Possibilities of the Introduction of a Financial Transaction Tax in Germany: Comparison and Evaluation on the Basis of the Italian and French Transaction Tax With Regard of the EU Taxation Principles

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This article evaluates the financial and economic implications of implementing a stock financial transaction tax (FTT) in Germany, setting aside the political dimensions prevalent in European discussions. It finds that an FTT decreases market efficiency and does not aid in stabilizing the financial system. Observations from France and Italy, where FTTs yielded revenues below projections, suggest that such a tax might be economically unfeasible for Germany. The study investigates whether a national FTT targeting transactions of German company shares on domestic exchanges—and levying the tax on the purchaser—conflicts with European Union principles, especially the free movement of capital as stated in Articles 63-65 of the Treaty on the Functioning of the European Union (TFEU). Moreover, it scrutinizes the compatibility of the proposed Franco-German cooperative FTT with German constitutional law and whether the financial sector's contribution to the public good justifies the tax base under the Basic Law's tax typology.

Keywords: taxation law, Tobin tax, European taxation law, stock financial transaction taxation, Jurisprudence of the EU Court of Justice

INTRODUCTION

Implementing a financial transaction tax has been a topic of discussion for a while now. The European Commission proposed a directive in 2011 to introduce taxes on various financial transactions throughout Europe. At first, it was unclear if multiple European countries would apply a tax on various securities. It appears that the tax will only apply to stocks with high political significance, and this decision is becoming more definite (European Commission,(EC), 2011b). The introduction of the financial transaction tax is mainly associated with two economic objectives by its proponents. Firstly, it is intended to incentivize preventing transactions that do not serve the efficiency of financial markets, particularly by curbing speculation deemed harmful. Secondly, the tax generates additional tax revenue (Uricchio and Spriveri, 2022a). On the other hand, critics fear that with low revenue, there will be significant negative impacts on market liquidity, investments, and economic growth. These impacts may include higher capital costs, increased costs for risk hedging, and lower returns for investors. This publication aims to assess the economic rationality of a financial transaction tax on equities, regardless of other potential political goals that may be relevant in the current European negotiation process (Uricchio and Spriveri, 2022b). The statement concludes that a financial transaction tax reduces capital market efficiency and is therefore, counterproductive for stabilizing the financial system. Compared to the expectations before its introduction, the tax revenue in countries such as France and Italy, which have implemented a financial transaction tax, is often disappointing. Therefore, the scientific advisory board Of the Federal Ministry of Finance in Germany considers the introduction of a financial transaction tax in Germany to be economically unjustified (Deutscher Bundestag (DB), 2020). The Department for Europe of the German Parliament has been tasked with exploring the feasibility of implementing a national financial transaction tax (FTT) that would only apply to German companies. The goal is to assess whether such a tax would comply with the primary laws governing the internal market **(**DB, 2020). If implemented, the department understands that the national FTT would impose tariffs on transactions of shares of German companies on German trading venues. The tax would be paid by the acquirer of the claims, as specified by the commissioning party. The audit mandate is limited to relevant audit standards concerning potential violations of fundamental freedoms. The proposed FTT can be evaluated against the EU law's standard of free movement of capital under Art. 63 - 65 Treaty on the Functioning of the European Union (TFEU). The relevant review standards are outlined in the following(DB, 2020a). It is also largely requested clarification on the compatibility of the planned financial transaction tax (FTT), established through enhanced cooperation between France and Germany, to ensure a fair contribution from the financial industry towards public welfare. Additionally, they request an explanation of whether the grounds for imposing the FTT are adequately covered and whether it can be classified within the broad interpretative categories defined by the Basic Law. Determining if a legitimate power exists to create such a tax (Ress and Ukrow, 2019; Uricchio, et al., 2022) is essential. Lastly, they require a comparison between the planned FTT and the securities transaction tax that was in effect in Germany until 1991(DB, 2020b)**.** Another perspective highlights that the Next Generation EU program **(**Uricchio and Selicato, 2022) will be funded by significant debt taken on by the European Union. These debts are expected to be repaid until 2058 (Uricchio,*et.al*, 2022e). The Own Resources Decision for 2021-2027 includes the creation of new categories of own resources meant for repaying capital market funds. New categories of resources are available based on a border adjustment mechanism for CO2 and a digital levy **(**Uricchio and Gallo, 2022)**,** as well as resources connected to the EU Emissions Trading System. The system may be expanded to include aviation and maritime industries. The roadmap states that the Commission will propose new resources by June 2024 after assessing their impacts. These resources may involve a financial transaction tax or a common corporate tax base, which will require a financial contribution from the corporate sector. The new Own Resources Decision includes a plastic levy to finance the EU budget (Uricchio and Giambrone, 2020a). While some of the proposed new sources of revenue can be allocated to the EU level, creating new funding sources can have distributional effects, as seen with the plastic levy. Although there are other potential sources of own resources, it is essential to note that the Gross National Income-based own resources, which currently make up more than 70% of the EU budget financing, are generally considered the most relevant revenue source for the EU budget (DB, 2020 b; DB, 2020c). These own resources are considered a comprehensive indicator of the economic capability of member states).

