dimension. It does not result specifically from the harmonisation of such national taxes, which is the**

object of the enhanced cooperation. Similar costs could arise as a matter of non-harmonised taxes in the same area. In this context, it is worth noting that Directive 2010/24/EU does not associate mutual assistance with limits imposed on requesting Member States in regard to their tax policy, in particular as regards the choice of the object and scope of tax legislation they see fit. At the same time, it contains clear rules on who bears what costs: cf. Article 20 thereof.

**Example 94:**

If one or both of the parties to a taxable transaction fail to pay the FTT, by whom, from whom and how will the tax be recovered?

According to Article 10(3), each party to a (taxable) financial transaction, including persons other than the financial institution, is jointly and severally liable for the payment of the tax due by a financial institution on account of that transaction, in case a financial institution has not timely paid the tax (safety net). It would be also for the participating Member States to provide that other persons can be held jointly and severally liable for the payment of the tax (Article 10(4)). Member States would thus have the right to organize the tax collection by other means than set out under basic rules of the proposal.

Participating Member States may also use the existing legal instruments on administrative cooperation, such as Directive 2011/16/EU, Directive 2010/24/EU or the OECD-Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters (where applicable).

**Example 95:**

Will any UK authority be involved in collecting the FTT of Member States of the FTT jurisdiction, e.g. through mutual cooperation mechanisms (tax administration, courts etc.)?

According to Article 11(1), the participating Member States will lay down registration, accounting, reporting and other obligations intended to ensure that the FTT due to the tax authorities is effectively paid. Recourse to mutual cooperation mechanisms with the administrations of non-participating Member States for the tax collection purposes might be envisaged (see also answer to example 99).

Moreover, the proposal confers relevant delegated powers to the Commission, notably on taxpayer obligations (Article 11(2)) and the Commission may also adopt implementing acts providing for uniform methods of collection of the FTT due (Article 11(5)).

Where possible, models of central tax collection for example through trading venues or other actors may be proposed. This is still under examination.

### **Example 96:**

A French broker purchases 1000 ABC shares for the price P-1 and sells 1100 ABC shares for the price P-2 on a French exchange during the same day. At the end of the day only the net balance of the purchases/sales, i.e. 100 ABC shares, are delivered into settlement.

- a) Would the FTT apply to 1100 ABC shares, 1000 ABC shares, 2100 ABC shares, or only to 100 ABC shares?

**According to Article 2(1) point (2), a financial transaction means any of the following: the purchase and sale of a financial instrument before netting or settlement. Thus, in this case there would be two financial transactions: (i) the purchase of 1000 ABC shares subject to the FTT applicable to 1000 ABC shares and (ii) the sale of 1100 ABC shares subject to the FTT applicable to 1100 ABC shares.**

- b) What would be the taxable amount?

**In the case of securities, according to Article 6(1), the taxable amount is everything which constitutes the consideration paid or owned, in return for the transfer, from the counterparty or a third party. Thus, in the purchase transaction the taxable amount is the price  $P1 \times 1000$  and in the sale transaction, the taxable amount is the price  $P2 \times 1100$ .**

### **Example 97:**

French insurance company C-1 is the owner of government bonds B-1 and needs to provide a CCP with collateral. The CCP does not accept bonds B-1 as collateral. C-1 exchanges bonds B-1 for government bonds B-2 with French bank C-2 for the time period of three months. C-1 pays the fee P-1 for this exchange. Bonds B-2 are accepted as a collateral by the CCP. In three months B-1 are returned to C-1 and B-2 to C-2.

What would be the taxable amount?

**In the case of financial transactions (two) relating to securities (bonds in this case), according to Article 6(1), the taxable amount is everything which constitutes consideration paid or owned, in return for the transfer, from the counterparty or a third party. In the first transaction the consideration for the transfer of B1 by C1 is the value of B2 (market price) which is logically higher than the value of B1. The consideration for the transfer of B2 by C2 is the value of B1 increased by the sum paid by C1 to reach equivalence. In the second transaction similar solutions would apply.**

### **Example 98:**

A German car salesman buys a Greek government bond from a German bank. The German bank is declared bankrupt.

Only the German bank would be liable to German FTT (assuming that the German car salesman is not considered to be a financial institution). The tax would become chargeable at the time of sale (Article 5 (1)) and would need to be paid to the accounts determined by Germany at that moment if the transaction is carried out electronically or within three working days in the other cases (Article 11(5)). The tax is due to the German authority (Article 10(1)). In case the German bank does not pay the FTT due within the time limit set in Article 11(5) in Germany, the other legal possibilities of tax collection have to be examined (including possible recourse to joint and several liability under Article 10(3)-(4)).

