



# COMMENTI

## Taxing financial transactions as an alternative to the regulation of financial markets

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Proposal for a  
**COUNCIL DIRECTIVE**  
implementing enhanced cooperation in the area  
of financial transaction tax  
COM(2013) 71  
(Extract)

### **Chapter I**

#### **Subject matter and definitions**

##### *Article 1*

##### *Subject matter*

1. *This Directive implements the enhanced cooperation authorised by Decision 2013/52/EU by laying down provisions for a harmonised financial transaction tax (FTT).*
2. *Participating Member States shall charge FTT in accordance with this Directive.*  
(....)

### **Chapter II**

#### **Scope of the common system of FTT**

##### *Article 3*

##### *Scope*

1. *This Directive shall apply to all financial transactions, on the condition that at least one party to the transaction is established in the territory of a participating Member State and that a financial institution established in the territory of a participating Member State is 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.*
2. *This Directive, with the exception of paragraphs 3 and 4 of Article 10 and paragraphs 1 to 4 of Article 11, shall not apply to the following entities:*
  - (a) *Central Counter Parties (CCPs) where exercising the function of a CCP;*
  - (b) *Central Securities Depositories (CSDs) and International Central Securities Depositories (ICSDs) where exercising the function of a CSD or ICSD;*
  - (c) *Member States, including public bodies entrusted with the function of managing the public debt, when exercising that function.*
3. *Where an entity is not taxable pursuant to paragraph 2, this shall not preclude the taxability of its counterparty.*
4. *This Directive shall not apply to the following transactions:*
  - (a) *primary market transactions referred to in Article 5(c) of Regulation (EC) No*

1287/2006, including the activity of underwriting and subsequent allocation of financial instruments in the framework of their issue;

- (b) transactions with the central banks of Member States;
- (c) transactions with the European Central Bank;
- (d) transactions with the European Financial Stability Facility and the European Stability Mechanism, transactions with the European Union related to financial assistance made available under Article 143 of the TFEU and to financial assistance made available under Article 122(2) of the TFEU, as well as transactions with the European Union and the European Atomic Energy Community related to the management of their assets;
- (e) without prejudice to point (c) and (d), transactions with the European Union, the European Atomic Energy Community, the European Investment Bank and with bodies set up by the European Union or the European Atomic Energy Community to which the Protocol on the privileges and immunities of the European Union applies, within the limits and under the conditions of that Protocol, the headquarter agreements or any other agreements concluded for the implementation of the Protocol;
- (f) transactions with international organisations or bodies, other than those referred to in points (c), (d) and (e), recognised as such by the public authorities of the host State, within the limits and under the conditions laid down by the international conventions establishing the bodies or by headquarters agreements;
- (g) transactions carried out as part of restructuring operations referred to in Article 4 of Council Directive 2008/7/EC<sup>17</sup>.

#### Article 4

##### Establishment

1. For the purposes of this Directive, a financial institution shall be deemed to be established in the territory of a participating Member State where any of the following conditions is fulfilled:

- (a) it has been authorised by the authorities of that Member State to act as such, in respect of transactions covered by that authorisation;
- (b) it is authorised or otherwise entitled to operate, from abroad, as financial institution in regard to the territory of that Member State, in respect of transactions covered by such authorisation or entitlement;
- (c) it has its registered seat within that Member State;
- (d) its permanent address or, if no permanent address can be ascertained, its usual residence is located in that Member State;
- (e) it has a branch within that Member State, in respect of transactions carried out by that branch;
- (f) it is party, 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, to a financial transaction with another financial institution established in that Member State pursuant to points (a), (b), (c), (d) or (e), or with a party established in the territory of that Member State and which is not a financial institution;
- (g) it is party, 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, to a financial transaction in a structured product or one of the financial instruments referred to in Section C of Annex I of Directive 2004/39/EC issued within the territory of that Member State, with the exception of instruments referred to in points (4) to (10) of that Section which are not traded on an organised platform.

2. A person which is not a financial institution shall be deemed to be established within a participating Member State where any of the following conditions is fulfilled:

- (a) its registered seat or, in case of a natural person, its permanent address or, if no permanent address can be ascertained, its usual residence is located in that State;

(b) it has a branch in that State, in respect of financial transactions carried out by that branch;

(c) it is party to a financial transaction in a structured product or one of the financial instruments referred to Section C of Annex I to Directive 2004/39/EC issued within the territory of that Member State, with the exception of instruments referred to in points (4) to (10) of that Section which are not traded on an organised platform.

3. Notwithstanding paragraphs 1 and 2, a financial institution or a person which is not a financial institution shall not be deemed to be established within the meaning of those paragraphs, where the person liable for payment of FTT proves that there is no link between the economic substance of the transaction and the territory of any participating Member State.

4. Where more than one of the conditions in the lists set out in paragraphs 1 and 2 respectively is fulfilled, the first condition fulfilled from the start of the list in descending order shall be relevant for determining the participating Member State of establishment.

### **Chapter III**

#### **Chargeability, taxable amount and rates of the common FTT**

##### **Article 5**

###### *Chargeability of FTT*

1. The FTT shall become chargeable for each financial transaction at the moment it occurs.

2. Subsequent cancellation or rectification of a financial transaction shall have no effect on chargeability, except for cases of errors.

##### **Article 6**

###### *Taxable amount of the FTT in the case of financial transactions other than those related to derivatives contracts*

1. In the case of financial transactions other than those referred to in point 2(c) of Article 2(1) and, in respect of derivative contracts, in points 2(a), 2(b) and 2(d) of Article 2(1), the taxable amount shall be everything which constitutes consideration paid or owed, in return for the transfer, from the counterparty or a third party.

2. Notwithstanding paragraph 1, in the cases referred to in that paragraph the taxable amount shall be the market price determined at the time the FTT becomes chargeable:

(a) where the consideration is lower than the market price;

(b) in the cases referred to in point 2(b) of Article 2(1).

3. For the purposes of paragraph 2, the market price shall be the full amount that would have been paid as consideration for the financial instrument concerned in a transaction at arm's length.

##### **Article 7**

###### *Taxable amount in the case of financial transactions related to derivatives contracts*

In the case of financial transactions referred to in point 2(c) of Article 2(1) and, in respect of derivative contracts, in points 2(a), 2(b) and 2(d) of Article 2(1), the taxable amount of the FTT shall be the notional amount referred to in the derivatives contract at the time of the financial transaction.

Where more than one notional amount is identified, the highest amount shall be used for the purpose of determining the taxable amount.

## Article 8

### Common provisions on taxable amount

For the purposes of Articles 6 and 7, where the value relevant for the determination of the taxable amount is expressed, in whole or in part, in a currency other than that of the taxing participating Member State, the applicable exchange rate shall be the latest selling rate recorded, at the time the FTT becomes chargeable, on the most representative exchange market of the participating Member State concerned, or at an exchange rate determined by reference to that market, in accordance with the rules laid down by that Member State.

## Article 9

### Application, structure and level of rates

1. The participating Member States shall apply the rates of FTT in force at the time when the tax becomes chargeable.

2. The rates shall be fixed by each participating Member State as a percentage of the taxable amount.

Those rates shall not be lower than:

(a) 0.1% in respect of the financial transactions referred to in Article 6;

(b) 0.01% in respect of financial transactions referred to in Article 7.

3. The participating Member States shall apply the same rate to all financial transactions that fall under the same category pursuant to points (a) and (b) of paragraph 2.

**SOMMARIO:** 1. The Commission's interest in financial taxation. – 2. Financial taxation for correction of competition: similarities with the environmental tax. – 3. What is the recipe for financial market stability: taxation or regulation? – 4. The option to tax: is it a purely political choice?

## 1. The Commission's interest in financial taxation

In recent years European institutions have shown great conviction in taking the road of financial taxation: although – and we must point this out here – the literature has not reached any unequivocal position on the suitability of this form of taxation<sup>1</sup>. The topic is of particular interest as a legal analysis of the intervention of European public institutions in not just economic but also social relations, as it highlights a trend worthy of attention: the European institutions, and in particular the Commission, have a special sensitivity to the objectives of

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<sup>1</sup> The suitability is advocated by A. BOTSCH, *Financial transaction taxes in the EU*, in *ETUI Policy Brief*, n. 8, 2012, p. 1 ss., and A. TANASIE-N. MARCU, *The New Perspectives On The Tobin Tax. Could It Provide Any Support For The Euro-Area?*, in *Revista Tinerilor Economisti (The Young Economists Journal)*, n. 18, 2012, p. 182 ss.; whereas a weak conviction is formulated by M. HEINRICH, *Steuer(n) in die richtige Richtung? Betrachtungen zur Finanztransaktionssteuer*, in *Wirtschaftsdienst*, n. 4, 2013, p. 238 ss.