TAXATION AND THEORETICAL FINANCIAL CONSIDERATIONS

The impact of financial transaction taxes is similar to transaction costs, so the existing literature on transaction costs can offer valuable insights into how these taxes work. Dominant research (Guasoni and Muhle-Karbe, 2013; Vayanos and Wang, 2013) present an overview of the literature on transaction costs. One important finding from this literature is that demand becomes less responsive in certain situations due to transaction costs (Bundesministerium für Finanzen (BMF), 2020; Uricchio, 2022g). This rationale is logically intuitive, implying that trading activities are profitable only when price movements are substantial enough to compensate for transaction costs. The reduced sensitivity of demand to price changes results in a decline in market liquidity, leading to decreased trading volumes and increased susceptibility of market prices to external shocks. Transaction costs limit trading activity and increase market price fluctuations. This viewpoint finds support in research such as Constantinides (1986).

Some literature studies how financial transaction taxes might impact the presence of market price bubbles. Scheinkman and Xiong (2003) examine a model where investors attribute varying degrees of significance to publicly available information. In this framework, information can cause financial prices to deviate from their efficient values, resulting in "price bubbles." When transaction taxes are imposed, it significantly reduces securities trading. According to Buss et al. (2016), the Scheinkman and Xiong (2003) model shows that a financial transaction tax decreases trading volume and increases market price volatility. They further integrated this into a production economy. In a separate study, Adam et al. (2015) analyze the financial transaction tax within a structural stock price model that accurately reproduces the behavior of both stock prices and trading volumes. The model incorporates intermittent stock price bubbles caused by expectation-driven optimism, leading to significant wealth redistribution among different market participants (BMF, 2020). When financial transaction taxes are applied, they can decrease market liquidity, which may result in higher price volatility. As supported by Nagel and Greenwood's empirical research in 2009, financial transaction taxes can increase stock price bubble occurrence. This type of bubble leads to a significant transfer of wealth between investors with varying levels of stock market experience (Zimmermann, 2002). Unfortunately, less experienced investors tend to suffer losses while more experienced investors make gains. The effect of financial transaction taxes is to amplify this wealth redistribution in favor of the more experienced investors. In the field of market microstructure, researchers have studied how transaction taxes affect market participants who trade based on private information or individual liquidity needs (Uricchio and Mosco, 2020). In this context, the effect of transaction taxes depends on how the tax influences the decision to participate in the market for different types of traders (Uricchio, 2020a). If the relative share of liquidity traders increases, price volatility rises; otherwise, it decreases (DB, 2020; Uricchio, 2021).