**Example 99:**

A German leasing institution holds convertible bonds in a Danish company which is converted into stocks. The stocks are sold to an Estonian real estate company. The German leasing institute is declared bankrupt.

If the German leasing institution and the Estonian real estate company are financial institutions, then according to the residence principle both parties are liable to pay the tax, respectively in Germany and Estonia (Articles 4(1) and 3(1) and Article 10(1)). In case the German institute does not pay the FTT due within the time limit set in Article 11(5) in DE, the other legal possibilities of tax collection have to be examined (including possible recourse to joint and several liability under Article 10(3)-(4)).

**Example 100:**

Two US banks trade a stock in a French company. The US banks ignore any request to pay FTT to France.

When the trade takes place OTC or on a trading venue outside the FTT jurisdiction, the two US banks are taxed according to the issuance principle (Article 4(1) (g)). In case the trade took place on a trading venue in France, the banks would be taxed according to the residence principle (probably according to Article 4(1)(a)). In both cases, the tax would be due to the French authorities (Article 10(1)).

According to Article 11(1), the participating Member States will lay down registration, accounting, reporting and other obligations intended to ensure that the FTT due to the tax authorities in France (in this case) is effectively paid. Recourse to mutual cooperation mechanisms with the administrations of non-participating Member States for the tax collection purposes might be envisaged. Negotiations with third countries and/or third country financial intermediaries could be needed.

Moreover, the proposal confers relevant delegated powers to the Commission, notably on taxpayer obligations (Article 11(2)) and the Commission may also adopt implementing acts providing for uniform methods of collection of the FTT due (Article 11(5)).

Also, in case the transaction took place on a trading venue withholding the tax at the moment where the financial transaction occurs, the tax would automatically be paid to the French tax authorities.

**Example 101:**

A Thai subsidiary of an investment bank in Germany sells unquoted stocks in a German industrial company to an investment bank in China. No payment or tax return is sent to Germany.

**According to the issuance principle both parties are taxed (Article 4(1)(g)) and the tax is due to the German authorities (Article 10(1)).**

**Example 102:**

Financial institutions from states that did not introduce FTT conclude an OTC transaction for a financial instrument issued in Slovenia – our opinion is that this transaction should be taxed with FTT but we are concerned about the possibility of exercise of the control over such transactions by national tax administrations.

**According to Article 4(1)(g), if two financial institution of countries which are outside the FTT jurisdictions are involved in a financial transaction related to a financial instrument issued in the FTT jurisdiction (Slovenia in the example) they are deemed to be established in the FTT jurisdiction (except for derivatives which are not traded on an organised platform). Both financial institutions will be taxed and the tax will accrue to the Slovenian authorities (Article 10(1)).**

**Slovenia (together with the other participating Member States) will lay down obligations intended to ensure that FTT due to the tax authority is effectively paid (Articles 11(1) and 11(2) and (5)).**

**Moreover, the proposal confers relevant delegated powers to the Commission, notably on taxpayer obligations (Article 11(2)) and the Commission may also adopt implementing acts providing for uniform methods of collection of the FTT due (Article 11(5)).**

**Example 103:**

Is a settlement agent or a financial intermediary who carries out the settlement on account of his client liable for the payment of FTT in case when a transaction with financial instruments is concluded on the OTC market?

**The question would need further clarification.**

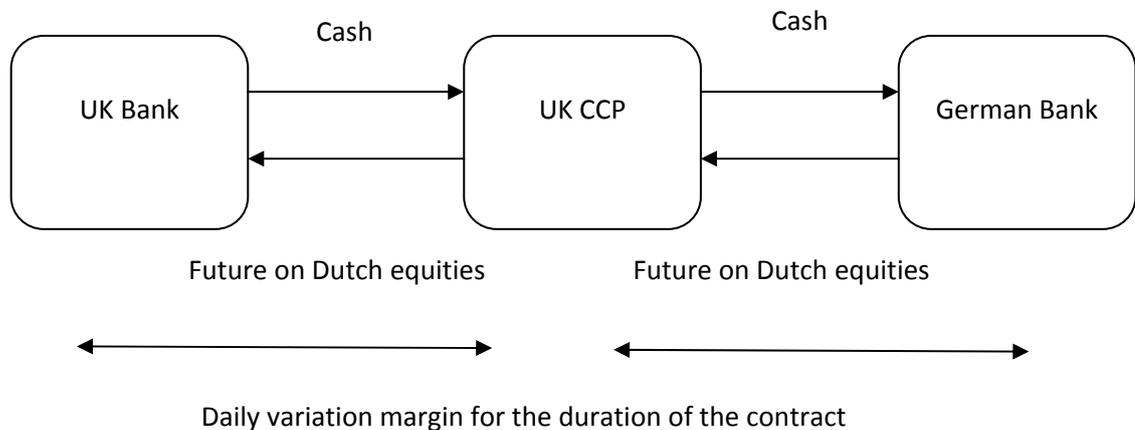
**We assume that the settlement agent will not be a party to the financial transaction as defined in Article 2(1) point (2) at issue. In this case the settlement agent would not be held liable for the payment of FTT, except if Member States made use of Article 10(4).**