An adverse opinion is expressed by R. UPPAL, *A Short Note on the Tobin Tax: The Costs and Benefits of a Tax on Financial Transactions*, EDHEC-Risk Institute, 2011: following this essay the EDHEC-Risk Institute addressed a letter in 2011 to the Internal Market and Services Commissioner Michel Barnier to recommend the dismissal of the project.

The question is variously commented in the forum *The Financial Transaction Tax – Boon or Bane?*, in *Intereconomics*, n. 2, 2012, p. 76 ss.

“social justice” which can be pursued through regulatory measures and the rescaling of competition and the market. The purpose of this article is therefore to propose the introduction of a framework for taxation of financial transactions, based on essentially social and distributive grounds; it therefore concerns the willingness of the EU to take charge of economic and social imbalances, which today represent inequalities and prevent people from exercising the rights to which they are entitled.

Back in 2010, the first communication from the Commission entitled *Financial Sector Taxation*<sup>2</sup> set out the reasons for a tax on these particular activities. The first reference document therefore consists of an act of so-called *soft law*, a non-binding but already very significant statement on the position taken by the European institutions in this area; despite the absence of any legal status, it is of particular interest for the approach adopted to “fiscal policy”.

The context is that of the economic and financial crisis within which this new mode of taxation would be an appropriate contribution to achieving a threefold goal. First, it would probably improve the stability of the financial sector, by discouraging certain high-risk activities and at the same time making it a source of tax revenue. Second, the new taxes would affect a sector that has been judged to be largely responsible for the onset and extent of the crisis and its negative effects on public debt across the world. As a result, these taxes could be seen as a contribution which the financial sector, to which some governments have provided massive support during the crisis, makes to the economic systems, as the resources so collected could achieve a fiscal consolidation and create reserve funds. And finally, since the majority of European financial services are exempt from value added tax, it appears to the Commission that the demand for a more substantial contribution from the financial sector to public finances is also an equitable option for distributive justice.

The communication identifies two urgent political challenges that are pressing today not only at EU but also at the international level and which require substantial budgetary resources; such resources, according to the Union, should be collected through new tax instruments. Here then is the close connection between two objectives – protection of the climate and development – and unprecedented fiscal measures whose adoption requires a coordinated approach to ensure that different national taxes, calculated on different bases, do not encourage tax arbitrage and produce distortions in their allocation between financial markets in Europe. The most recent trend is unfortunately in this direction; France and Italy introduced forms of financial taxation in 2013, leading six German banking associations at the end of the year to submit formal complaints to the European Commission on the grounds of breach of the freedom of movement of capital.

With this communication, the Commission proceeded to identify these fiscal measures, advancing a twofold proposal: a Financial Transaction Tax (FTT) which will be based on the value of individual transactions, applicable to a wide range of financial instruments from shares to bonds and from currencies to derivatives; and a Financial Activities Tax (FAT), designed to impact profits and overall compensation. While the former would apply to every single player in the market on the basis of their financial transactions, the second would apply to companies: the communication estimates the amount of revenue that

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<sup>2</sup> Com(2010) 549.



could be produced if both forms are carried out<sup>3</sup>, but more attention is given to the idea of a tax on financial activities.

It is interesting to observe how an argument already known in the field of environmental taxation is being used for these instruments: the FTT in particular would be suitable for implementing the principle of “the polluter pays”. This mechanism could be used to internalise the potentially negative external effects of financial sector activities. In fact, a broadly applied FTT could help to reduce undesirable speculative trading and transactions on financial markets. Indeed, social scientists and public finance economists now agree that in principle a tax – at the Community as well as national level – on financial transactions could play a very positive role in terms of better regulation and rationalisation of financial markets and, above all, the objective of putting the brake on the excessive financial speculation that has been seen in recent years<sup>4</sup>. However, the document recognises that it is not certain that such a measure would result in an increase in efficiency, and in particular it acknowledges that there is a risk that such a taxation could cause a displacement of trading activity, which would be averted only by a general application of the tax in all financial centres. This may in fact be the reason why this measure has not received the full support of the Commission: it does however give it a unique role, namely to remedy the phenomenon of “financial pollution”<sup>5</sup>, as if such a tax was a new kind of financial *carbon tax* at EU level; which, moreover, serves the purpose of transferring the tax burden from employment and enterprise to capital and activities with massively negative external effects.

The idea of a levy on financial transactions – a revival of the well-known *Tobin tax*, i.e. the mechanism intended to “throw some sand into the gears of finance”, according to the original formulation<sup>6</sup>, which in any case was to cover only the foreign exchange market and currency transactions<sup>7</sup> – has been further developed by the Commission, which has advanced two proposals for different directives due to the non-linear process of acceptance by the Member States.

The first was presented in 2011 and concerns a system of common financial transaction taxes<sup>8</sup>, which was intended as an amendment to Directive 2008/7/EC on indirect taxes on the raising of capital. To this end, the proposal

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3 A report prepared for the International Regulatory Strategy Group by London Economics in 2013, *The Impact of a Financial Transaction Tax on Corporate and Sovereign Debt*, offers data and estimates at this regard.

4 Cf. F. GALLO,  *Mercati finanziari e fiscalità*, in *Rass. trib.*, n. 1, 2013, p. 44.

5 The expression must be credited to F. GALLO,  *Mercati finanziari e fiscalità*, cit., p. 50.

6 As regards the origins of the financial taxation based on the model created by James Tobin see K. RAFFER, *The Tobin Tax: Reviving a Discussion*, in *World Development*, n. 3, 1998, p. 529 ss.; and S. CIPOLLINA,  *Profilo della de-tax*, in *Riv. dir. fin. sc. fin.*, n. 2, 2002, p. 247 ss.

7 R.P. BUCKLEY, *A Financial Transaction Tax: The One Essential Reform*, in *The Financial Transaction Tax – Boon or Bane?*, cit., p. 102, remarks that «forty years ago, the Nobel laureate James Tobin proposed a tax on currency transactions in an effort to improve the workings of the foreign exchange markets». It is clear that a levy on the financial transactions would be «a much more broadly based tax than one just on currency and is thus far more difficult to transact around and avoid. In fact, an FTT was first proposed by Keynes in 1936 when he wrote, “the introduction of a substantial government transfer tax on all transactions might prove the most serviceable reform available, with a view to mitigating the predominance of speculation over enterprise in the US”», J. M. KEYNES, *The General Theory of Employment, Interest and Money*, New York, 1936, p. 156.

8 Com(2011) 594.

outlined the essential structure of the tax on financial transactions (FTT), with the objective of taxing gross transactions before any downstream remunerative payments. A wide range of applications was provided in this regard, since the objective was to cover transactions involving all types of financial instruments, including instruments tradable on the capital market, money market instruments, units or shares in collective investment schemes and derivatives contracts. The scope of the tax would not be limited to transactions on organised markets, but also cover other types of OTC transactions; transactions with the European Central Bank and the national central banks, on the other hand, were to be excluded in order to avoid any impact on possibilities for refinancing financial institutions or monetary policies in general.

Despite the favourable opinions expressed in 2012 by the European Parliament, the Economic and Social Committee and the Committee of the Regions, numerous reservations were expressed by the Member States; consequently the Council on 22 June and 10 July 2012, in view of the need to establish a common FTT system and the desirability of a harmonised tax on financial transactions, issued a different decision: based on the request of eleven of the Member States (Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal, Slovenia and Slovakia), the Commission presented the Council with a proposal to authorise more cooperation on this matter.

Based on this authorisation the Commission in 2013 proceeded to the second proposal to implement more cooperation in the area of a financial transactions tax<sup>9</sup>, which, although going beyond the previous 2011 proposal, still retains the objectives and respects the essential principles, with some changes. First of all no change is made to the amendment of the 2008 Directive, as this must necessarily remain unchanged for the States not involved in the enhanced cooperation; and secondly, the intention is to enhance the dimension of the prevention of tax evasion primarily through the use of the “principle of establishment”, with the “principle of issue” being used only complementarily and as a subordinate measure. In this way it is believed that attempts at tax evasion, distortions and transfers through other jurisdictions can be prevented, because financial operators will find it less advantageous to transfer assets and domiciles outside the jurisdiction of the ITF, while securities sales will in any case be subject to tax on issue within the ITF jurisdiction.