CONSTITUTIONAL ASPECTS OF A PROPOSED FINANCIAL TRANSACTION TAX FOR GERMANY: AN OVERVIEW TO THE FINANCIAL TRANSACTION TAXATION IN FRANCE AND ITALY

Germany and France have jointly initiated a European initiative to introduce a financial transaction tax (FTT) in 10 EU member states through enhanced cooperation. The financial transaction tax is intended to be based on the FTT that has been in place in France since 2012. The French FTT applies only to transactions involving shares of French-resident corporations with a market capitalization of more than one billion euros in the previous year. The tax is levied solely on the buyer's side. Market-making activities and primary market issuances are exempt from taxation. The companies themselves are not subject to taxation under the FTT.

France imposes a financial transaction tax of 0.3% on the value of equity instrument transfers for French companies, including stocks and similar securities. French securities trading is subject to a tax, which applies irrespective of the transaction location or whether the securities are traded on the exchange or over-the-counter (OTC). The tax does not apply to trading foreign company securities in France (Jeanne and Rose, 2022; BMF, 2020). This is because of the "Issuance Principle" which aims to keep trading activities in the country and prevent them from diverting to other nations. Bonds that do not have the option to convert to equity and derivatives that involve cash settlement only (without the actual delivery of securities) are not subject to this tax. They are commonly referred to as "plain vanilla" securities. Securities of French companies with a market capitalization exceeding 1 billion euros as of a specific date and listed on a "recognized market platform" are subject to taxation. Purchases and sales can be offset within a single day (known as "netting"), exempting intra-day trading from taxation. Transactions in the primary market and those serving "market-making" activities are also exempt from taxation. Apart from regular equity trading, there is also a tax on buying uncovered credit default swaps (CDS) on government bonds of an EU member state. This tax is 0.01% of the nominal value. Unlike the basic version, the tax on uncovered CDS only applies to individuals and legal entities with a residence or registered office in France (Residence Principle).

Furthermore, trading activities of high-frequency traders above a certain threshold are subject to taxation, albeit at a meager tax rate. Similar to the taxation of uncovered CDS, the "Residence Principle" applies in this case. Trading activities are considered high-frequency when the proportion of cancelled or modified trade orders within a half-second interval exceeds 80% on a trading day. Cancelled or modified trade orders above the 80% threshold are subject to a tax of 0.01% of the transaction value. Trading of exchange-traded funds (ETFs) is not subject to taxation, but the trading of the underlying securities is (BMF, 2020; Uricchio and Selicato, 2021b).

The revenue forecasts at the beginning were greatly overestimated as they didn't consider the behavioral changes of market participants that would affect the projections. In August 2012, it was projected that the revenues for the following months until December would be 530 million euros. However, the actual revenues only amounted to 250 million euros. For the year 2013, revenues of 1.6 billion euros were anticipated, but only 756 million euros were actually generated. A few years ago, Colliard and Hoffmann (2017) studied how the financial transaction tax impacted stock trading in France. The authors demonstrated that even with a relatively low tax rate, there was a significant decrease of around 10% in the overall trading volume (BMF, 2020, pp. 9-10). There was a notable variation in the level of response among different stock categories. Stocks included in Euronext's "Supplemental Liquidity Provider" initiative, which is a discounted program aimed at promoting high-frequency trading in these stocks, were only slightly influenced by the tax (BMF, 2020). It was observed that the stocks not covered under this program faced a reduction of about 20% in trading activity and an increase in bid-ask spreads. Surprisingly, even though high-frequency investors were mostly exempt from the tax, their trading activity decreased by 35%. According to a study by Eichfelder, *et al.* (2018), trading volume was significantly decreased after the financial transaction tax was implemented. However, this effect was temporary and mainly affected stocks with low liquidity. In this regard an overview to the transaction tax in Italy is necessary.