It is to be noted that if a Central Securities Depository (CSD) or a Central Counter Party (CCP), acting as a buyer and seller, intervenes in a transaction (according to Article 3(2)), the proposed directive does not apply to CCPs and CSDs where exercising their function, except for some provisions of the proposal, in particular the provisions on joint and several liability (Article 10(3)-(4)).

Finally, where a financial institution acts in the name or for the account of another financial institution only the other financial institution is liable to pay FTT (Article 10(2)).

**Example 104:**

UK Bank buys a future on Dutch equities from a German Bank for cash, cleared by a CCP.



a) Who is responsible for collecting and paying the duty?

Except for some provisions, the proposed directive does not apply to CCPs where exercising their function (Article 3(2) (a)). It means that the CCP side of the transaction between respectively the UK bank and the UK CCP (acting as principal) will not be taxed and that again the CCP side of the transaction between the German bank and the UK CCP will not be taxed. FTT will be due from both the UK bank and the German bank on their side of transactions (Articles 3(1), 10(1)). The UK bank will be deemed to be established in Germany as the proposed directive does not apply to CCPs ("look-through approach") and it is thus involved in a financial transaction with the financial institution established in Germany (Article 4(1) (f)). All tax will be due to the German tax authorities (Article 10(1)).

As regards the collection of FTT, according to Article 11(1), the participating Member States will lay down obligations intended to ensure that the FTT due to the tax authorities is effectively paid. Moreover, the proposal confers relevant delegated powers to the Commission, notably on taxpayer obligations (Article 11(2)) and the Commission may also

adopt implementing acts providing for uniform methods of collection of the FTT due (Article 11(5)).

It is to be noted however that where the tax due has not been paid within the time limit, other legal possibilities of tax collection have to be examined. According to Article 10(3), each party to a transaction, i.e. also the CCP, shall then be jointly and severally liable for the payment of the tax due. Also, if participating Member States would have provided so, Article 10(4) could be applicable to CCPs in cases where Article 10(3) does not apply.

b) How much tax is due, and to whom?

See reply above.

c) The UK transacts with the CCP, who is located outside the FTT zone – is this leg of the transaction subject to FTT?

See reply to the first question. The proposed directive does not apply to CCPs where exercising their function (Article 3(2) (a)). It means that the CCP side of the transaction between respectively the UK bank and the UK CCP (acting as principal) will not be taxed and that again the CCP side of the transaction between the German bank and the UK CCP will not be taxed.

d) How does the FTT incidence change if the future is based on French equities?

In this case the transaction is subject to FTT anyway because of the involvement of a financial institution established in the FTT jurisdiction – German bank (Articles 3(1), 4(1) (f)). It does not matter whether the derivative contract is based on securities issued in the FTT jurisdiction or not.