In this context it may be interesting to add another element that can clarify the expectations that the Commission is encouraging in relation to financial taxation. The system of so-called “Own Resources” of the Union has been under discussion for some years now. The most recent proposal for a Council decision<sup>10</sup> drafted by the Commission dates from 2011 and is aimed at overcoming the current system of raising resources, in respect of the framework of legal instruments now provided by the Lisbon Treaty. Article 311 TFEU in fact gives the Council the power to establish, by regulation, new categories of own resources and to remove existing categories. Now, the Commission has already put forward the idea of abolishing own resources based on VAT; given both the administrative complexity associated with this resource and the current modest collection rates, the approach envisaged is not that of phasing out, but complete abolition as of a specific date. To replace this source of revenue, the 2011 proposal provides for the creation of a new resource that is still

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9 Com(2013) 71.

10 Com(2011) 510.

linked to VAT but within the context of harmonized national systems; and above all, to the extent of its relevance here, the proposal provides for investment in taxation of financial transactions, which is expected, as well as benefits in the form of the stabilisation of financial markets, to have much more wide-ranging consequences. The scenario therefore seems quite complex: we see that there are many obvious reasons for the Commission to favour financial taxation, but at the same time we do not see the Member States being equally excited about the proposals<sup>11</sup>.

As we wait to follow the developments in this new field of taxation designed by and intended for implementation at the national level, we can note that the principal supporters of the tax at Member State level are Germany and France, and the latter in particular has recently introduced it; the United Kingdom is much more hostile<sup>12</sup>, being unwilling to constrain the financial transaction sector that is so crucial for its economy. The 2013 Italian law on stability – no. 228/2012 – introduced a tax along the lines of the EU model that imposes a financial transaction tax only on share transfers, equity financial instruments and related derivatives. These measures are still quite limited, but attest to a willingness to comply with the EU guidelines.

If we consider the Italian case, the data about the revenues in 2013 are quite disappointing: a billion euro was expected before the enforcement of the new rules, but only € 159 millions have been actually collected. What's more, the tax produced a significant collapse in the stock markets: the analysts evaluated a reduction of the transactions of 15-20% – in some cases also 25% – corresponding to € 17,5 billions each month.

Also the forecast of the French institutions, who introduced a similar taxation in 2012, were not confirmed: the tax was expected to generate €170 million in additional revenue for 2012 and another €500 million in 2013. But the really problematic question, apart from the revenue, was represented by the strong reduction of the transactions. Such results will require a careful consideration for the future.

## 2. Financial taxation to correct competition: similarities with the environmental tax

The basic premise of the latest proposal of the Commission, which in 2013 sought to enhance cooperation, is quite unusual when compared with the purposes that have led in the past to the Community harmonisation of indirect

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11 J. VELLA, *The Financial Transaction Tax Debate: Some Questionable Claims*, in *The Financial Transaction Tax – Boon or Bane?*, cit., p. 95, points out that «the strength of the opposition of some states to the FTT is well known. The adoption of an FTT by these states is not more realistic than the adoption of other taxes on the financial sector. Indeed, the Commission's statement that its proposal "should pave the way towards a coordinated approach with the most relevant international partners" appears to be no more than an expression of hope, which some might term fanciful».

12 An analysis of the House of Commons, A. SEELY, *The Tobin Tax: recent developments*, 2013, p. 1, supports this hostility: «although this idea received support from some EU States, the Coalition Government has been strongly opposed, on the grounds that such a tax would only be viable if implemented on a global scale, and that the UK's own banking levy, which was introduced in January 2011, meets many of the aims set for an FTT without some of its possible drawbacks».



taxes. The Commission with the proposed directive takes an unusual position in relation to financial market dynamics, identifying those markets among the causal factors of the recent economic and financial crisis and providing a specific intervention for them which is intended to produce a correction, not to say outright compensation. The financial sector is singled out as a major contributor to the economic crisis, the costs of which were borne by governments and European citizens but not by the financial operators themselves. The Commission therefore embodies the opinion, widespread in Europe as well as internationally<sup>13</sup>, that the financial sector should “contribute more fairly given the costs related to management of the crisis and the current insufficient taxation”.

In particular, financial taxation is intended to achieve three objectives: first, it should harmonise legislation on indirect taxation of financial transactions, which is necessary to ensure the proper functioning of the internal market of financial instrument taxation and avoid distortions in the competition between instruments, operators and financial markets throughout the European Union. Secondly, taxation in this manner is expected to ensure a fair and reasonable contribution from financial institutions in order to cover the costs of the recent crisis, as well as to ensure a level playing field with other sectors in fiscal terms; and ultimately the aim is to create appropriate mechanisms that would demotivate transactions that do not contribute to the efficiency of financial markets, in order to avoid future crises.

This set of objectives is considered achievable only through the initiative of the Union; only this “could in fact prevent financial markets from becoming fragmented across the activities and states and at the level of products and operators, by ensuring equal treatment of EU financial institutions and therefore, ultimately, the proper functioning of the internal market. The development of a system of common financial transaction taxes in the Union reduces the risk of market distortion due to the geographical relocation of the activities induced by the tax system”<sup>14</sup>.

The peculiarity of the process started – whose ultimate outcome cannot be predicted – lies in the Commission’s emphasis on the responsibilities of the financial sector in the course of the current crisis, and on the need to find adequate responses to opportunistic and speculative behaviour by financial operators, which the market alone has shown itself incapable of effectively curbing. These curbs are considered to take the form of taxation which on the one hand should act as a disincentive to such opportunistic behaviour, while on the other ensuring compensation, by allowing the collection of resources to be deployed to areas that have particularly suffered from the crisis.

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<sup>13</sup> A report presented by the International Monetary Fund in 2010 at the G20 summit, S. CLAESSENS-M. KEEN-C. PAZARBASIOGLU, *Financial Sector Taxation. The IMF’s Report to the G-20 and Background Material* answers to the request of the G20 summit in 2009 to «prepare a report for our next meeting [June 2010] with regard to the range of options countries have adopted or are considering as to how the financial sector could make a fair and substantial contribution toward paying for any burden associated with government interventions to repair the banking system»: the *fair and substantial contribution* expresses the same concern of the Commission that the sector of finance must in some way return to the system of the real economy at least a part of what it received in order to overcome the situation of crisis.

<sup>14</sup> *Proposal for a Council directive implementing enhanced cooperation in the area of financial transaction tax*, Com(2013) 71, cit., p. 2 ss. Such common system is said to ensure tax neutrality through harmonisation with a broad scope, notably to also cover very mobile products such as derivatives, mobile actors and market places, thus also contributing to less double-taxation or double-non-taxation.

The argument that would supposedly apply to such a tax seems to resume and revive the argument for taxation in the environmental sphere, which we will therefore briefly revisit.

Using the same legal foundation created by the Treaties in the field of environmental protection, which it is not necessary to discuss here, the Union has produced a series of soft laws, which have proven to be particularly suitable tools for fiscal objectives. This creation of soft laws has made a significant contribution to the concept of taxation and fulfilment of the tax obligation, which is especially interesting for its likely implications in relation to financial transactions.

With the communication *Environmental Taxes and Charges in the Single Market* in 1997<sup>15</sup>, the Commission defined the legal framework applicable to Member States wishing to introduce environmental taxes and charges. The Commission recognises at the outset that these new fiscal instruments can be a means to apply the principle of “the polluter pays” (OECD Recommendation No. 128 of 26 May 1972), including the environmental costs of pricing goods and services: fiscal instruments are viewed as incentives to help direct the choice of producers and consumers to make them more sustainable for the environment.

With respect to the direct link between taxation and the results of environmental protection, taxes and environmental taxes work in such a way that environmental costs are included in the prices of goods and services. The expected result is that consumers and producers can be induced to act more compatibly with ecological requirements; however, this result must be achieved in accordance with market logic, and therefore with a balanced assessment of the level of the price to be determined. The main objective is therefore to influence the choices of consumers and producers, but with an equally important effect in terms of the tax revenues generated as a result, which can be used to finance initiatives to protect the environment.