The structure of the financial transaction tax in Italy shares significant similarities with that in France. The Tobin tax (Uricchio, 2020) is a financial transaction tax that applies varying tax rates depending on the type of financial operation. It targets three types of transactions: the transfer of ownership of shares and other participatory financial instruments issued by companies residing within the country, as well as securities representing these instruments, regardless of the residency of the issuing entity (BMF, 2020; Uricchio, *et. al*,2021b). A tax rate of 0.2% is applied to the transaction value, reduced to 0.1% for transfers occurring on regulated markets and multilateral trading systems. Transactions involving derivative financial instruments are primarily based on one or more participatory financial instruments. In such cases, a fixed tax is imposed based on the instrument type and contract value, as specified in a table attached to the Stability Law 2013. High-frequency trading, characterized by frequent modifications and cancellations of orders using computer systems capable of executing orders within milliseconds. This type of trading allows for profits from minimal price differentials on the same security. The location of the transaction's conclusion and the residency of the contracting parties are irrelevant in all three cases. Like in France, only stocks are subject to the tax, and it follows the "Issuance Principle," where the tax liability is determined by the company's registered office rather than the location of the trade. However, the threshold for taxed companies' market capitalization in Italy is lower, set at 500 million euros. Certain transactions, such as those related to market making, pension funds or statutory retirement schemes of EU/EEA member states, ECB transactions, and trading of "ethical" financial products, are exempt from taxation. To encourage trading on regulated platforms, different tax rates apply. A tax of 0.12% of the transaction volume is charged for transactions carried out on regulated trading platforms. When engaging in over-the-counter (OTC) trading without a trading platform, a tax of 0.22% of the transaction volume is imposed. In addition, like in France, high-frequency traders are taxed on their trading activities (BMF, 2020; Uricchio, 2023). Trading orders are considered high-frequency if canceled or modified within half a second of being placed, and if the proportion of these orders exceeds 60% on a trading day. Canceled or modified transactions surpassing this threshold are subject to a tax of 0.02%. Derivatives are taxed based on their nominal value and type. The tax system uses a table that displays both the threshold values and the corresponding tax amounts instead of just a percentage. Unlike in France, derivatives with cash settlement are also subject to taxation. Just like France, the projected tax income was overly optimistic. The initial estimation was 1 billion euros each year, but in the first year of introduction (2012), only 200 million euros were actually collected.

Coelho (2016) studied the effects of financial transaction taxes in Italy. The study focused on how market participants avoided these taxes and found that most of the tax revenue shortfall was due to non-taxable instruments and less flexible portfolios that minimize trading activity (DB, 2020b). The study also found that high-frequency trading strongly responded to the tax, even though it received significant exemptions. These findings align with those of Colliard and Hoffmann (2017). In Italy, the transaction tax only applies to companies with a market capitalization of more than 500 million euros. Researchers Cappelletti et al. (2017) have studied the effects of this tax threshold and found that it negatively affects market liquidity and increases price volatility. However, the impact on trading activity is only marginal. "The introduction of a so-called special tax on high-frequency trading (HFT) is not part of the considerations of the German government. The question arises as to whether introducing such a German financial transaction tax would be compatible with the constitutional requirements of the Basic Law (Grundgesetz) for introducing a new type of tax. In this regard, examining the guidelines set by the Federal Constitutional Court (BVerfG) regarding the legislature's authority to enact taxes is essential. In its recent decision on the nuclear fuel tax, the German Federal Constitutional Court (BVerfG, 2017), limited the legislature's authority to create taxes to the existing typifications in Articles 105 and 106 of the Basic Law. The financial constitution (Art. 104a et seq. GG) constitutes a self-contained framework and procedural system designed for clarity and adherence to established forms. There is no room for analogical inferences that would necessarily lead to an expansion or relaxation of this framework in this area. The strict observance of the financial-constitutional jurisdictions of the federal government and the states is paramount for the stability of the federal constitution (Ress and Ukrow, 2019; Uricchio, *et. al*., 2021). "The allocation of earnings needs to be certain to avoid any disruptions in the pacification function of the fiscal constitution. The fiscal constitution not only has an organizational function but also serves to protect and limit the relationship with citizens. The Basic Law categorizes taxes and types of taxes through Article 105 and Article 106. To identify the defining features of each type, the standard or typical case should be used as a reference. It is also not always necessary for all characteristics that define the type to be present. When considering new taxes, they should be evaluated based on how well they align with the characteristics of existing tax concepts outlined in Articles 105 and 106 of the Basic Law. To make an accurate assessment, it is important to consider any deviations (European Commission, 2018b). As per the classifications outlined in Articles 105 and 106 of the Basic Law, lawmakers can introduce new taxes as needed (German Federal Bank, 2020). The exploration of new sources of taxation is at least acceptable from the perspective of the distribution of competencies as long as it remains within the framework of the conventional characteristics of the respective taxes. (European Commission (EC), 2011b; BVerfG, 2017)

