

The Main Problems Related to the Financial Transaction Tax: The Case of an Extraterritorial Effect and the Coverage of Pension Funds

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It is globally accepted that the financial sector caused the financial crisis of 2008. As a result, it was internationally agreed that it should pay a fair share to the public finances. The Financial Transaction Tax is an European model of 'the financial sector paying a fair share'. However, the Financial Transaction Tax is a new tax proposed by the European Commission which - at the time of this article - still remains at the stage of discussion. Therefore, the author of this article discusses the main problems which might hinder the further introduction and functioning of the tax, explaining the reasons which might have caused such problems and drawing the attention how these problems are dealt with in the context of current debates of the tax.

1 Introduction

Lack of responsibility and transparency of financial institutions, excessive risk-taking activities, large amount of complex derivatives and market abuse problems led to global financial crisis of 2008. As a result, huge financial interventions of national governments were put into financial sector with the aim to sustain the viability of banks, funds and other financial institutions.¹ Those financial interventions put a heavy burden on current public finances at the expense of taxpayers from the other sectors of economy and households. In parallel, the dramatic raise of governments' loans was caused.

Notwithstanding the global shared opinion that banks are the ones who caused the financial crisis of 2008 and as a result should pay a fair

1 The G20: Pittsburgh Summit Statement, 26 September 2009.

share, the agreement of uniformed pattern for global taxation of the financial sector was not reached. Therefore, the EU Commission had no other choice than to work on the common financial transaction tax (hereinafter – the FTT) system only within the EU.

However, the harmonised tax system of the FTT proposed by the Commission² failed to get the required unanimous support due to the essential differences in opinions amongst the Member States.³ Consequently, eleven Member States⁴ made a request to establish enhanced cooperation in the area of the FTT. This decision was supported by the Council.⁵ On 14 February 2013 the Commission presented a modified proposal of Council directive for implementation of enhanced cooperation in the area of FTT.⁶

The author of this article further discusses two main problems, namely the inclusion of the pension funds in the scope of the FTT and the extraterritorial effect of the tax, which might hinder the smooth introduction and functioning of the FTT at a level of enhanced cooperation.

In the first part of this article the effect of an extraterritoriality of the tax will be discussed. The author will explain how the tax resulted to have such an effect and how this issue is being dealt with throughout the current debates of the tax. The second part of this article is dedicated to the discussion whether pension funds should be relieved from the burden of the FTT. The author of this article elaborates on the problem regarding pension funds and their inclusion in the scope of the FTT and further sets out arguments why, in her opinion, the pension funds should remain covered by the FTT.

2 The European Commission: proposal for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC COM (2011) 594, 28 September 2011, [2011] OJ L 145.

3 European Council: Conclusions EUCO 76/12, 29 June 2012, [2012] OJ L 163.

4 Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal, Slovenia and Slovakia.

5 European Council: decision authorising enhanced cooperation in the area of financial transaction tax 2013/52/EU, 22 January 2013, [2013] OJ L 22.

6 Op. cit. 5.

2 The Extraterritorial Effect of the FTT

2.1 The starting point

Due to the fact that the enhanced cooperation in the area of the FTT was established, the territorial scope of the tax was narrowed and this caused a problem in a form of an extraterritorial effect of the tax. This effect appears due to both the principle of residence and the principle of issuance.

The residence principle aims at reducing the risk of tax avoidance through geographical relocation of transactions outside the EU. The rationale behind it is that financial institutions are less mobile than financial transactions, thus taxing institutions that carry trade on the basis of the residence principle mitigates this geographical relocation risks compared to taxing transactions at source.⁷ As a result, every financial institution is deemed to be a resident of a Member State where the conditions set out in the proposed Directive are fulfilled.⁸

The issuance principle was introduced later with the amended proposal in the area of the FTT. This principle is seen as a last resort in attempts trying to prevent the avoidance of the tax. Pursuant to the issuance principle, the FTT would be payable even in situations when a financial institution is established outside the FTT zone but is trading in financial instruments originally issued within the FTT zone.