Particularly interesting is the definition provided by the communication as to what constitutes an “environmental tax”: it is a tax which must have “a tax base that has a clearly negative effect on the environment”. Whether this means emissions, and is therefore targeted at financial benefits that are directly related to the pollution caused or relates to the products, raw materials and incorporated inputs, it is the sum of the measures that can affect the choices between different technological or consumption alternatives, through the alteration of convenience in terms of costs and private benefits. In any case, the aim is to “internalise” the “environmental externalities”. The environment is used for a dual purpose: on the one hand, it represents the purpose of the tax, as the revenue is allocated to its protection; on the other hand, it is the subject of extra-fiscal protection criteria that stem from incentives and disincentives. The taxes acquire an environmental function, in the sense that the environment serves as an extra-fiscal purpose<sup>16</sup>, legitimised by the principle of “the polluter pays”. The latter, in a very peculiar manner in terms of the tradition of tax law, represents the general method of allocating the costs of environmental protection: national legislators then proceed to identify the most appropriate

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15 Com(97) 9.

16 Cf. P. SELICATO, *La tassazione ambientale: nuovi indici di ricchezza, razionalità del prelievo e principi dell'ordinamento comunitario*, in *Riv. dir. trib. int.*, n. 2-3, 2004, p. 257; see also F. GALLO-F. MARCHETTI, *I presupposti della tassazione ambientale*, in *Rass. trib.*, n. 1, 1999, p. 116 ss.

tools – damages, fines, tax and financial compensation – to effectively apply this principle, in the light of the various socio-economic and legal contexts.

The significant novelty was therefore the incorporation of the environment, or rather its transformation, within the framework of the tax as the basis for calculating the tax levy. The general purpose is to reduce the source of pollution, without excluding the aim of achieving revenue to be allocated to interventions that preferably mend the damages caused by that pollution. Any production or consumption activity that could lead to an external diseconomy could take on the traits of “tax suitability”, meaning that the private individual acquisition of natural resources available in limited quantities could be regarded as a signal of the economic capacity of the acquiring person<sup>17</sup> and therefore liable to tax.

The subsequent document, the 2001 Eurostat *Environmental taxes – a statistical guide* proposed a further definition of the environmental tax, which it qualified as a tax whose tax base is a physical unit (or a proxy of it) of something that has a proven, specific negative impact on the environment. Only the taxable amount is considered relevant for the purpose of qualifying the tax as “environmental”, while the share incentive and purpose remain additional external elements whose impact varies based on Community expectations and opinions. Finally, the Green Paper on market-based instruments for environmental and other connected purposes<sup>18</sup> of 2007 deepened the logic regarding the use of market-based instruments<sup>19</sup>. The most common of these are duties, taxes, and systems of tradable shares, whose justification lies in the ability of these instruments to efficiently correct market failures in terms of cost. Market failure means a “situation in which markets are either entirely lacking (e.g. environmental assets having the nature of public goods) or do not sufficiently account for the ‘true’ cost or the social cost of an economic asset”. Public interventions justified in such cases can be administrative or legislative, or intended to provide for the use of market instruments, and have the advantage of using the signals of the latter to remedy their own failures. In particular, these instruments implicitly “recognise the differences between businesses and therefore provide flexibility that can substantially reduce the costs of environmental improvements”<sup>20</sup>.

There is a recent communication which testifies the firm belief of the Commission as regards the environmental taxation: in 2011 the proposal for a Council directive amending Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity<sup>21</sup> states that “since the time the ETD (Energy Taxation Directive) was adopted, the underlying policy framework changed radically. In the areas of energy and climate change, concrete and ambitious policy objectives have been defined for the

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17 See P. SELICATO, *Imposizione fiscale e principio “chi inquina paga”*, in *Rass. trib.*, n. 4, 2005, p. 1158, as concerns this particular concept of economic capacity.

18 Com(2007) 140.

19 Cf. M. VILLAR EZCURRA, *Sviluppo sostenibile e fiscalità ambientale*, in *Riv. dir. trib. int.*, n. 1, 2010, p. 343 ss.

See also M. CAFAGNO, *La cura dell'ambiente tra mercato ed intervento pubblico. Spunti dal pensiero economico*, in D. DE CAROLIS-E. FERRARI-A. POLICE (eds.), *Ambiente, attività amministrativa e codificazione*, Giuffrè, Milano, 2006, p. 191 ss.; M. CLARICH, *La tutela dell'ambiente attraverso il mercato*, in [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it), 2006.

20 *Libro verde sugli strumenti di mercato*, cit., p. 3.

21 Com(2011) 169.

period until 2020. The climate and energy policy package adopted in 2009 provides a policy framework to implement these objectives in a cost-effective and fair way. *Taxes on energy represent one instrument at the disposal of Member States for the purposes of reaching the objectives set*". The communication offers the case of the impact assessment underpinning the Commission proposal for the climate and energy policy package: that assessment was that the overall welfare and cost-efficiency can be increased if revenue generating instruments, such as taxation, are used to reduce emissions; and it adds that "the impact assessment confirmed the *key advantage of taxation* which, in addition to its influence on behaviour of consumers, generates revenue that can be used to finance accompanying measures and thereby indicated how distributional concerns can be addressed [*italics ours*]"<sup>22</sup>.

### 3. What is the recipe for financial market stability: taxation or regulation?

The process of adoption of the European legislative framework on tax on financial transactions or the Financial Transaction Tax (FTT) seems incomplete at the moment, and, since this is the indispensable condition for states to deploy it in a coherent and consistent manner, it is not possible to express an opinion on its progress, which has only just started.

Although the statistics on effect are not currently available yet, and therefore not measurable, we can still speculate about the motivation and the appropriateness of this choice. The line of argument here is however still broader as it goes beyond the analysis of this single proposal. It is necessary to reflect on the broader theme of the many instruments which could lead to financial stability. The instruments of taxation are in fact different from other instruments, which are already well known and used<sup>23</sup>, also intended to achieve the objectives of financial stability. This is primarily in reference to the nature of regulatory approaches, which the European institutions have undertaken since the end of the last century – with the banking directives, then collected and codified in 2000 by Directive 2000/12/EC; and later supplemented by subsequent acts on financial supervision – always remaining the preferred route to achieve financial market conditions that guarantee the freedom of movement of services and establishment, and prevent actions of operators which lead to mistrust and instability. It is clear that this question cannot be answered in a definitive manner: it is only possible to allude to problematic aspects, such as stressing that until now efforts have been made only for the preparation of a framework of regulation and supervision, and highlighting how, in recent years, a profoundly different vision has surfaced, a vision that somehow advocates operating hand in hand with the regulatory setting.

With this in mind, it is necessary to reflect on the functionality and convenience of the alternative route – that of taxation as a mechanism for the recovery of stability – which is designed to produce effects and consequences that

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<sup>22</sup> *Ivi*, p. 5.

<sup>23</sup> See the considerations expressed before the economic and financial crisis by I. MECATTI, *Il futuro dei financial services in Europa: verso un European Single Regulator?*, in *Dir. pubbl. comp. eur.*, n. 4, 2004, p. 1955 ss.

must be weighed when trying to maintain competition in financial markets.

Before proceeding with such an evaluation it is necessary to observe that taxation could be considered also a form of regulation, and not a proper alternative route. This is particularly true if we discuss just about environmental taxes. The literature agrees that “regulating by means of economic incentives might be thought to offer an escape from highly restrictive, rule bound, C & C regimes”<sup>24</sup>. The reason is that “a mischief causer, say a polluter, can be induced to behave in accordance with the public interest by the state or a regulator imposing negative or positive taxes or deploying grants and subsidies from the public purse”<sup>25</sup>.

At the moment ancient and innovative tools of public regulation coexist<sup>26</sup>: to the old ones, represented by mechanisms of *command and control*, others have added, and the latter are mainly market instruments and incentives. These unusual means – if compared with the traditional method of regulation – are considered apt to play, in turn, a regulatory role.

As regards market instruments, they have been built on the ground of incentives as the result of the opinion, expressed by various economists, that the mechanisms of *command and control* were weak and insufficient, and the public authorities should stimulate methods based on the market<sup>27</sup>. Besides these instruments, the innovation was the adoption of forms of taxation which seemed capable to achieve the same goals, or even better goals, which the regulatory way can assure: they allow the single agent or subject to evaluate the opportunity or not of exercising the activity which is destined to be taxed. This represents, according to a number of scholars, an element of superiority of the method of taxation as compared to the imposition of bans<sup>28</sup>.