FREE MOVEMENT OF CAPITAL, ARTICLES 63 ET SEQ. OF THE TFEU ACCORDING TO GERMAN LAW WITH REGARD OF ITS RESTRICTIONS

First, the scope of the free movement of capital under Article 63(1) of the Treaty on the Functioning of the European Union (TFEU) needs to be determined, as well as potential limitations on the free movement of capital under EU law. The scope of the free movement of capital is derived from Article 63 of the TFEU. According to Article 63(1) of the TFEU, all restrictions on the movement of capital between Member States and between Member States and third countries are prohibited within the framework of Articles 63 to 66 of the TFEU (Glaesner, 2019). The precise definition of the free movement of capital is not explicitly provided in the EU treaties, including the Treaty on European Union (TEU) and the TFEU. It has yet to be comprehensively determined by the Court of Justice of the European Union thus far (Bröhmer, 2016). In simpler terms, "capital movement" refers to transferring money and non-monetary assets across the borders of a European Union (EU) member state, usually for investment reasons.In contrast to other fundamental freedoms, such as the freedom to provide services, the European Court of Justice (ECJ) further emphasizes that the transactions must primarily involve the investment and allocation of capital rather than the remuneration for service (Luisi and Carbone v Ministero del Tesoro (1984). The proposed taxation of securities transfers through the Financial Transaction Tax (FTT) falls within the scope of the freedom of capital movement, as it would tax the acquisition of shares in German-based companies on German trading platforms (College Pension Plan of British Columbia v Finanzamt München (2019); Uricchio, *et. al*, 2021). Therefore, implementing a financial transaction tax would need to comply with the freedom of capital movement principles. Furthermore, applying fundamental freedoms also requires a cross-border element, which exists when the parties to a transaction are resident in different EU member states or when the traded financial instrument is issued in a member state different from the parties to the transaction. An example of a cross-border element would be when buyers from abroad (EU or non-EU) acquire shares in German companies.

Restriction of the Free Movement of Capital, Art. 63(1) TFEU From an Italian Taxation Law Perspective in View of the Financial Transaction Tax

