EU27 - FTT

Summary:

This paper presents the different options for a European financial transaction tax (FTT). It defines the possible scope for a EU 27 FTT or a Euro-zone FTT and lays out how this tax could be collected. The FTT should both maintain a level playing field between European financial actors and their foreign competitors and be designed in such a way, as to make the circumvention of the tax as difficult as possible. The conclusion of the paper is that a European FTT is feasible and in line with the requirements of EU law. Most of the financial products exchanged in the European Union could be covered and hence significant and stable revenue collected.

A. The practical perspective

1. Which products a EU FTT should cover?

The scope of a EU FTT needs to be designed in such a way that it prevents circumvention by financial actors. Not all the products can be taxed as the taxation of global products, like commodities derivatives, would just lead to a transfer of these activities to non-taxed areas.

According to our analysis, a EU FTT could cover the following financial products:
European stocks and bonds
Interest rates derivatives on European currencies
Equity derivatives on European stocks
Credit derivatives bought by European financial users.
EU 27 currencies foreign exchange transactions

The transaction of the following financial products, however, is not going to be taxed, as an EU 27 financial transaction tax could be easily circumvented by financial institutions:
EUR- foreign currency foreign exchange rate derivatives and Commodity derivatives. Most of the exchanges of commodity derivatives take place already today in the US (Chicago Mercantile Exchange).

1.1. FTT on European stocks and bonds:

A FTT on European stock and bond transactions would probably be the easiest FTT to implement. Indeed, all transactions involving stocks and bonds held with European Central Security Depositaries (CSD)[i] could be taxed on the market-based tax principle. CSD's centralize all the institutional arrangements required for the clearing and settlement of securities trades. They permit the holding and legal transfer of securities.

1.1.1. **Regulated and organised markets**

Tax is levied on exchange traded stocks and bonds by the Exchanges registered in the EU 27 via the payment and integrated securities and derivatives settlement systems they operate. Integrated securities and derivatives settlement systems handle the cash and the securities leg of transactions without the involvement of payment systems. Exchanges essentially combine trading, clearing and settlement of transactions.

- EX: UK stamp duty on shares traded on the London Stock Exchange (LSE) is levied by CREST settlement system, which is the Central Securities Depository of the LSE.
- Collection of the tax is cheap. Only 0.09 pence spent in order to collect 1£ of tax on securities transaction. In contrast, 1.56 pence spent in order to collect 1£ of income tax and 0.98 pence in order to collect 1£ corporation tax (Institute for Fiscal studies, Stamp Futy on Share Transaction, 2002).

1.1.2. OTC Transactions

Tax on OTC[ii] share and bond transactions held by European CSD's are levied by the payment and integrated settlement systems settling OTC securities transactions. Tax on OTC transactions of shares and obligations held with European CSD's bypassing payment and settlement systems are going to be paid:

- by the **Custodian bank to the revenue collecting authority**, if a custodian banks makes the in-house settlement of the transaction. Custodian banks with a branch registered in the EU are obliged to report to the CSD's holding the exchanged financial asset every in-house transaction and pay the transaction tax to record the change of ownership.

- By the two **contracting parties** to the revenue collecting authority. Financial institutions registered in Europe are obliged to report to the CSD's holding the exchanged financial asset every OTC transaction they engage in and pay the transaction tax to record the change of ownership.

1.1.3. Management of tax evasion/avoidance risks

There is no danger of European **shares and obligations changing their place of listing** (e.g. changing exchange), as:
it is expensive for a company to leave an exchange and to list in a new one.
exchanges in other jurisdictions are under a different regulatory regime to which the company would have to adapt.
each regulatory regime has its own inconvenient (class actions in the US).
European companies will find it hard to raise money on foreign exchanges especially if they need to raise Euros.