Actually, the conclusions of the main literature are now quite sceptic about the effects of taxation as a form of regulation: “the advantages of incentive regimes can, however, be exaggerated and a number of cautionary points should be borne in mind”: one of them is the complexity of the systems of rules in the field of taxation<sup>29</sup>. But the disadvantages have shown to be not few, so it is not so easy to judge the trade-off between regulation and taxation in the perspective of the protection of the environment.

We can move the analysis from the academic contribution to the European acts. In 2011 a significant communication entitled *Roadmap to a Resource Ef-*

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24 R. BALDWIN-M. CAVE, *Understanding regulation. Theory, Strategy, and Practice*, Oxford University Press, Oxford, 1999, p. 41. The Authors quote the following scientific works: A. OGUS, *Regulation. Legal Form and Economic Theory*, Oxford University Press, Oxford, 1994, ch. 11; T. DAINITH, *The Techniques of Government*, in J. JOWELL-D. OLIVER (eds.), *The Changing Constitution*, Oxford Clarendon Press, Oxford, 1994; S. BREYER-R. STEWART, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, in *Wisconsin Law Review*, 1985, p. 685; R.B. STEWART, *Il diritto amministrativo nel XXI secolo*, in *Riv. trim. dir. pubbl.*, 2004.

25 R. BALDWIN-M. CAVE, *Understanding regulation*, cit., p. 41.

26 M. D'ALBERTI, *Poteri pubblici, mercati e regolazione*, Il Mulino, Bologna, 2008, p. 89 ss.

27 M. CAFAGNO, *Principi e strumenti di tutela dell'ambiente come sistema complesso, adattativo, comune*, Giappichelli, Torino, 2007, p. 400. The Author refers to further literature: S. AMOROSINO, *Ambiente e privatizzazione delle funzioni amministrative*, in S. GRASSI-M. CECCHETTI-A. ANDRONIO (eds.), *Ambiente e diritto*, Olschki, Firenze, 1999 p. 349 ss.; F. DE LEONARDIS, *La disciplina dell'ambiente tra Unione europea e WTO*, in *Dir. amm.*, 2004, p. 513 ss.; T. TIETENBERG, *Economia dell'ambiente*, McGraw-Hill, Milano, 2006, p. 55 ss.

28 T. VENTRE, *I principi fondamentali e le dinamiche della tassazione ambientale nel sistema giuridico multilivello*, Edizioni Scientifiche Italiane, Napoli, 2012, p. 47 ss.

29 R. BALDWIN-M. CAVE, *Understanding regulation*, cit., p. 42.



*efficient Europe*<sup>30</sup> certified the attitude of the Commission as concerns environmental taxes and market instruments in general. Facing the problem of a scarcely efficient use of the resources and fearing for their disappearance the Commission recognized that “market based instruments have a strong role to play in correcting market failures – for example by introducing environmental taxes, charges, tradable permit schemes, fiscal incentives for more environmentally-friendly consumption or other instruments. New policies should help to align the prices of resources that are not appropriately valued on the market, such as water, clean air, ecosystems, biodiversity, and marine resources. These may need to be part of a broader approach involving regulation for example where resources are common goods”. In this document markets instruments and taxes are viewed as something belonging to the field of regulation, which is still considered the correct approach in order to maintain an economy sustainable and based on competition.

If we now come back to the sector of the financial markets, it is possible to observe that the model of the *self-regulation* has been considered the best solution at the end of the last century: but the eruption of the financial scandals has led to a renewed claim to forms of regulation capable to ensure transparency, correctness and stability<sup>31</sup>.

The assessment about the alternative regulation/taxation – if this can be really considered an alternative – must necessarily rely on the analysis of economists<sup>32</sup> and therefore, without going into details of calculations and estimates, it is necessary to proceed on the basis of such studies to be able to comment on the merits of the new form of taxation.

Various initiatives have been taken on regulating the financial sector: the European legal order initially sought the liberalisation of the market for such services based on a stronger synchronization approach, but later moved to a less restrictive philosophy based on minimum synchronization, mutual recognition and *home country control*<sup>33</sup>. In 1999, the *Financial Service Action Plan* came into existence, which, among other objectives, attempted to determine European financial standards for prudential supervision, geared to the reduction of risk<sup>34</sup>; this was followed by the adoption by the European Council in Stockholm in 2001 of the *Final Report of the Committee of Wise Men on the Regulation of the European Securities Market* in order to achieve a harmonised regulatory framework for the financial markets. Known as the Lamfa-

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30 Com(2011) 571.

31 M. D'ALBERTI, *Poteri pubblici, mercati e regolazione*, cit., p. 88; D. HELD-A. MC GREW, *Globalismo e antiglobalismo*, Il Mulino, Bologna, 2003, p. 134.

32 Various scholars dealt with James Tobin's proposal: see J.E. STIGLITZ, *Using tax policy to curb speculative short-term trading*, in *Journal of Financial Services Research*, n. 3, 1989, p. 101 ss.; L. SUMMERS-V.P. SUMMERS, *When financial markets work too well: a cautious case for a securities transaction tax*, in *Journal of Financial Services Research*, n. 3, 1989, p. 261 ss.; W.G. SCHWERT-P.J. SEGUIN, *Securities transaction taxes: an overview of costs, benefits, and unresolved questions*, in *Financial Analysts Journal*, 1993, p. 27 ss.; J. DOW-R. RAHI, *Should speculators be taxed?*, in *Journal of Business*, n. 1, 2000, p. 89 ss.; C.M. JONES-P.J. SEGUIN, *Transaction costs and price volatility: evidence from commission deregulation*, in *The American Economic Review*, n. 4, 1997, p. 728 ss.; A. SUBRAHMANYAM, *Transaction taxes and financial market equilibrium*, in *Journal of Business*, n. 1, 1998, p. 81 ss.

33 I. MECATTI, *Il futuro dei financial services in Europa*, cit., p. 1955. A wide literature is recalled.

34 Cf. K. ALEXANDER, *Establishing a new European securities regulator: is the European Union an optimal economic area for securities regulation?*, CERF Working Paper n.7, Cambridge, 2002.

lussy Report, the *Final Report* highlighted the malfunction and the gaps in the regulation of European securities markets, and indicated the solution as reforming the existing legislation. The goal was to simplify and shorten the procedures for the adoption of Community rules in this area, although it was soon found that proper European standardisation could be insufficient in ensuring the stability of financial markets, if the implementation at the state level remained weak. One of the causes of the malfunctioning of the harmonised rules was largely attributed to the fragmentation of supervisory powers provided for in the national contexts.

On the other hand, especially with the eruption of the crisis, it has become clear and undeniable that surveillance limited to individual national markets had become unsatisfactory and that the problem had to be faced from a European perspective, possibly with the establishment of a specific authority presiding over that authority: this goal, however, is difficult to achieve given the lack of specific skills in this regard on the part of the Union.

The last set of steps was triggered by the creation in 2008 – and therefore already during the state of crisis – of a group of experts headed by the Governor of the Bank of France, de Larosière, with a remit to pinpoint the instruments to strengthen European cooperation in the surveillance of financial stability risks of macro-prudential type. The findings of the work of the group, which reaffirmed the principle that “good regulation is a necessary condition for the preservation of stability”, were in particular, once again, the lack of supervisory functions and the recommendation to keep supervisory mechanisms as well as macro-and micro-prudential mechanisms strictly connected; its analysis stated that “the present crisis results from the complex interaction of market failures, global financial and monetary imbalances, inappropriate regulation, weak supervision and poor macro-prudential oversight. It would therefore be simplistic to believe that these problems can be ‘resolved’ just by more regulation. Nevertheless, it remains the case that good regulation is a necessary condition for the preservation of financial stability”<sup>35</sup>. But above all, the *de Larosière Report* led in 2009 to the establishment of the European Systemic Risk Board (ESRB), a body responsible for macro-economic and macro-prudential surveillance, with no legally binding powers but able to provide evaluations of high quality, especially on risk situations<sup>36</sup>. Opinions on the operation of this system are not totally favourable today, but we need not go into that here. The scenario to date is that currently the stability of financial markets has been entrusted to the European System of Financial Supervisors (ESFS), which is designed as a decentralised system with tiered micro-prudential and macro-prudential authorities. However, the situation is still likely to change, given that in the meantime a banking union has been created,

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35 [http://ec.europa.eu/internal\\_market/finances/docs/de\\_larosiere\\_report\\_en.pdf](http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf), p. 13.