Article 63(1) of the TFEU prohibits restrictions on the free movement of capital. However, what constitutes a "restriction" is not clearly defined. Actions that limit investment in other states or prevent non-residents from investing are considered restrictions. This includes any hindrances, limitations, or prohibitions that affect the flow or circulation of capital. In a case before the ECJ (Case C-565/18) concerning a claim for the reimbursement of a financial transaction tax paid by an Italian branch of a French bank on financial transactions involving derivative financial instruments under Italian law, Advocate General Hogan interpreted the ECJ's case law on the existence of a restriction. According to his opinion, the ECJ interprets the term "restriction" narrowly concerning introducing taxes. Taxation affects the attractiveness of one of the four freedoms associated with the internal market (DB, 2020; Uricchio and Selicato, 2021). This is due to the nature of taxation. Advocate General Hogan has suggested to the Court of Justice of the European Union (ECJ) in Case C-565/18 that taxes imposed by Member States should not be excessively restricted. He recommends that Article 63 of the Treaty on the Functioning of the European Union (TFEU) be considered compatible with the Financial Transaction Tax (FTT) under dispute, based on the specific question presented. Advocate General Hogan has interpreted ECJ case law and concluded that the FTT does not discriminate against parties involved in a transaction or intermediaries based on their location. This means that the FTT does not violate Article 63 of the TFEU. The French bank involved in the matter argued that the Italian regulation might impede foreign investors from engaging in derivative financial instruments based on Italian law. They claimed that this restriction could lead to a limitation on the free movement of capital. Advocate General Hogan responded that this circumstance does not amount to direct discrimination. He explained that the disputed derivatives, based on Italian law's underlying assets, cannot be considered similar to derivatives not subject to Italian law. The final decision of the ECJ adhered to Advocate General Hogan´s view. Based on Advocate General Hogan's interpretation of ECJ case law, the determination of discrimination in the FTT being reviewed is contingent upon whether cross-border transactions are treated differently from purely domestic transactions. If the FTT is applied equally to both types of transactions, there is no discrimination according to this interpretation. On April 30, 2020, the Court of Justice of the European Union (CJEU) reviewed Case Société Générale (C-565/18) to determine if the Italian financial transaction tax complies with Article 63 of the Treaty on the Functioning of the European Union (TFEU), which relates to freedom of capital movement. The CJEU stated that determining whether unequal treatment exists depends on comparing cross-border situations to domestic situations within a member state, considering the regulation's purpose. The CJEU found that the Italian tax treated domestic and cross-border transactions equally for tax purposes and did not result in unequal treatment. In addition, the CJEU determined that the regulation's objective was not met in both scenarios. The aim was to ensure that those involved in transactions with derivative financial instruments, whose underlying assets were subject to Italian law, contributed to public expenditure. However, financial instruments with underlying assets subject to Italian law were not similar to those with underlying assets not subject to Italian law. As a result, the CJEU determined no violation of Article 65(3) of the TFEU, which prohibits discrimination (European Commission, 2018b; Uricchio and Giambrone, 2020a). The CJEU reviewed if the Italian tax hindered the unrestricted movement of capital. Despite the potential drawback of making investments in taxable financial instruments less favorable, this disadvantage is attributed solely to the absence of harmonization at the European Union (EU) level (Uricchio and Giambrone, 2020b). Consequently, the Court of Justice of the European Union (CJEU) concluded that such a circumstance does not restrict the freedom of capital movement. It is noteworthy that the CJEU's ruling in the case of Société Générale v Agenzia delle Entrate (European Court of Justice) (2020), which assessed the compatibility of the Italian financial transaction tax, could serve as valuable guidance for the implementation of the proposed joint financial transaction tax system (referred to as the D/F proposal), which is based on the principle of issuance. The proposed FTT seeks to treat foreign (EU) and domestic investors equally when buying shares of German companies on German trading platforms. This ensures that foreign investors are not discriminated against and allows for cross-border transactions (European Commission, 2018b;Uricchio and Giambrone, 2020c). Additionally, General Advocate Hogan has argued that derivatives with underlying assets subject to Italian law cannot be compared directly to derivatives with underlying assets not subject to this law. Therefore, it would be reasonable to conclude that shares of German companies are also not directly comparable to shares of non-German companies. This eliminates the possibility of discrimination. If the FTT (Financial Transaction Tax) causes any unfair limitations on the free movement of capital, it must be justified under the Union law. However, the potential justifications under Union law are only explained in principle. Restrictions on the free movement of capital can fall into two categories: the exceptions set out in Articles 64 et seq. of the Treaty on the Functioning of the European Union (TFEU), and justifications based on unwritten grounds. The provisions in Articles 64 et seq. of the TFEU contain exceptions regarding restrictions on the free movement of capital under Article 63(1) of the TFEU. Article 64 of the TFEU does not affect restrictions on the free movement of capital concerning third countries in relation to direct investments, establishment, the provision of financial services, or the admission of securities that existed on December 31, 1993, based on national legislation or Union legislation on capital movements. However, introducing new taxes, such as in the case of the FTT, is not covered by the scope of Article 64 of the TFEU. Furthermore, Article 65 of the TFEU provides for various exceptions to national restrictions. According to Article 65(1)(a) of the TFEU, Member States can apply the relevant provisions of their tax law that treat taxpayers differently based on their residence or the location of their capital investments. Tax disparities should not be restricted under Article 65(1)(a) of the TFEU if taxpayers are not in a comparable situation due to their different residence or capital investment location. However, a national FTT that taxes transactions of shares in German companies on German trading platforms, with the tax borne by the acquirer of the shares, would not differentiate based on the taxpayer's residence or capital investment location. Therefore, the FTT would not fall within the scope of Article 65(1)(a) of the TFEU. A definitive assessment, however, would depend on the specific design of the FTT. Lastly, Article 66 of the TFEU regulates permissible short-term protective measures that the Council can adopt, on a proposal from the Commission and after consulting the European Central Bank, towards third countries for a maximum duration of six months if such measures are necessary. If the FTT is to be introduced permanently, the exception in Article 66 of the TFEU would not apply (Bröhmer, 2016; Uricchio, 2022c).