Both principles tackle tax avoidance and have the aim to make evading the FTT potentially far more expensive than paying it.⁹ However, both of the principles are also the prerequisites for the caused extraterritorial effect of the financial transaction tax. Therefore, having in mind this overlap of the good intentions by the Commission (anti-avoidance measures) and rather controversial outcome (the extraterritorial aspect of the tax), the author of this article finds it important to explain why the inclusion of the above mentioned principles in the Commission's proposal was important and how effectively they serve the intended

7 The European Commission: technical fiche, 'the residence principle and the territoriality of the tax', [2012].

8 Op. cit. 5, Art. 3.

9 'Parliament adopts ambitious approach on financial transaction tax', in: European Parliament News, 23-05-2012. Retrieved via: <http://www.europarl.europa.eu/news/en/news-room/content/20120523IPR45627/html/Parliament-adopts-ambitious-approach-on-financial-transaction-tax>, last visited on 20 April, 2014.

purpose. In addition to this, different elements of the extraterritorial effect of the tax will also be discussed further.

2.2 Measures in place in order to mitigate the possible migration of business

One of the most extensively discussed risks related to the introduction of the FTT is the risk of the relocation of business outside the FTT zone. This issue was firstly identified during the discussions at the level of the G20¹⁰ and later on - during the considerations and debates at the EU institutions regarding the introduction the FTT. The European Commission has acknowledged¹¹ that the functioning and effectiveness of the FTT is attainable only if it does not create possibilities and does not result in tax avoidance through substantial migration of trade to other financial centres outside the FTT zone.¹² Therefore it is important to safeguard the effective functioning of the tax and that was done through the residence and issuance principles.

In many discussions relating to the risk of the migration of the businesses, the example of Sweden in the 1984-1991 period is put forward. In 1984, Sweden introduced its national financial transaction tax which was applicable to financial transactions (purchase or sale of an equity securities) concluded in the territory of Sweden if one of the parties of the transaction was established there. The tax was levied on the financial intermediaries registered in Sweden through which the securities transaction was being conducted. It is important to emphasize that the mentioned tax was abolished five years later due to fact that most of the businesses trading in securities started doing their business in the UK. As a result, Sweden lost more revenue than it was collecting from the tax.¹³ The critics of the FTT presuppose that history will repeat itself when an EU FTT be introduced and warn that the countries which

10 During the discussions of a global financial transaction tax for which the unanimous consensus was not reached.

11 Op. cit. 7.

12 Kitromilides J., González A. R., 'The EU Financial Transactions Tax: Antecedents and Current Debate', *Panoeconomicus* (3), 2013, Special Issue, pp. 311-321.

13 The European Commission: staff working document, impact assessment accompanying the document proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax, analysis of policy options and impacts SWD(2013) 28 final, 14 February 2013, [2013] OJ L 46.

support the tax would suffer from the relocation of business outside their territories or even worse – outside the territory of the EU¹⁴.

However, the author of this article would like to emphasise that the Swedish model of the FTT and the amended proposal of the EU FTT¹⁵ are not comparable as firstly, the Swedish FTT was a national tax whilst the to be introduced FTT is a supra-national tax. Secondly, the fact that the Swedish tax was applicable only to transactions that took place in Sweden made it rather easy to avoid the tax, whereas an EU FTT is supposed to cover a much broader spectrum of taxable events. It is anticipated that the proposed tax will create a taxable event when three situations occur¹⁶: 1) when both parties of a transaction are established within the FTT zone (residence principle I); 2) when only one of the parties of a transaction is established in the jurisdiction of the FTT (residence principle II); 3) or when *none* of the parties of a transaction is established in the FTT zone but they are trading in financial instruments that are issued *within* the jurisdiction of the FTT (issuance principle, a 'deemed establishment'). It should be noted that the issuance principle, which was introduced as a last resort, is expected to serve as an effective measure in reducing the incentives of the relocation of business as it will be less advantageous to transpose activities and establishments outside the FTT jurisdiction, since trading with the financial instruments issued within the FTT jurisdiction will be taxable anyway.