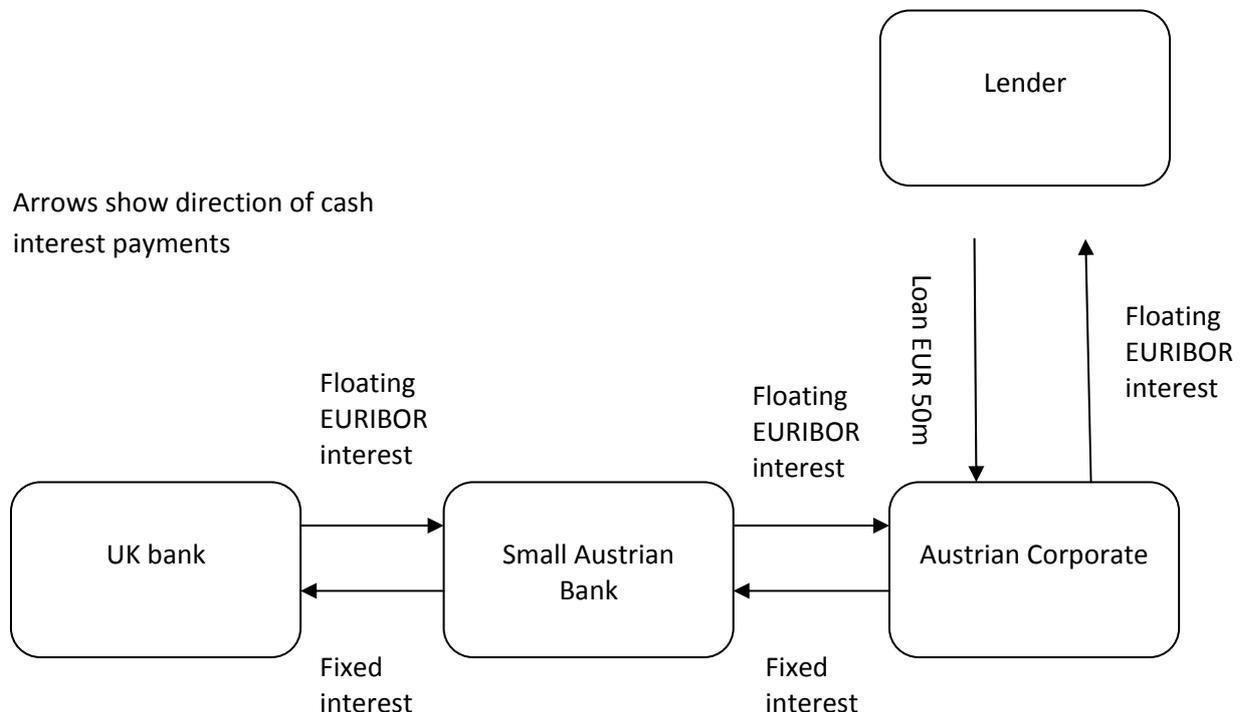
If the UK bank would however transact, for instance, with a non-FTT financial institution also with alike involvement of the UK CCP, the transaction will be subject to FTT only if the derivative contract is issued in the FTT jurisdiction and traded on an organised platform (Articles 3(1), 4(1) (g) and 2(1) point (11)). It would not matter where the underlying security is issued. Attention is however drawn to the possible use of the general anti-abuse rule of the proposal (Article 13).

e) How does the FTT incidence change if the CCP is German?

There would be no change as the proposed directive does not apply to CCPs, whether established in the FTT zone or outside, where exercising their function (Article 3(2) (a)). It means that in this case each time only the CCP side of the transaction is not taxed.

### Example 105:

An Austrian Corporation wants to hedge its variable interest rate exposure and enters into a floating to fixed interest rate swap.



In this example, the Austrian Corporate is too small to access the UK bank directly and so uses a small local bank to facilitate the trade, who acts as principal. The corporate pays floating interest and receives fixed interest.

- a) Who is responsible for collecting and paying the duty?

**Derivatives' transactions (in this case interest rate swaps) are in the scope of FTT (Article 2(1) points (2) and (4)). FTT will be payable by all financial institutions involved in the transactions (Article 10(1)) under normal rules (Articles 3(1) and 4). Consequently, in the transaction between the Austrian Corporate and the Small Austrian Bank, only the latter will be liable to pay Austrian FTT (Article 4(1)(a)) assuming that Austrian Corporate is not considered to be a financial institution. In the transaction between the Small Austrian Bank and the UK bank, also the latter will be deemed to be established in the FTT jurisdiction (Austria) as it is involved in the financial transaction with the Austrian bank acting as principal (Article 4(1) (f)). Both banks will be liable to pay the tax and the tax will accrue to the Austrian tax authorities (Article 10(1)).**

**The taxable amount is the notional amount referred to in the contracts (Article 7).**

- b) How much tax is due, and to whom?

**See reply above.**

- c) If the Austrian bank acts as agent rather than principal how does this affect the FTT incidence in the example?

**Assuming the Austrian bank acts as agent (we suppose acts in the name and for the account of) of the Austrian Corporate (assuming not to be considered a financial institution), there is only one transaction between the UK bank and the Austrian Corporate. The UK bank will be also deemed to be established in Austria, as it is involved in the financial transaction with a party, which is not financial institution, established in the territory of Austria (Article 4(1)(f)). The UK bank and Austrian bank will be liable to pay the tax and the tax will accrue to the Austrian tax authorities (Article 10(1)).**

**However, if the Austrian Corporate is a financial institution itself (Article 2(1) point (8)(j)), in this case it will be liable to pay FTT, not the Austrian bank (Article 10(2)).**

\*        \*  
  
\*