36 The *Report de Larosière* and the legal transposition which followed are analyzed by I. BEGG, *Regulation and Supervision of Financial Intermediaries in the EU: The Aftermath of the Financial Crisis*, in *Journal of Common Market Studies*, n. 5, 2009, p. 1107 ss.; R. BEETSMA-S. EIJJFINGER, *The restructuring of financial supervision in the EU*, in *European View*, 2009, p. 3 ss.; R. MASERA, *La crisi globale: finanza, regolazione e vigilanza alla luce del rapporto de Larosière*, in *Riv. trim. dir. ec.*, n. 3, 2009, p. 147 ss.; G. GODANO, *Le nuove proposte di riforma della vigilanza finanziaria europea*, in *Il Diritto dell’Unione Europea*, n. 1, 2010, p. 75 ss.; F. CIRAOLO, *Il processo di integrazione del mercato unico dei servizi finanziari, dal metodo Lamfalussy alla riforma della vigilanza finanziaria europea*, in *Il diritto dell’economia*, n. 2, 2011, p. 415 ss.; E. GALANTI, *L’acquisizione di partecipazioni in intermediari finanziari fra regole comunitarie uniformi e discrezionalità delle autorità di controllo*, in *Banca, borsa, tit. cred.*, n. 2, 2012, p. 194 ss.

which will necessarily require a revision of the ESFS as early as this year.

The point now is simply to give prominence to a change of setting at the European level: after having invested in improving and strengthening the regulatory approach, the trend seems to be moving dramatically, because the expectations in terms of financial stability appear to be changing into a tool of a very different nature, as a mechanism of taxation could well be.

One can surmise that the modest results obtained with regulatory interventions have led the European institutions to act on a totally different front: they have probably perceived the persistent scepticism about regulatory ambitions, since it has been observed that the legal regulation of the market in question is largely influenced by a mechanism of mutual interdependence, which is obviously not limited to the European financial centres, but extends globally. The result is that “beyond any utopian vision of global governance of financial economics” that very fact is “the greatest obstacle to any attempt to establish in this sector, even if only in limited geographic areas, a comprehensive and consistent legal framework”. The difficulty lies in identifying clearly the optimal manner and extent of this regulation and legislation on controls and sanctions, because it has to be determined how many and what rules would be needed for the operation of financial markets, but also “it must be understood who is responsible for dictating the rules and who is then able to really enforce them”<sup>37</sup>.

In addition, there is no doubt that inside and outside the European Union, there is sort of a competition between jurisdictions, to the point that there is even talk of a kind of “market in rules” that each operator uses to its advantage by choosing, at any given time, the country believed to be best for it to carry out its business. This has made it impossible to avoid the risk that competition between jurisdictions awards the system with less protection for investors or consumers, therefore “triggering a race to the bottom: that is, the rules which ensure more rights to all do not have the upper hand, but rather those that agree to the best interest of the subjects with greatest economic power (and sometimes also in a position to impose such power to the legislators themselves)”<sup>38</sup>.

If, therefore, the need for a surveillance system both at the EU and at the national level is now widely recognised, the challenge of a mechanism consistent with a quasi-federal structure, which at the same time is based on specific European powers and safeguards the peculiarities of national markets, is time consuming and difficult, and it proves that, in the end, the crisis produces effects far wider than economic difficulties, decisively influencing the integration model of the Union<sup>39</sup>.

On the other hand the solution represented by a levy on financial transactions does not prove less of a problem in order to ensure more stable conditions. For a complex set of reasons, economists opposed this method of taxation in the years preceding the crisis. First of all, the Arrow-Debreu model<sup>40</sup> on

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37 R. RORDORF, *La dimensione europea dei mercati finanziari*, in *Federalismi*, n. 13, 2012, p. 2 ss.

38 *Ivi*, p. 5. Critical opinions about the European regulative approach are expressed also by M. LAMANDINI, *Towards a New Architecture for European Banking Supervision*, in *European Company Law*, n. 1, 2009, p. 6 ss.

39 See the comment of I. BEGG, *Regulation and Supervision of Financial Intermediaries in the EU*, cit.

40 K.J. ARROW-G. DEBREU, *Existence of an equilibrium for a competitive economy*, in *Econometrica*, n. 3, 1954, p. 265 ss.

the equilibrium of a competitive economy has long established the view that innovation in the financial sector would make the relative markets more complete, would promote better *management* and would favour the distribution of risk. Moreover, it was long believed that financial markets in which large volumes were exchanged with high frequency were particularly capable of providing liquidity and therefore tended to create efficient prices: such was the position taken by the European Central Bank (ECB), *Opinion of the European Central Bank of 4 November 2004 at the request of the Belgian Ministry of Finance on a draft law introducing a tax on exchange operations Involving foreign exchange, banknotes and currency*<sup>41</sup>.

Secondly, the opponents of the FTT have denied the empirical basis of the claim that exaggerated exchange activities was the cause of significant price fluctuations and their deviations from fundamental values; and actually proving that excessive transactions were the cause of inefficient pricing is rather difficult, since the establishment of the “right’ price”<sup>42</sup> does not respond to existing and predictable models. Although traditional economic theory argues that the “price mechanism works to bring together willing buyers and willing sellers to complete an exchange which is mutually beneficial, while at the same time achieving an optimum allocation of scarce resources in a society”<sup>43</sup> so that “a transaction, as described, between two willing participants each acting for her own benefit is voluntary, and therefore just”, today it is undeniable that “few economists would argue that such a ‘perfect’ transaction exemplifies the modern market system. There are, most agree, market failures, and these failures include transactions that are characterised by externalities (effects of an activity are felt by parties not participating in the exchange), and by information asymmetries (parties to the transaction have dissimilar knowledge of the transaction or of its effects). When either of these two characteristics are present, social costs may result, the transaction is no longer entirely voluntary, and it may result in injustice”<sup>44</sup>. It is therefore now clear that the doctrine of price formation is the result of many complex factors<sup>45</sup>, which are not always predictable and not reducible to topics related to the poorly controlled expansion of financial markets and transactions.

Referring again to the predominant doctrine, all arguments against this mode of taxation derived from an estimated growth of tax evasion<sup>46</sup>; there was

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41 Com/2004/34.

42 S. SCHULMEISTER, *Implementation of a General Financial Transactions Tax*, WIFO Monographs, Wien, 2011.

43 Cf. R.A. PHILLIPS, *Stakeholder Theory and a Principle of Fairness*, in *Business Ethics Quarterly*, n. 1, 1997, p. 51 ss.; R.G. LIPSEY, *Globalization and National Government Policies: An Economist’s View*, in J.H. DUNNING (ed.), *Governments, Globalization, And International Business*, Oxford University Press, New York, 1999, p. 73 ss.

44 S. L. CHRISTENSEN-B. GRINDER, *Justice and Financial Market Allocation of the Social Costs of Business*, in *Journal of Business Ethics*, 2001, p. 106.

45 See the study of M. CIPRIANI-A. GUARINO, *Transaction costs and informational cascades in financial markets*, in *Journal of Economic Behavior & Organization*, 2008, p. 581 ss., regarding the impact of transaction costs (as in the case of Tobin’s financial tax) on the choices of the investors.

46 P. M. GARBER, *Issues of enforcement and evasion in a tax on foreign exchange transactions*, p. 129 ss., and P.B. KENEN, *The feasibility of taxing foreign exchange transactions*, p. 109 ss., in M. UL HAQ-I. KAUL-I. GRUNBERG (eds.), *The Tobin Tax, Coping with Financial Volatility*, Oxford University Press, New York, 1996; J.G. STOTSKY, *Why a two-tier Tobin Tax won’t work*, in *Finance and Development*, n. 2, 1996, p. 28 ss.

also a fear that so-called *tax competition* would be triggered, which would not have helped the creation of the internal market: as has been noted, “it is not surprising in this context to observe a general opposition to proposals such as those of the European Commission for a uniform minimum withholding tax. In the face of exemptions on domestic capital income for a large share of investments, far from helping to complete the Internal Market, a uniform withholding tax would result in further discrimination between countries and reverse tax competition if not appropriately levied. Harmonisation would occur for the benefit of ‘domestic’ investments but with vast misallocations of capital”<sup>47</sup>. Finally, there was scepticism regarding the possibility of curbing speculation in trade in foreign currency, while a negative impact on the flow of trade was feared<sup>48</sup>.