The author of this article is of the opinion, that in order to move the trading business in financial instruments to a FTT-free jurisdiction, enterprises should not only cease to meet any of the extended FTT clauses of the establishment¹⁷, but should also refuse any transactions in financial instruments and structured products with the entities established in the jurisdiction of the FTT, abandon their operation in any of the collective investment structures within the FTT jurisdiction, and, finally, do not to carry out any transactions in the financial instruments issued in one of the FTT zone countries. In other words, with an introduction of the issuance principle, it became very difficult for

14 Vince Heaney, 'Europe takes a step closer to a tax on financial transactions', in: the Financial Times, 18-09-2011, retrieved via: <http://www.ft.com/intl/cms/s/0/eae0db9c-dea5-11e0-a228-00144feabdc0.html#axzz337K0a1eg>, last visited on 29 May, 2014.

15 Op. cit. 5.

16 Op. cit. 5, Art. 4 (1).

17 Op. cit. 5, Art. 4.

business trading in financial instruments to avoid the payable FTT as such an avoidance requires not only the substantial transposition of business outside the FTT zone but also a *complete withdrawal* from the trading activities that would result in the FTT burden (namely, trading in financial instruments issued within the FTT zone and trading with a financial institution established within the FTT zone). This mentioned aspect is of a crucial importance as the financial institutions, cogitating the relocation of business outside the area of FTT, will have to critically reflect and precisely calculate the balance of the potential benefit (non-payment of the FTT) and loss (a complete dissolution of activities in the FTT jurisdiction) as well as fundamentally rethink their investment strategies.

2.3 Good intentions – an unexpected outcome?

As it was already mentioned above, the issuance principle should be seen as a double edged sword: on the one side, the principle is expected to be a proper and effective measure against the migration of businesses while trying to avoid the tax, on the other – it creates a far reaching extraterritorial effect of the tax. The latter caused a big concern for non-participating countries both within and outside the EU as their financial institutions might fall within the scope of the new tax and have to bear an additional tax burden. The issuance principle creates a wide reaching extraterritorial impact by covering financial instruments issued in the FTT jurisdiction regardless of where they are traded or where the parties to the transaction are established¹⁸ as long as a financial institution is party to the transaction.¹⁹ In other words, this means that non-FTT zone financial institutions—e.g. those in London, New York and Asia—will be taxed every time they transact with parties in the FTT zone, and every time they deal in securities issued by an enterprises established in the FTT jurisdiction.²⁰

18 Op. cit. 5, Art. 4 (1) (f) and (g).

19 Bhogal S., Fryer F., 'The E.U. Financial Transaction Tax', Journal of Taxation & Regulation of Financial Institutions Vol. 27 (1), 2013, p. 47 - 56.

20 'U.S. Firms Fear Extraterritorial Reach of European Transaction Tax', in: The markets media, 28-01-2013. Retrieved via: <http://marketsmedia.com/u-s-firms-fear-extraterritorial-reach-of-european-transaction-tax/>, last visited on 20 April, 2014.

Moreover, the principle of residence even widens the extraterritorial effect of the tax as it brings within scope of the FTT all branches and financial institutions conducting business within the FTT jurisdiction which are either EEA-authorized institutions trading in the FTT zone under a "passport" or third-country institutions permitted to trade in the FTT zone.²¹ However, it should be noted that theoretically there is a way out of being qualified as 'assumingly established' in the FTT zone: a financial institution can prove that there is no link between the economic substance of the transaction and a territory of FTT-Member State²². Nevertheless, by this time, it is still very unclear how this provision should be applied as the European Commission gives indications that its scope might be rather limited²³. Also it is unclear whether the burden of proof to deny deemed residence will not be too administratively burdening²⁴. Therefore, it comes as a no surprise that non-participating countries are not joyous with this extraterritorial effect of the up-coming tax as it creates costs and additional burdens for the latter, especially when the refutation mechanism of the deemed residence is still very uncertain and puts the burden of proof on the shoulders on the financial institutions.

While the non-EU countries started looking for legal ways out of the due FTT by re-arranging their business structures (e.g. in order to shield their operations from the FTT, the financial business in the FTT zone might be isolated from the other business operations²⁵) or reviewing already existing as well as putting in place new tax planning structures, the non-participating EU Member States (with the UK and Luxembourg in the lead) are not willing to give up easily and are trying to stop the implementation of the tax (at least in a substance and to that extent as it is suggested by the last proposal). Recently the UK challenged²⁶ Council Decision 2013/52/EU²⁷ on a basis that it is contrary to the EU law. In its motion the UK generally argues that the mentioned decision is contrary to Article 327 TFEU because it authorises the adoption of the FTT with extra-territorial effects *'which will fail to respect the*

21 Op. cit. 19.

22 Op. cit. 5, Art. 4 (3).

23 Bombecke G., Bleus E., 'Financial Transaction Tax', INTERTAX Vol. 41 (10), 2013, p. 553 – 565.

24 Especially for those enterprises that have no economic link with FTT-zone and Europe in general, except of the fact that they are buying or selling financial instrument issued within FTT zone.