Enforcement of the tax on OTC **share and bond transactions held by European CSD's** bypassing settlement and payment systems will be strengthened by the rule that the **legal enforceability of transactions** of shares and obligations is made dependent on payment of the transaction tax.
The buyer of a share or a bond only becomes the legal owner of it, if the transfer of ownership is recorded by the CSD. The transfer of legal rights is thus dependent on the payment of the transaction tax.

a) **In order to prevent the formation of secondary markets** bypassing European payment and integrated settlement systems two further measures could be adopted:

EITHER one could forbid the transfer of shares and bonds held by a European CSD to a person operating a non-European depositary receipt scheme (CSD) or a non-European payment or integrated settlement system.

OR a high penalty leaving tax could be imposed on transactions with persons that operate a non-European depositary receipt scheme (CSD) or a non-European payment or integrated settlement system.

Euro-zone option:

Should a EU 27 FTT not be possible because of political objections of single Member states, one could also implement a Euro-zone FTT. As far as stocks and bonds are concerned, the transaction of stocks and bonds held with European Central Security Depositaries (CSD) in the Euro-zone would be taxed.

- In order to prevent a relocation of trading activities to non-Eurozone EU MS, a deal would have to be found whereby exchanges and financial institutions engaging in regulated or OTC transactions related to stocks and bonds held by euro-zone CSD's would be taxed by non Euro-zone EU MS as well. Revenue of the tax would be split between the Eurozone MS and the non-Eurozone tax collecting EU MS. Without such kind of agreement a Euro-zone FTT on stock and bonds would only lead to a transfer of stock and bond exchanges to the United Kingdom.
- The imposition of penalty taxes on transactions with persons operating non- euro-zone but still EU depositary receipt schemes or payment systems is probably legally unviable. Such a scheme would impede the free movement of capital and discriminate between non-euro zone and euro-zone CSD's and payment and integrated settlement systems within the EU. It would also not be legally enforceable in the framework of the current EU treaty.

1.2. FTT on derivatives

Derivative trading has come to represent the great majority of trading activities and a substitute for spot trading of all kind of financial assets. Excluding the derivatives markets from the FTT scope would let a major part of the financial transactions uncovered and reduce the revenue generated by the tax. However the derivative markets are global markets and the risk of circumvention is particularly high. A European FTT on derivatives thus has to be carefully designed.

1.2.1. Equity derivatives

The purchase by European financial institutions of **equity derivatives** (options, swaps, futures, etc on equities) is taxed. Working like a consumption tax, the European buyer of the equity derivative will have to pay the tax.

- **Exchange-traded equity derivatives:** Tax is levied by the exchanges via the integrated settlement and payments systems they operate.

OTC equity derivatives by-passing settlement systems are taxed by the tax collecting authority upon information from the European trade repositories.

> <u>*Remarks:*</u>
> *The European Market Infrastructure Regulations (EMIR) proposed by the Commission in September will harmonize the legislation on Central Counter Parties (CCPs) in Europe and force OTC Derivative transactions to be recorded by European trade repositories. It is unclear at this point which OTC transactions exactly will be recorded in a European trade repository. Derivatives transaction where the underlying asset is denominated in one of the EU27 currencies or where one of the parties to the OTC is a European registered institution. Generally, however, one can observe a trend towards an increased use of settlement and payment systems also for OTC transactions, as traderers want to reduce settlement costs and risk.*

> <u>***Euro zone option:***</u>
> The same tax could be applied on the purchase by Euro-zone financial institution of Equity derivatives.

1.2.2. Interest -rate derivatives

1.2.2.1. Collecting the tax

Single currency (EU27 MS currency) interest rate derivative (IR swaps, options, forward agreements) transactions are taxed.

- **Exchange-traded EU27 currency interest rate derivatives:** Taxed by the settlement systems operated by the European exchanges. Majority of interest rate derivatives are exchange traded.

- **OTC EU27 currency interest rate derivatives** by-passing settlement systems are charged by the tax collecting authority upon information from the trade repositories (Tri-Optima's OTC Interest Rate Derivatives Trade Reporting Repository went live in December 2009).

