

6 March 2012

French Financial Transaction Tax

French Parliament Adopts Proposed Legislation on Financial Transaction Tax with Few Amendments

SUMMARY

Draft legislation to introduce a financial transaction tax (the “FTT”) in France was presented by the French government on 8 February 2012 (see our client memorandum of 8 February 2012). This proposal was adopted by the French Parliament on February 29, 2012. The most notable amendment voted by the Parliament is an exemption for transfers of convertible bonds (*obligations convertibles et obligations échangeables*). The FTT will be applicable to transactions carried out as from 1 August 2012. As noted below, new taxes on high frequency trading and on certain credit default swap transactions will also come into effect as from 1 August 2012.

In addition, French transfer tax rates applicable to transfers of shares (*actions*), which currently range from 0.25% to 3%, will be replaced by a single 0.1% rate as from 1 August 2012.

SCOPE

Equity instruments issued by a French-listed company. The FTT applies to the transfer for consideration of the ownership of any equity instrument issued by a French-listed company having a market capitalization in excess of €1bn on the first of January of the year during which the transfer occurs. A list of such companies will be published in a forthcoming decree (*arrêté*).

“Equity instruments” (*titres de capital*) are defined as shares and other instruments giving access to the capital or the voting rights of a company (art. L. 212-1 A of the *Code Monétaire et Financier*). This includes warrants (*bons de souscription d'actions*).

Bonds that are convertible into shares of the issuer at the option of the holder (*obligations convertibles*) and bonds that are convertible into other shares held by the issuer (*obligations échangeables*) are

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expressly excluded from the scope of the FTT. It is unclear as to whether bonds mandatorily convertible into shares (*obligations remboursables en actions*) are also excluded.

The FTT will be due irrespective of whether the acquisition is carried out by a company or an individual.

Transfer of ownership. The FTT will be applicable to any transfer of ownership, including acquisitions of shares upon exercise of an option, forward sales or share-for-share exchanges. Transfers of equity instruments issued in consideration of contributions made to the share capital are in principle within the scope of the FTT, but our understanding is that such issuance of shares would be exempt under the “primary market” exemption described below.

EXEMPTIONS

Primary market. The primary issuance of shares and other equity instruments is excluded from the FTT. This exemption is also applicable when the issuance is carried out through a bought deal or a firm underwriting pursuant to L. 321-1 of the *Code Monétaire et Financier*.

Employee incentive plans. Acquisitions of equity instruments by employee funds (*FCPE* and *SICAV d'actionnariat salarié*) and acquisitions made directly by employees through their employee savings plans (*PEE*) are not subject to the FTT. Share buy-backs are excluded from the FTT to the extent that the shares repurchased are sold by the issuer to its employees through their employee savings plan (*PEE*).

Market-making activities. Acquisitions by French or foreign financial institutions in the course of their market-making activities are exempt from the FTT. Market-making activities are defined as (i) the simultaneous issue of a buy order and a sell order of similar size in order to provide liquidity to the market on a regular and continued basis, (ii) the execution as counterparty of buy or sell orders issued by clients, or (iii) the hedging of positions taken under (i) or (ii) above. The exemption also applies to transactions carried out on behalf of the issuer under liquidity agreements compliant with EU law on market abuses.

Clearing house/Central securities depository. The FTT is not applicable to transfers of equity instruments that are made by a clearing house or a central securities depository in the course of their clearing activities.

Intra-group transactions/Reorganizations. Certain exemptions are applicable to intra-group transactions and reorganizations, including the following:

- Transactions between companies that are members of the same group within the meaning of art. L.233-3 of the French commercial code;
- Transactions between companies that are members of the same tax consolidated group within the meaning of art. 223 A of the French tax code;
- Transfers of ownership resulting from a merger, a contribution or a spin-off, if such reorganization benefits from the favorable tax regime provided by art. 210 A and 210 B of the French tax code.

Temporary transfers. Temporary transfers of securities include stock loans and sale and repurchase agreements (“Repos”). Such transfers are excluded from the scope of the FTT.

TERRITORIAL SCOPE

The FTT is only applicable to equity instruments issued by entities that have their registered seat in France. It applies to acquisitions made by French or non-French residents, irrespective of whether or not the transaction includes a French counterparty.

PAYMENT AND ENTRY INTO FORCE

Computation. The FTT amounts to 0.1% of the value of the equity instrument.

Payment. The FTT is due by the broker-dealer (*prestataire de service d'investissement*) who executes the buy order or, if no broker-dealer is involved, by the bank in charge of the acquirer's securities account (*teneur de compte*). In most cases, the central securities depository (Euroclear France) will be in charge of centralizing the collection of the tax, reporting to the tax administration and paying the tax to the French Treasury no later than on the 25th of the month following the acquisition date of the equity instrument.

Entry into force. The FTT (as well as the other transaction taxes described below) will be applicable to transactions carried out as from 1 August 2012. Administrative guidelines are expected to be issued before the entry into force of the provision.

OTHER TRANSACTION TAXES

High-frequency trading. A tax of 0.01% will apply to high-frequency trading performed by establishments located in France, including French branches of non-French banks, and excluding non-French branches of French banks.

The tax is triggered when the percentage of orders that are cancelled or modified within a trading day by that establishment is higher than a rate to be set in a forthcoming decree. Such cancellation rate shall not be less than 2/3 of the orders.

The tax will apply on the value of the cancelled or modified transactions that exceed this threshold.

Credit default swaps on sovereign bonds. A tax of 0.01% will apply on the acquisition of credit default swaps (or similar derivative instruments) with respect to bonds issued by a member state of the EU. Such tax is applicable to acquisitions carried out by individuals domiciled in France, companies incorporated in France and French establishments of non-French companies. The tax is based on the notional amount of the credit default swap.

The tax is not applicable if the acquisition corresponds to the hedging of a long position on such bonds or on other assets/instruments the value of which is correlated to such bonds.

TRANSFER TAX ON SHARES

Until the enactment in December 2011 of the Finance Bill for 2012, the transfer of listed shares was either exempt from transfer tax or subject to a 3% transfer tax capped at €5,000. The Finance Bill for 2012 introduced new transfer tax rates from 0.25% to 3% and, more importantly, removed the €5,000 cap.

New rate. The French government had initially proposed to reinstate the previous rules including the €5,000 cap. This proposal was rejected by the Parliament, which has finally adopted a 0.1% rate on shares (*actions*) with no cap. In order to avoid double taxation, the transfer tax is not applicable when the FTT is due.

Rules applicable to transfer of shares may be summarized as follows:

- Listed shares issued by a company with a market capitalization exceeding €1bn: 0.1% FTT (unless above-mentioned exemptions apply): no transfer tax;
- Other listed shares: 0.1% transfer tax due only if a transfer deed is executed (except if the FTT is due);
- Non-listed shares (*actions*) in non-real estate companies: 0.1% transfer tax;
- “*Parts sociales*” in non-real estate companies: 3% transfer tax;
- Shares in non-listed real estate companies: 5% transfer tax.

Exemptions. The following transfers are not subject to the 0.1% and 3% transfer tax:

- Acquisitions of shares in the context of a share capital increase;
- Acquisitions of shares of companies subject to a safeguard proceeding (*procédure de sauvegarde/redressement judiciaire*); or
- Acquisitions of shares resulting from a share buy-back to the extent that the shares repurchased are sold by the issuer to its employees through their employee savings plan (*PEE*) (same exemption as for the FTT);
- Intra-group transactions/reorganizations: same exemption as for the FTT.

Entry into force. The new transfer tax rate will be applicable to transactions carried out as from 1 August 2012.

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