25 Op. cit. 19.

26 Case C-209/13 United Kingdom v Council, [2014].

27 This decision allows enhanced cooperation in the area of the FTT.

competences, rights and obligations of the Non-Participating States'.²⁸ Moreover, the UK predicates that decision in question is unlawful as for an authorization of a tax with extraterritorial effects there is no justification in customary international law which has to be respected as it takes precedence over the EU law. Furthermore, it is being argued that Article 332 TFEU is also breached as the implementation of the FTT would inevitably cause costs to the Non-Participating States. As a result, the UK asked the CJEU to annul Council Decision. However, the CJEU in its decision of 30 April, 2014 rejected the UK's challenge as premature due to the fact that the challenge was based on a tax which does not yet exist and by today there is still no final common agreement on what the final tax would look like.²⁹

In this context of the challenge, it should be noted that probably it is true that non-participating countries will have to bear additional costs of the collection of the tax as the new collection mechanism will have to be implemented.³⁰ Nonetheless, it should be noted that in general taxes with extra-territorial effects are not *per se* forbidden under public international law, however, only to the extent, that their enforcement does not require the performance of activities on the territory of another jurisdiction.³¹ To put it differently, countries are not hindered from implementing tax rules which would give a rise of taxing rights for some elements located outside their jurisdiction, yet, it does not mean that countries can unilaterally require the performance of other countries on the behalf of 'the issuance country' (e.g. to exercise the collection of the tax in the jurisdiction of another country). It is believed that the latter case might be the effect of the Commission's amended proposal as it 'would require financial institutions established outside the territory of any participating Member State to collect and pay, for the account of a given participating Member State, the FTT due on the relevant leg of the targeted transactions'.³² This could be the reason why the tax might be contrary to the international customary law.

The UK motion against the proposed FTT also raised intense discussions among the tax practitioners. Due to the fact that the CJEU's judgement

28 Op. cit. 26.

29 Ibidem.

30 Which in itself is costly, as well as the employees will have to be trained to work with the new system, further the collection of the tax will have to be tracked, monitored, administrated and remitted, ect.

31 'FTT under enhanced cooperation: is it legal?', in: The Luxembourg Bankers' Association, 25-04-2013. Retrieved via: <http://www.abbl.lu/node/58850>, last visited on 20 May, 2014.

32 Op. cit. 31.

suggested that a subsequent challenge could be admissible³³ all these discussions raised are still of big relevance. Some practitioners adhere to a rather pessimistic point of view stating that the puzzle of the extraterritorial effect of the tax might be crucial to the success of the FTT, especially, having in mind, that extraterritorial impact is very hard to justify which might result in a repudiation of the proposal.³⁴ Whereas others claim that any challenge against the ECJ is unlikely to result in the abolition of the FTT having in mind some of the previous experiences in challenging the usage of enhanced cooperation against the ECJ.^{35 36} Moreover, the European FTT still has a very strong support from Germany and France.³⁷ Nevertheless, in any case, it appears that the judgement put some pressure on the states as the ten³⁸ participating Member States during the last ECOFIN meeting³⁹ agreed on a gradual introduction of the tax (step-by-step approach) aiming at covering, initially, only stocks and certain derivatives with a possibility to widen the extend of the tax eventually. Furthermore, the introduction date of the tax was also postponed to more realistic one – (at latest) 1 January 2016. Interestingly, that Slovenia – one of the initial eleven participating states – did not sign the joint statement. This reached consensus nearly constitutes a minimal agreement required for the

33Op. cit. 26.

34 De la Feria R., a professor of tax law at Durham University Law School and program director at the Oxford University Centre for Business Taxation, in: The tax analyst, 16-09-2013. Retrieved via: <http://www.taxanalysts.com/www/features.nsf/Articles/4C0D73B2B701E2C485257BE8005C61C6?OpenDocument>, last visited on 31 May, 2014.