1.2.2.2. Management of tax evasion/avoidance risks

Danger of a EU 27 currency interest rate derivative market developing outside the EU 27 is limited:

There are too little Euros, Pounds or Swedish Kronas outside the EU-27, which are no more under the indirect control of the ECB and the other respective national central banks. The Eurodollar market in London could only develop, because large amounts of $ have long left the US.

The biggest actors in the market for EU 27 currency single currency interest rate derivatives are European banks, which receive their liquidity from the ECB and their respective national banks. These European banks are inevitably linked with the European payment and settlements.

1.2.2.3. Other kind of interest rate derivatives

All other kinds of interest rate derivatives, mixed or single interest rate derivatives involving the interest rate of a non-EU 27 currency area are going to be taxed on purchase by European financial institutions.

Euro zone option:
The tax would simply be limited to EUR-EUR single currency interest rate derivatives. The purchase by Eurozone financial establishments of all other interest rate derivatives will be taxed.

1.2.3. Credit derivatives (CDS)

Credit derivatives transactions (CDS) are charged on EU registered financial institutions buying credit derivatives emitted by European institutions.
Information from the purchase of credit derivatives can be gained by trade repositories (DTCC Deriv/SERV's Trade Information Warehouse).

Euro zone option:
Financial institutions incorporated in the Euro-zone could be charged for buying credit derivatives emitted by Euro-zone institutions.

1.3. FTT on EU27 MS's foreign-exchange transactions

1.3.1. Collecting the tax

A **Currency Transaction tax** (CTT) is introduced on all foreign exchange transactions involving a currency of the 27 EU MS. In contrast to the other FTT's, the CTT is levied by the central banks of the EU27.

The information on the transactions taking place is obtained by the European payments systems (TARGET 2 + RTGS of EU MS with own currency) or the CSL bank dealing with the Euro-leg of the transaction.
Information is forwarded to the EU27 central bank whose currency is being exchanged. The relevant central bank then charges the settlement account held by the bank engaged in the FX-transactions. If one of the banks does not hold an account with the Central bank, the tax is imposed on the correspondent bank.

1.3.2. Management of tax evasion / avoidance risk

- Risk of establishment of secondary market

Since there are not large amounts of EU-27 currencies outside the EU, the danger of a secondary market by-passing the CSL and European payments systems is small. Hence most FX-transactions involving EU 27 currencies and more than one financial institution wherever it notionally takes place triggers accounts in the EU.

Large financial institutions will have no interest not to rely on a efficient, profitable, IT-dependent financial settlement and clearing infrastructure for FX transactions because of a small FTT. The setting up of settlement systems (CLS bank, RTGS) has massively reduced settlement risk and cost. These advances also explain the recent explosion in trading volumes in the FX-market (see triennial Central bank survey on FX and derivatives transactins).

Considering the considerable investments, it is hard to see why they should construct an alternative to the current settlement system, which also only becomes profitable the more the network expands. Furthermore, how could settlement systems and large financial institutions active in the Euro FX and derivatives market work without the support of the ECB and other central banks.

- Increased use of FX-OTC transactions?

As mentioned before, the danger of an explosion of OTC transactions by –passing European settlement systems is limited. There is simply too little liquidity (e.g. EU27 currency outside the EU). Furthermore, European financial institutions can be obliged to report on the FX-OTC transactions they engage in to their relevant central bank.

- Problem of in-house transactions?

Custodian banks registered in the EU would have to report to their Central bank all the foreign exchange transactions they are undertaking. Again, custodian banks exchanging on a large scale EU 27 currencies must be nearly by definition in the EU and linked to European central banks.

- Risk of flight towards trading of FX derivatives to escape the CTT on spot transactions?

The risk that financial institutions increase the trading of FX derivatives in order to evade the tax is small.

Foreign exchange swaps and outright forwards are ultimately settled in the spot market and thus fall under the CTT.

Foreign exchange option contracts and currency swaps are not naturally settled in the spot market but hedging activity related to FX option contracts leave a significant footprint in the traditional FX market, which would be captured by the CTT. (Bank sells option, bank hedges risk connected to option by a number of transactions in spot market). Engaging more in options effectively means engaging more in the spot market

With the obligatory registration of all kinds of derivatives in trade repositories, the tax could be levied even on foreign exchange derivatives.