The most recent doctrine holds different beliefs, because, while there are still those who question the suitability of the tax<sup>49</sup> on the grounds that the volatility of the markets would not be redimensioned<sup>50</sup> but rather the volume of trade would decrease, on the other hand, a different view has developed, first of all stimulated by the crisis but also by the Commission’s proposal, which deemed that the impossibility of such proof could not justify opposition to the FTT. Unfortunately the forecast of the reduction of the volume of trade has been already confirmed by the trends of the financial transactions in France and Italy in the last two years. But the events that characterized the financial markets before and during the crisis urge a reflection which goes further.

Before 2008 the markets were repeatedly invaded by new products which, in retrospect, proved to be not so much instruments of completion as instruments that channelled funds towards ill-defined assets and actions whose risk level was difficult to assess. The “bubbles” which appeared from 2007 onwards have not been more than long-term deviations of the actual price compared to the “right price”, which refute “the paradigm of efficient price formation in highly liquid financial markets”<sup>51</sup>. Therefore the question raised here is far from solved: the regulatory instruments have not produced the results expected, and the new route which is now being conceived is based on the attempt to apply in the financial markets what has been experimented in the sector of environment. The new question concerns the possibility of transferring that logic to completely different markets: and in particular the challenge is to verify the performance of the solutions created for the environmental pollu-

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47 J.S. ALWORTH, *Taxation and Integrated Financial Markets: The Challenges of Derivatives and Other Financial Innovations*, in *International Tax and Public Finance*, n. 5, p. 528.

48 P. DAVIDSON, *Are Grains of Sand in the Wheels of International Finance Sufficient to Do the Job When Boulders are Often Required?*, in *The Economic Journal*, n. 442, 1997, p. 671 ss.

49 The following literature supports this position: J. HUBER-D. KLEINLERCHER-M. KIRCHLER, *The impact of a financial transaction tax on stylized facts of price returns-Evidence from the lab*, in *Journal of Economic Dynamics & Control*, n. 8, 2012, p. 1248 ss.; K. MANNARO-M. MARCHESI-A. SETZU, *Using an artificial financial market for assessing the impact of Tobin-like transaction taxes*, in *Journal of Economic Behavior & Organization*, n. 2, 2008, p. 445 ss.; J. LENDVAI-R. RACIBORSKI-L. VOGEL, *Macroeconomic effects of an equity transaction tax in a general-equilibrium model*, in *Journal of Economic Dynamics & Control*, n. 2, 2013, p. 466 ss.

50 See the analysis produced by T. MATHESON, *Security transaction taxes: issues and evidence*, in *Int. Tax Public Finance*, 2012, p. 884 ss.

51 Cf. D. SCHÄFER, *Financial Transaction Tax Contributes to More Sustainability in Financial Markets*, in *The Financial Transaction Tax – Boon or Bane?*, cit., p. 77. See also S. SCHULMEISTER, *A General Financial Transactions Tax: Strong Pros, Weak Cons*, in the same Review, p. 89 ss.



tion. The idea that “regulating by means of economic incentives might be thought to offer an escape from highly restrictive, rule bound, C & C regimes” because “a mischief causer, say a polluter, can be induced to behave in accordance with the public interest by the state or a regulator imposing negative or positive taxes or deploying grants and subsidies from the public purse”<sup>52</sup> is still to be verified.

A large part of the economic analyses continue to deem the regulatory tools the most appropriate means to ensure well-functioning markets, provided they do not generate mechanisms of capital flight towards less regulated and more attractive exchange platforms in terms of expected gains; these tax instruments are regarded by some as distorting interventions, in turn intended to induce the phenomena of emigration of capital to trading venues that do not transactions. In this respect, there is a very interesting study, *Implications of a Financial Transaction Tax for the European Regulatory Reform Agenda*, commissioned by the City of London from the independent audit and consulting firm Deloitte Touche Tohmatsu and published in 2014, concentrating in particular on the possible conflicts of a new form of taxation with the regulatory arrangements applied today in global financial markets. It demonstrates what has already been argued about environmental taxes: the choice for taxation instead of regulation is a question which has not found ultimate answers, not only because the advantages and disadvantages of the trade-off are difficult to determine, but also in the sense that the instruments of taxation could be also considered a form of regulation.

In part, however, there is a different tendency, which, starting from a broader evaluation of the complex context of the crisis, sees in taxation policy a desirable option in this area. The final considerations are dedicated to this.

#### 4. The option to tax: is it a purely political choice?

It is now quite clear that the world view that has predominated in the economic and political environment in recent decades has been guided by the principle according to which “the ‘freest’ markets, i.e. the financial markets, cannot produce systematically wrong price signals, the type of signals one would see if trending were the most characteristic property of asset price dynamics”: such a cultural context can only be contrary to any form of taxation on transactions<sup>53</sup>.

And yet, despite the lack of predisposition on the part of government institutions, financial institutions and traders in this direction, the most recent literature has highlighted the fact that using this method of taxation “Governments have an additional instrument at hand to influence trading activity” since the levy aims to reduce “regulatory arbitrage, flash trades, overactive portfolio management, excessive leverage and speculative transactions of financial institutions – activities that have contributed to the financial crisis”. In a perspective of Business Ethics, “a Tobin-like tax on stock transactions might be just a means of achieving greater justice in the distribution of the social cost burden.

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<sup>52</sup> The quotation of note (24) is here repeated: R. BALDWIN-M. CAVE, *Understanding regulation*, cit., p. 41.

<sup>53</sup> Cf. once more S. SCHULMEISTER, *A General Financial Transactions Tax*, cit., p. 89.

We have noted that such a tax, implemented properly, might also be less costly and more effective in internalising the social costs of doing business than regulation”<sup>54</sup>. And in any case, even if, contrary to expectations, the harmful transactions are not contained, at least the FTT will generate “large tax revenues that can contribute to covering the costs of the financial crisis,” although there is awareness that “attempts at tax avoidance are, of course, inevitable, and therefore the effect of the tax should be monitored closely so that the governments can react quickly if tax loopholes and tax-induced geographical relocation plans of financial institutions come to light”<sup>55</sup>. The scale of the problem seems to be a more than sufficient reason to justify such taxation. It has been observed that supporters of FTTs generally wish to use them to achieve one or both of the following goals: raising revenue from the financial sector to help pay for the costs of the recent financial crisis or for global development; and reducing financial market risk and helping to prevent asset price bubbles. The ease of collecting such a tax on exchange-traded instruments is also frequently cited as a reason to adopt it<sup>56</sup>.

This leads to the use of the notion of “stability” that the recent financial crisis has shown to be “a public good” because banks or other market participants cannot be excluded from the advantages of this good, nor competition in these markets cause its depletion. Stability and competition have been recognized as two coordinated values: competition is the rule, which can find a limit in stability<sup>57</sup>. In order to guarantee the second value – stability – competition may meet some limitations: and the case we are examining demonstrates that just temporary limitations could be sufficient.

But above all, stability is an asset which cannot be provided by the financial markets themselves, with interacting individuals pursuing partial interests, but can be ensured only at the institutional level, “trading can thus be viewed as using the public good ‘financial market stability’ with respect to which the FTT is a mean to prevent over-usage and to contribute to the financing of this public good”<sup>58</sup>. This is, after all, the conviction gained within an influential part of economic theory, which held that instability is an inevitable trait of the capitalist

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54 S.L. CHRISTENSEN-B. GRINDER, *Justice and Financial Market*, cit., p. 111. See also D. MASCIANDARO-F. PASSARELLI, *Financial systemic risk: Taxation or regulation?*, in *Journal of Banking & Finance*, n. 2, 2013, p. 587 ss., as regards the choice between taxation and regulation.

55 D. SCHÄFER, *Financial Transaction Tax*, cit., p. 77. There is, anyway, awareness that «attempts at tax avoidance are, of course, inevitable, and therefore the effect of the tax should be monitored closely so that governments can react quickly if tax loopholes and tax-induced geographical relocation plans of financial institutions come to light».

R.P. BUCKLEY, *A Financial Transaction Tax*, cit., p. 101, lists the benefits of FTT: it would be «a credible measure to mitigate the entrenched culture of short-termism in markets; is likely to reduce levels of highly speculative trading; will result in a progressive incidence; could reduce opacity and excessive counterparty risk by imposing higher tax rates on OTC transactions and trading in specified complex derivative instruments; would assist policymakers and regulators to monitor market trends; and would enable more effective oversight of market trading and potential risks on a domestic and global basis».