35 Italy and Spain's challenge of the usage of enhanced cooperation in the context of unitary patents failed against the ECJ.

36 'Legal challenge to the EU FTT – what happens now? ', in: PwC, 20-04-2013. Retrieved via: http://www.pwc.com/en_CA/ca/global-ifs/publications/pwc-legal-challenge-to-eu-fft-what-happens-now-2013-05-en.pdf, last visited on 31 May 2014.

37 The FTT Blog maintained by the KPMG UK, in: KPMG UK, 31-04-2014. Retrieved via: <http://www.kpmg.com/uk/en/services/tax/corporatetax/pages/europea-n-financial-transaction-tax.aspx>, last visited on 31 May 2014.

38 Belgium, Germany, Estonia, Greece, Spain, France, Italy, Austria, Portugal and Slovakia.

39 The Economic and Financial Affairs Council (ECOFIN) meeting on 5-6 May, 2014.

enhanced cooperation⁴⁰ which brings in a lot of uncertainty to the future of the tax. Clearly, a strong political will is required in order to make this tax work.

3 Inclusion of Pension Funds in the Scope of the FTT

3.1 The starting point

In its current form, the EU FTT would tax transactions of all different types of financial institutions, including pension funds. Such an inclusion of pension funds in the scope of the FTT might create additional problems which could hinder the smooth introduction and functioning of the FTT. The mentioned issue is mostly raised and extensively discussed by the pension funds themselves as they argue that an exemption from the tax is needed in order to hinder the future beneficiaries facing higher contributions payments and / or reduced benefits.⁴¹ The author of the article further will explain the core of the problem raised by the pension funds and will set out her arguments why the pension funds should not be relieved from the burden of the FTT.

To begin with, it is very important to emphasize that after the introduction of the FTT system, it is very likely that the financial institutions will not want to reduce their profits by the payable FTT. As a result, it is highly probable that banks and other financial institutions will try to shift the burden of the FTT to the shoulders of their clients by raising the fees on day-to-day financial services and thus, indirectly withdrawing the cost of the FTT from their customers. This type of risk was firstly identified during the meetings of G20⁴² and later on one more time addressed by the European Parliament.⁴³

40 For the procedure of enhanced cooperation a participation of nine Member States is required.

41 Leppälä M., 'Cost of the FTT ultimately born by pensioners', in: The Parliament magazine, 12-05-2014. Retrieved via: https://www.theparliamentmagazine.eu/articles/sponsored_article/pm-costs-fft-ultimately-borne-pensions, last visited on 31 May 2014.

42 During the Pittsburg G20 Summit in 2010, the International Monetary fund presented its report 'A fair and substantial contribution by the financial sector', in which it was highly emphasized that the global financial transaction tax could be more detrimental than beneficial as the burden on the end users would be higher than the

Therefore, if banks and other financial institutions, in order to (indirectly) avoid the payable FTT, would raise the fees of the daily transactions for the end-users, the general aim of the FTT, namely to make the financial institutions pay a fair share to public finances, would not be achieved and the tax itself could lose its primer social value.

Furthermore, the mentioned risk is of particular importance regarding the activities of pension funds as the latter openly declare that the FTT levy would ultimately hurt the returns of the pension funds and would have to be paid by current and future retirees.⁴⁴ This transfer of the fiscal burden to the future pensioners is the main argument supporting pension funds' suggestions to be exempted from the burden of the FTT.⁴⁵

However, the Commission is not willing to give an exemption from the tax to the pension funds, arguing that they already benefit from a various advantageous tax regimes / schemes in many Member States (depending on a Member State, pension funds do not pay any or pay a very low corporate, income, dividends and capital gains tax, also in some Member States pension funds are exempted from VAT).⁴⁶ Furthermore, such an exemption would be detrimental to the level-playing field between various products available for savings and retirement and would be against the principle of tax neutrality as the alternative products, such as bonds, collective investment vehicles and life insurance contracts already fall within the scope of the FTT.⁴⁷

generated income. International Monetary Fund. A Fair and Substantial Contribution by the Financial Sector final report for the G-20, June 2010. Retrieved via:

<http://www.imf.org/external/np/q20/pdf/062710b.pdf>, last visited on 31 May 2014.