Euro zone option:
Tax is simply levied only on Euro foreign exchange transactions. Payment systems in non Euro but EU Member States linked to TARGET 2 (the Eurozones payment system) must be obliged to tax the transactions.

2. Who is going to be exempted from the FTT?

All transactions between customers (households and enterprises) **and financial institutions** (banks, insurance companies and brokerage firms) **are not subject to the proposed FTT.**

- Ex: Hence, if a private person orders his broker to buy or sell a stock, the payment between the customer and the broker is not taxed. Only the transaction between the two financial institutions (brokers, banks) falls under the scope of the tax.

Furthermore, there could be a possibility for exempting non-financial institutions from the FTT on all derivative transactions. Derivative transactions may be a useful tool for non-financial institutions to reduce the risk of fluctuations in FX, interest-rates or commodity prices.

- Non-financial institutions could be defined as institutions having no significant positions in the derivatives market and for which derivatives constitute not a significant part of their balance sheet.

3. Implementation period and review clause

5 years after the implementation of the FTT, the tax is going to be reviewed.
Idea is that financial actors hesitate to delocalise, as they don't know if the FTT is going to be kept. This could generate a positive dynamic in the sense that the FTT is indeed capable of collecting significant tax revenues. This would furthermore create a timeframe in which other countries could adapt FTT's, as they see that the EU is able to collect sufficient funds.

Assuring the political right that nothing is definitive and that should the FTT be a failure, it could still be abolished.

4. Revenue of a EU-27 FTT

The following results are based on the assumption that with the proposed FTT we cover about roughly 75% of all financial transactions and that a further 18% of transactions will not be taxed as they are realised by non-financial institutions. (International Swap and Derivatives Association)

The essential reason why a uniform FTT would have different effects on the transaction volumes of different financial assets is that the lower the transaction costs and margin requirements related to the transaction of a financial assets the greater will the reduction effect of an FTT be.

Also the more leveraged financial transactions are (typically the case for Derivatives) the stronger the tax burden and hence the reduction in transaction volume. Transaction costs for equity and bonds amount in average to 0.3%, respectively 0.2% of the value of traded financial asset. Transaction costs for OTC Derivatives transactions are as low as 0.003% of the notional value of the Derivative.

Revenue generated by a EU27 (+Norway, Switzerland) FTT:
Expressed in % of EU 27 (+Norway and Switzerland) GDP

Reduction of transaction volume --------------------- Tax rate	**Low**	**Medium**	**High**
0.1	1.962 = 244.42 bn EUR	1.376 = 171.41 bn EUR	0.806 = 100.40 bn EUR
0.05	1.272 = 158.46 bn EUR	0.981 = 122.21 bn EUR	0.549 = 58.39 bn EUR
0.01	0.486 = 60.54 bn EUR	0.427 = 53.19 bn EUR	0.368 = 48.84 bn EUR

Source: Greens calculation based on Schulmeister 2007 study for a FTT covering all transactions of shares, obligations covering 61.5% of the derivatives market transactions (18% exemptions for non-financial institutions and 25% of the transactions not covered by the scope of the tax).

Revenue generated by a EU 27 (+Norway, Switzerland) FTT if there would be no tax exemption for non-financial institutions on derivatives transactions:
Expressed in % of EU 27 (+Norway and Switzerland) GDP

Reduction of transaction volume --------------------- Tax rate	**Low**	**Medium**	**High**
0.1	2.345 = 292.13 bn EUR	1.633 = 203.43 bn EUR	0.941 = 117.22 bn EUR
0.05	1.527 = 190.22 bn EUR	1.173 = 146.12 bn EUR	0.647 = 80.60 bn EUR
0.01	0.587 = 73.18 bn EUR	0.517 = 64.40 bn EUR	0.444 = 55.31 bn EUR

Source: Greens calculation based on Schulmeister 2007 study for a FTT covering all transactions of shares and obligations plus 75% of the derivatives market transactions.