56 A sceptical observer, T. MATHESON, *Security transaction taxes*, cit., p. 884, depicts the expectations of the supporters of FTT.

57 Cf. S. MEZZACAPO, *La concorrenza tra regolazione e mercato. Ordine giuridico e processo economico*, Cacucci Editore, Bari, 2004, p. 275. The Author uses the definition of *stable competition*.

58 D. SCHÄFER, *Financial Transaction Tax*, cit., p. 77 ss.

economic system<sup>59</sup>. If, therefore, financial crises have endogenous origins – the reduction in risk aversion and speculative developments lead to cyclical behaviours – the correction of imbalances is unlikely to come from the markets themselves, dominated by the logic of uncertainty and risk exposure; which leads economic units – households, businesses, investors – to high levels of debt specifically at the stage of euphoria and *boom*, behaviours that then cause credit crunches and then the pathological scale of the crisis, which eventually leads to depression. And since the financial system governs the evolution of the economy, the instability of that particular market is likely to undermine the stability of all the others<sup>60</sup>.

This analysis is also largely applicable to the most recent crisis, which showed the tendency of traders to expose themselves to debt and speculation in the first phase, which was then followed by a phenomenon of insolvency that has destabilised the markets. It thus revealed the inclination of the holders of partial interests to abuse of the public good of stability, and it is this fact that leads inevitably to designing new instruments to regulate the behaviour of financial market participants. It has been observed that “today’s institutional investors are operating in a competitive environment, characterised by continuing financial liberalisation, in which essentially they appeal to individuals as consumers of their products. The situational logic of these investors always pushes them to interpret their functions according to purely market criteria, to give priority to portfolio management rather than to seek to influence the enterprises in which they invest”<sup>61</sup>. In this context, “the introduction of an FTT, as proposed by the EU Commission, will increase transaction costs and offers the prospect of slowing down the mutually reinforcing and growing trends of an increasing number of derivative products and shorter holding periods. Therefore it can make an important contribution to stopping the decoupling of financial markets from the real economy”<sup>62</sup>. This means making the transition from a theoretical approach, based on the analysis of the possible reactions of the markets, to an approach of a pragmatic and realistic nature, and therefore fundamentally to a political approach: “politicians might be in a better position to make such a move than mainstream economists”<sup>63</sup>. “A policy response to

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59 C.P. KINDLEBERGER, *Manias, Panics, and Crashes. A History of Financial Crisis*, Basic Books, New York, 1978, and H.P. MINSKY, *Stabilizing an Unstable Economy*, Yale University Press, New Haven, 1986, Italian translation of A. LEVY-G. PADULA (eds.), *Governare la crisi: l'equilibrio di una economia instabile*, Comunità, Milano, 1989, p. 280.

This theoretical approach comes from a sort of reinterpretation of J.M. Keynes' *The General Theory*, and must be ascribed to H.P. MINSKY, *A Theory of Systemic Fragility*, in E.I. ALTMAN-A.W. SAMETZ, *Financial Crises. Institutions and Markets in a Fragile Environment*, John Wiley and Sons, New York, 1977, and *The Financial Instability Hypothesis: A Restatement*, Thames Papers in Political Economy, London, 1978.

60 Cf. H.P. MINSKY, *John Maynard Keynes*, Columbia University Press, New York, 1975, Italian translation *Keynes e l'instabilità del capitalismo*, Bollati Boringhieri, Torino, 2009, p. 171.

61 J. GRAHL, *Financial integration in the EU: Policy issues and proposals*, in *Critical Perspectives on Accounting*, 2006, p. 265, asserts that «today’s institutional investors are operating in a competitive environment, characterised by continuing financial liberalisation, in which they appeal essentially to individuals as consumers of their products. The situational logic of these investors pushes them always to interpret their functions according to purely market criteria, to give priority to portfolio management rather than to seek to influence the enterprises in which they invest».

62 D. SCHÄFER, *Financial Transaction Tax*, cit., p. 83.

63 S. SCHULMEISTER, *A General Financial Transactions Tax: Strong Pros, Weak Cons*, cit., p. 89.

the new world of globalised capital, but to the political power of the finance industry that has grown so large in the richer nations” is expected<sup>64</sup>.

The problem then appears to be predominantly political choices: against a backdrop of deterioration in the financial markets, the question that the European institutions have set for themselves, and that the more recent doctrine seems to share, is whether the threat to financial stability, which then has an impact on the real economy, requires actions that cannot remain prisoners of the analyses of economists, but must be characterised for the particular features and therefore the values pursued by the political vision that sustains them. There are even those who are totally radical, arguing that “the financial sector competes with the rest of the economy for scarce resources” and therefore “financial booms are not, in general, growth enhancing”<sup>65</sup>: therefore, the growth of financial markets would not be a cause of growth of the real economy, but would produce opposite effects especially if rapid and precipitous<sup>66</sup>.

This is then a political vision inspired by values that can be defined, in the final analysis, as “social justice”, which in the historical transition could be represented by a reduction of the financial markets in order to satisfy the interests of other stakeholders and other economic and social contexts. The interventions that would accompany this mode of taxation could go so far as to have defining influences on markets and therefore on competitive processes, in a much more invasive fashion than the regulatory measures have so far done: the negative trends of the financial markets would be contained through fiscal mechanisms capable of influencing the investment decisions of operators, which would no longer be taken exclusively on the basis of the dynamics of competition or ever more stringent – but actually not very effective – regulatory mechanisms. This would result in creating attainable objectives of social justice – the fight against climate change, dealing with unemployment, the pursuit of a more balanced economic development – to which the European institutions seem finally to be assigning a significant position.

And besides, a thousand economists took a position in this regard in 2011, sending the G20 a letter in which they argued that “the financial crisis has shown us the dangers of unregulated finance, and the link between the financial sector and society has been broken”; and stating that “it is time to fix this link and for the financial sector to give something back to society ... this tax is technically feasible. It is morally right”<sup>67</sup>. Without lengthy digressions into the field of morality, it seems, however, appropriate to conclude that the case of financial taxation seems particularly unique, very different from the method of taxation used so far; it is characterised by a strong motivation at Community level, which has no precedent in the past, and reveals unprecedented sensitiv-

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64 R.P. BUCKLEY, *A Financial Transaction Tax: The One Essential Reform*, cit., p. 101.

65 S.G. CECCHETTI-E. KHARROUBI, *Reassessing the impact of finance on growth*, Bank for International Settlements, 2012, p. 14, even maintain that «the financial sector competes with the rest of the economy for scarce resources» and therefore «financial booms are not, in general, growth enhancing»: according to this opinion, the growth of the financial markets would not be the condition for the growth the real economy, but it would rather produce opposite effects mainly if sudden and hasty. J.-L. ARCAND-E. BERKES-U. PANIZZA, *Too Much Finance?*, IMF Working Paper WP/12/161, 2012, sustain the same point of view.

66 M. DEMARY, *Transaction taxes, greed and risk aversion in an agent-based financial market model*, in *Journal of Economic Interaction and Coordination*, 2011, p. 1 ss., is firmly convinced of the better effectiveness of the regulative tools.

67 <http://www.theguardian.com/uk>, 13 April 2011.

ity in the European Union in relation to objectives of a “social” nature that the dynamics of the market have not been able to promote and ensure.

If the FTT will come to fruition, beyond the revenue it will produce – see the estimates of *The Impact of a Financial Transaction Tax on Corporate and Sovereign Debt*, a Report prepared for the International Regulatory Strategy Group by London Economics, 2013 – it will be a signal of the EU’s willingness to apply an atypical “regulation” to very complex and difficult markets and to pursue, through it, the purpose of greater social equity and promotion of interests which are not strictly economic. Although the FTT is “undoubtedly far from representing a panacea for financial market regulation”, it may prove to be “economically beneficial to the economy”: its “social benefits derive from its regulatory effects, as well as the additional revenue channelled into public budgets”<sup>68</sup>.

The social aim of equally distributing sacrifices seems to prevail even over the principle of free trade. The analysis of this system of levying taxes while awaiting approval and the examination of the implementation of environmental taxes mark a new approach to EU tax policies. The concept of “tax neutrality”, which implies that taxes must not produce any distortion in trade or prevent free movement seems to be going through a somewhat innovative stage. The new ideas on taxation enable social purposes to emerge so that the taxation of environmental or financial pollution is no longer considered problematic, as it can lead to a more equitable situation.

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68 A. BOTSCH, *Financial transaction*, cit., p. 4.