43 The European Parliament: resolution on innovative financing at global and European level (2010/2105(INI), 8 March 2011, [2011] OJ L 51.

44 Opinion of the director of the Dutch fund 'APG', in: Bloomberg, 04-03-2013. Retrieved via: <http://www.bloomberg.com/news/2013-03-04/pension-funds-clash-with-semeta-on-transaction-tax-harm.html>, last visited on 31 May 2014.

45 The mentioned opinion and identified risk is also a reason why the Netherlands insists upon an exemption for pensions funds in the FTT scheme.

46 The European Commission, technical fiche, 'Pension funds in the context of the FTT proposal', [2012].

47 Ibidem.

3.2 Is inclusion really harmful to the future pensioners?

The author of this article supports Commission's arguments set out above and also adheres to the point of view that pension funds should not be exempted from the burden of the FTT. This outcome is reached on a basis on further considerations.

Firstly, it should be noted, that in practise a rather small part of all European pension funds would be affected by the FTT. Only the pension funds that fall within the pension schemes of so-called II and III pillars⁴⁸ will be covered by the scope of the FTT. Pension schemes that are run by the states – the pillar I social security systems – would not be affected by the FTT at all as these pension funds do not trade in the financial markets. In this context it is essential to bear in mind that pillar I is the most important element of social security schemes in most Member States with the exceptions of the Netherlands, Ireland, United Kingdom, Sweden, Denmark, Germany and Belgium (in which pillar II social security schemes are of big importance⁴⁹). As a result, there is no wonder that precisely these countries - or to be more accurate, business groups, lobbyists for the financial sector and pension funds of the latter – raise questions of the probable exemption as these countries (and their business groups) would be the only ones that *in practise* be affected by the tax. Therefore, giving an exemption from the tax to the pension funds would mean favouring the interests of business groups, lobbyists and small amount of pension funds interest over the public interest. Such a beneficial treatment of a minority over the majority would be contrary to the general fairness, tax neutrality principles as well as to the primary purpose of the FTT.

Secondly, only pension funds that trade in the secondary market⁵⁰ will be taxed with the FTT, the ones that trade in the primary market⁵¹ and

48 Pursuant to the methodology of the World Bank of 1990, social security schemes can be divided into three pillars: I pillar – are public or pay-as-you-go pensions, II pillar – mandatory complementary and privately managed pension schemes, III pillar – voluntary contributions without any link to the employment.

49 Op. cit. 46.

50 Secondary market is the financial market in which previously issued financial instruments such as stock, bonds, options, and futures are bought and sold from one investor / speculator to another. This makes this market 'a second one' as the financial

invest in governments bonds are already excluded from the burden of the FTT. Moreover, it is obvious that the tax burden of the FTT will be higher for those pension funds that perform the high frequency trading investment strategies in the secondary markets than for the ones that pursue 'buy and hold' strategy. However, it should be emphasized that in actively managed pension funds and investment vehicles trading, operational costs as well as handling fees are *already* higher than in the passively managed ones.⁵² Therefore, the emphasis should be put on the word '*higher*' as the newly imposed FTT would not in itself create *high* costs for the frequently trading pension funds but it would merely contribute to the already high costs of the latter which are *already* carried along by the current and future retirees.

It has been calculated that annual operational and management costs of the actively managed pension funds are six to twelve times higher than the FTT due.^{53 54} In addition to this, the Commission has also made estimations that for an average 25 years membership in a pension

instruments are not being traded directly between the issuer of the financial instruments and investor / speculator.

51 Where a newly issued security is first offered. All subsequent trading of this security occurs is done in the secondary market.

52 Op. cit. 46.

53 The outcome of such calculation can be illustrated by the following example. Let's assume that an individual pension savings portfolio consists of 100, 000 EUR value assets (1000 securities x 100 € value each). The passively managed pension fund would trade 25% of the portfolio once a year, whereas an actively managed one would trade of all assets twice a year. As a result, we would have that the trading frequency in an actively managed pension fund is eight times higher than in the passively managed one. Consequently, this would mean that the passively managed fund would be taxed at only 25 EUR/year or 0.025% of total assets and actively managed fund - 200 EUR/year or 0.2% of total portfolio value (the rate of the FTT is 0.05% and it is due at the moment of buying and selling of that asset). In a contrast to this, annual operating and management costs of the pension funds are of 1.2%-2.4%. And the latter average six to twelve times any FTT payable.