Revenue generated by a Euro-zone FTT if there would be no tax exemption for non-financial institutions on derivative transactions
Expressed in % of EU 27 (+ Norway and Switzerland) GDP

Reduction of transaction volume --------------------- Tax rate	**Low**	**Medium**	**High**
0.1	1.360 =	0.947 =	0.545 =

	169.43 bn EUR	117.98 bn EUR	67.98 bn EUR
0.05	0.885 = 98.91 bn EUR	0.680 = 75.98 bn EUR	0.375 = 41.91 bn EUR
0.01	0.340 = 38.05 bn EUR	0.229 = 33.49 bn EUR	0.257 = 28.76 bn EUR

Source: Greens calculation based on Schulmeister 2007 study for a EU27 FTT. Covers all transactions of shares and obligations plus 75% of the derivatives market transactions. The market share in transaction volume in the equity, obligations and derivatives market of non-Euro zone members is subtracted.

B. The legal perspective

Introduction

Due to the financial crisis which was mainly caused by irresponsible behaviour of financial sector participants, many European Union (EU) Member States are now confronted with rising budget deficits and increasing government debt.. While EU Member States have reacted to this challenge by adopting wide-reaching austerity plans, the **re-balancing of national budgets** has to be tackled also by the taking on new fiscal instruments generating new sources of revenues. Furthermore, in order to prevent the formation of financial bubbles in the prices of financial market assets, whose bursting can have dramatic consequences for the economy, it is imperative to curtail the harmful speculative **behaviour of some participants in financial markets.** A Financial Transaction Tax (FTT) covering a broad base of financial market instruments can be used to fulfill both of these objects: produce eminent revenue for Member states and discourage speculative short - term financial transactions. Such a levy could be based on the economic policy provisions and more specifically the economic stability requirements spelled out in Articles 120 – 126 of the Treaty for the functioning of the European Union (TFEU). These Articles provide the legal basis for accomplishing the obligations arising from Art. 3 Treaty of the European Union (TEU).
The following pages shall provide a summary about the legal requirements for the implementation of a Financial Transaction Tax (FTT) in the European Union (EU). Due to limited competences of the EU in matters relating to tax legislation it has to be examined carefully *if and how* a European FTT could be adopted. Requirements from Primary Treaty law provision and secondary legislation have to be taken into account. Furthermore, the Treaty provisions addressing taxation in the EU and other more general principles governing the Internal Market such as the *freedom of capital* provisions need to be considered.
Additionally the options of making use of an enhanced cooperation within the EU shall be presented.

EU Law requirements

2.1 Indirect taxation

On the basis of Art. **113 TFEU** the European Council can after consultation of the European Parliament and the Social and Economic Committee pass legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.
Therefore the EU cannot by itself implement a unified European tax for all Member States. It can only harmonise taxation legislation, which then has to be introduced on a national level FTT. Harmonisation has to promote the objects of the common market. This can in the sense of a progressive European integration be interpreted as a need to introduce common minimum standards.
In order to achieve such means of harmonisation all forms of **legal acts** can be applied by the legislator (regulation, directive and decision; compare Art. 288

TFEU). For a widely acceptable and waterproof harmonisation of a stability levy such as a FTT a directive has to be seen as the most sensible tool. It gives Member States sufficient room to adapt the European measure to national peculiarities and at the same time serves harmonisation.

Any action taken on community level has to balance the desirability of **progressive integration** against the **subsidiarity** requirement laid down in Art. 5 para 3 TEU. *Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale of effects of the proposed action, be better achieved at Union level.*

Thus only relevant and necessary legislation shall be passed on EU level. However, it can be argued that a broad FTT is necessary to **promote stability on European financial markets** and therefore needs to be implemented on Community level. National attempts would not have the same impact and would be more difficult to be brought in line with EU monetary policy obligations.

The main obstacle to the realisation of a EU FTT in this legislative process certainly will be the **unanimity requirement** in the European Council. It seems rather unlikely that all Member States are set to promote a European FTT. Hence, this is where political advocacy is needed the most.

Neither Art. 114 TFEU which only requires the ordinary legislative procedure, thus co-decision with a simple majority in the Council and the EP, nor Art. 115 TFEU can be used as a legal basis. Art. 114 is ruled out by para 2 that ecxludes the applicability of Art. 114 to fiscal provisions. Art. 115 is according to the ECJ case law and academic literature indeed applicable for taxation issues in general but the *lex specialis* concerned with *indirect taxation* of Art. 114 is the more precise provision and therefore superior.

Especially for the taxation of currency transactions the sovereign responsibility of the European Central Bank (**ECB**) needs to be respected. It requires that the Euro will be treated equally within the European Monetary Union (EMU). The **exclusive monetary competences** are on community level. In other words: The euro area’s exchange rate-policy is an exclusive Community competence. All transaction taxes that include Forex Euro transactions will have to be approved by the EU authorities.

It has to be concluded that within the competences provided for, the European legislator can make use of the relevant provisions in order to implement a European Financial Transaction Tax.

2.2 Limits in Primary and Secondary European law

2.2.1 Free movement of capital

Critiques of a Financial Transaction Tax such as the ECB in 2004 argue that a transaction tax would directly or indirectly affect the *free movement of capital and payments between Member States and between Member States and third countries*. This general principle established in the Treaties (Art. 63 TFEU) and consequently further developed in the case law of the ECJ prohibits all restrictions on the movement of capital.

Nonetheless, it has to be considered that the free movement principles are not absolute freedoms. Both the primary sources of law as well as the courts decisions provide for exemptions based on the therefore developed ***rule of reason test*** as

corrective authority.[iii] Especially the ECJ's case law is helpful to interpret which and to what extent measures can limit these freedoms and on what grounds they can be justified.[iv] The adoption of legislative measures potentially impeding the free movement provisions can be justified on grounds of public interest. For the adoption of a FTT it therefore has to be explained how and why the measure safeguards the public interest.[v]
The criteria established by the ECJ questions weather a measure impacting the free movement provisions at hand:

1. *Is justified by compelling reasons of public interest;*
2. *Is suitable for guaranteeing the realization;*
3. *Does not go further than necessary to achieve the objective;*
4. *Is applied without discrimination to all market players; and*
5. *Is not incompatible with specific EC law*

The intention of the FTT to be an instrument stabilising the (European) financial markets certainly has to be considered a public interest. Especially since the aforementioned Treaty provision (Art. 3 TEU) requires the common legislator to establish a balance between economic growth and price stability in order to protect its markets and participants in a social market economy. Furthermore, an EU FTT would touch upon the Eurozone's monetary policy through its levy on foreign exchange transaction. Such a measure falling in the scope of the EMU would imperatively have to be adopted on a community level. Since the motivation concurs with Treaty obligations the levy therefore is **justified**.
A general FTT would be able to ensure both objects. On the one hand it would stabilize financial markets by reducing the volume of speculative high-frequent transactions and on the other hand generate additional revenue helping Member States to limit deficits. No other known measure would have this similar double effect while at the same time being less interfering with free movement principles. With a rather minor **tax rate** between 0.001 – 0.5% it would have immediate effect on the annotated high frequent trading but would hardly affect non-speculative behaviour. All market players, no matter which financial instrument they would be trading as substitutes to each other, would be affected equally by the tax. Neither their nationality nor residence or place of establishment, nor destination or origin of a product would be of concern of the measure. Only the transaction weather on a European exchange or simply registered (derivatives / Euros) in one of the Member States trade repositories or central Security Deposits are criteria for the application of the levy. The measure thus would not invoke any form of discrimination within the EU. Therefore the FTT is an appropriate instrument to achieve the longed for and legitimate objective.
If well designed, a Financial Transaction Tax cannot be opposed by the Treaty principle of the free movement of goods. No primary European Union law would be harmed by the introduction.