54 Botsch A., 'Financial transaction taxes in the EU', in: The European Union Trade Institute, 12-10-2012. Retrieved via: <http://www.etui.org/Publications2/Policy-Briefs/European-Economic-Employment-and-Social-Policy/Financial-transaction-taxes-in-the-EU>, last visited on 31 May 2014.

scheme, already existing high operational and management costs could result in a 17.5% loss in the real net return for the scheme member.⁵⁵ This leads to the conclusion that the substantial operational costs of the pension funds, not the FTT itself, is the real burden for the current and future retirees. Therefore, the FTT should not be used as a smokescreen to conceal this issue and avoid the payable FTT.⁵⁶

And finally, it should be born in mind that the newly introduced FTT might even be beneficial to the members and potential clients of the pension funds as it would lessen the high frequent trading of the pension funds and thus, contribute to the stability and regained trust in the financial markets. If the high volumes of trading were decreased, the high trading costs would also be reduced what could result in bigger returns for the pensioners.⁵⁷ Furthermore, the FTT could stimulate the development of the transparency requirements relating to the operational and management cost of the pension funds as well as perform a social function in a sense that clients before choosing one or another pension fund (actively or passively managed, trading in primary or secondary market) would collect more information and make more deliberate and measured decision for the future. Having in mind all the mentioned before, the new to be introduced EU FTT would not be harmful even contrary – it could be favourable to the current and future retirees.

4 Conclusion

In regard with all the above mentioned considerations, it can be concluded that the new tax should not be a problem for future pensioners as claimed by various pensions funds (as only the small number of pensions funds would be touched by the tax in question and the tax would only insignificantly contribute to the increase of the fund-related cost as these costs are already very high), therefore granting

55 Op. cit. 46.

56 Gray J., 'No exemption: the financial transaction tax and pension funds', in: The network for sustainable and financial markets, 10-12-2012. Retrieved via:

http://www.sustainablefinancialmarkets.net/wpcontent/uploads/2012/12/No_Exemption.pdf, last visited on 20 April 2014.

57 Ibidem.

the exemption from the tax would not be justified.⁵⁸ Nevertheless, if for the sake of the argument it would be assumed that the exemption from the FTT to the pension funds would be granted, even then pension funds would not be shield from the payable FTT as the effect of the tax would probably still hit them due to their trading partners.⁵⁹ Thus, it is rather accurate that pension funds in one way or another will be touched by the FTT, however, it cannot be known for certain that it will create additional (if any!) burden for the participants of the funds. The costs of the FTT might be absorbed by the investment chain itself as the pension funds will want to offer importunate rates to their clients.⁶⁰ Moreover, as it was already mentioned, the EU FTT might even be very beneficial for the current and future retirees. Therefore, pension funds, as financial institutions with a *social element*, should argue for not against the tax. However, contrary to the problem regarding pension funds, the issue concerning the extraterritorial effect of the tax might cause some further issues as no non-participating country attempts to apply the proposed FTT in the manner and scope it is designed now. Moreover, even if they were willing to collaborate, there is yet *no* mechanism in place for the collection of a tax which is so far from 'home' and where the parties of a taxable transaction might even have no effective connection to the taxing state. And finally, due to the fact that the CJEU did not close the door for the subsequent challenge, in the future there still might be a ruling regarding the extraterritorial effect of the tax and its compatibility with the EU law. Having in mind that it is very hard to justify the extraterritorial effect, the proposal of the tax might be amended (in regards of issuance and residence principles) by the participating Member States themselves.

58 Every exemption from the tax should be justified as every exemption faces the problem of loosening the ways and creating loopholes for the circumvention of the tax.

59 In order to entirely avoid FTT, as it was already mentioned before, pension funds should cease their trading in financial markets within the FTT zone (residence principle) and also should not trade in financial instruments issued within the FTT zone (issuance principle).

60 Op. cit. 56