2.2.2 Secondary EU law

As learned from previous European legislation on taxation such as the common value added tax (VAT) or taxes on the raising of capital, it can be important to make the levy as comprehensive and concise as possible. These examples show that a unified tax system for all Member States is feasible.

3 Alternative option: A Eurozone FTT?

3.1 The Eurogroup

The Eurogroup is the Meeting of Finance Ministers of Member States whose currency is the Euro. For the introduction of a unified FTT in this area the instrument of an enhanced cooperation seems adequate.

The complicated procedure and the numerous conditions the Treaties require for an enhanced cooperation might be the reasons for why MS including representatives of the Belgium presidency usually say that they want to implement a FTT in the Eurozone rather than on a bilateral basis or via coordinated national legislation. This automatically gives them an excuse for not pushing forward the implementation of the legislation.

At the same time an introduction with less Member States than the 19 Eurozone Member States in an enhanced cooperation would for legal reasons not be possible. As the ECB stated in its position regarding the Belgian CTT law from 2004, transaction taxes that include the exchange of foreign exchange cannot be done without the assent of the later. As the guardian of the common currency, the bank points out rightfully that policies concerning the euro have to be carried out by common means. Member states may not deviate from the common monetary policy. Effectively no single Member State or several Member States together of which at least one is part of the EMU can independently implement such levies.

3.2 Art. 20 TEU

> *Member States which wish to establish enhanced cooperation between themselves within the framework of the Unions non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties, subject to the limits and in accordance with the detailed arrangements laid down in this Article and in Articles 326 to 334 of the Treaty on the Functioning of the European Union. Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States, in accordance with Article 328 of the* TFEU.

This provision looks very suitable for the implementation of a Eurozone FTT when trying to avoid negative votes of Council Members who are not part of the Monetary Union. Furthermore, Art. 20 (2) requires that at least nine Member States would take part in the cooperation to attain certain objectives which would not be reached by the EU as a whole within reasonable time anyway.

The needed justification for the infringement of the principle freedoms might nevertheless be a little more sophisticated. Art. 326 requires the cooperation not to be to the detriment of other Member States and especially demands that it shall not undermine the internal market or economic, social and territorial cohesion. It shall not constitute a barrier to or discriminate in trade between Member States, nor shall it distort competition between them. This makes the justification for the introduction of a FTT only in the Eurozone more difficult as the introduction could be detrimental to the internal trade.

3.3 The procedure according to Art. 329 TFEU

Those Member States that want to establish an enhanced cooperation have to address a request to the Commission, specifying the scope and objectives of the enhanced cooperation intended. The Commission then may submit a proposal to the Council to that effect. When the Commission doesn't submit a proposal it has to inform the Member States and substantiate its decision.

The Council subsequently has to decide on the proposal after obtaining the consent with the EP. Given that all eleven Euro countries would join the cooperation, decisions regarding its scope and objectives could only be voted on by these Members. Therefore the potential opponents could only express their arguments during discussions open to all Council Members but not block the vote.

In order to implement a FTT the same treaty provisions are applicable nonetheless. Therefore for those countries which are parts of the enhanced cooperation Art. 113 TFEU still requires the unanimity requirement. The serious issue of a restriction of the common market would the have to be justified again.

[i] A **Central Securities Depository** (CSD) is an organization holding securities either in certificated or uncertificated (dematerialized) form, to enable book entry transfer of securities.
[ii] OTC: “over the counter”
[iii] The *rule of reason test* was established initially in Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* (‘Cassis de Dijon’) [1979] ECR 649.
[iv] Compare: Case C–101/05, *Skatteverket v. A* [2007] ECR I–11531, whereas „tax regimes are explicitly considered able to limit capital flows“.
[v] In *Case 203/80*, *Casti* the ECJ recognizes public policy as a permissible restriction to capital movements. It is argued that “complete freedom of movement of capital may undermine the economic policy of one of the member states or create an imbalance in its balance of payments”.