Unwritten Justifications – Imperative Reasons of General Interest Related to the Financial Transaction Tax

In addition to the written exceptions provided in Articles 64 et seq. of the Treaty on the Functioning of the European Union (TFEU), restrictions on the free movement of capital can be justified under the case law of the Court of Justice of the European Union (CJEU) through unwritten imperative reasons of general interest, as established in the Veronica case (C-565/18). According to the CJEU's interpretation, as outlined by Advocate General Hogan in Case C-565/18, this justification can also apply to discriminatory measures as long as they do not directly discriminate. Advocate General Hogan opined that the latter could only be justified by one of the grounds listed in the Blanco v Agenzia delle Entrata (European Court of Justice) (2014). However, another interpretation in the literature suggests that generally discriminatory restrictions cannot be justified by imperative reasons of general interest. Therefore, a decision from the CJEU in Case C-565/18 (CJEU, 2020) is still awaited to resolve this dispute. Irrespective of the outcome of the aforementioned debate, the CJEU has expressly recognized certain unwritten justifications in the field of tax law that can justify restrictions on the free movement of capital (Hogan, 2019). These justifications include ensuring effective tax supervision and control, the effectiveness of tax collection, combating tax evasion and avoidance, preventing double deduction of losses, preventing (other) abusive practices, preserving the balanced allocation of taxation powers between member states, and maintaining the coherence of the tax system. On the other hand, the CJEU's case law suggests that the avoidance of tax revenue loss cannot be considered an imperative reason of general interest that could justify a discriminatory measure conflicting with fundamental freedoms(La Pergola, 1999). According to the literature, introducing a Financial Transaction Tax (FTT) could be well substantiated as justified by imperative reasons of general interest, particularly in stabilizing financial markets by reducing speculative trading. However, no relevant decision by the highest court is apparent (Hogan, 2019).

Unwritten Justifications – Compelling Reasons of General Interest – According to Advocate General Hogan's View

In addition to the written exceptions provided in Articles 64 ff. of the Treaty on the Functioning of the European Union (TFEU), restrictions on the free movement of capital can also be justified by the unwritten compelling reasons of general interest, according to the case law of the Court of Justice of the European Union (CJEU) in the Veronica case. According to the interpretation of CJEU case law by Advocate General Hogan in Case C-565/18, SG v Agenzia delle Entrate (2020), this should also apply to discriminatory measures as long as they do not directly discriminate. In his view, the latter can only be justified by one of the grounds listed in the TFEU (EuGH, Urteil vom 13.11.2019). However, according to another interpretation of CJEU case law in the literature, generally, discriminatory restrictions cannot be justified by compelling reasons of general interest. A decision from the CJEU in Case C-565/18 (CJEU, 2020) is still pending.

Regardless of the outcome of the dispute mentioned above, the CJEU has expressly recognized certain unwritten justifications in the field of taxation that can justify a restriction on the free movement of capital (Ress and Ukrow, 2019; Uricchio, 2022). These justifications include ensuring effective tax supervision and control, the effectiveness of tax collection, combating tax evasion and avoidance, preventing double deduction of losses, preventing (other) abusive practices, ensuring a balanced allocation of taxing powers between member states, and maintaining the coherence of the tax system**.** However, according to CJEU case law, avoiding tax revenue losses cannot be regarded as a compelling reason of general interest that can be invoked to justify a discriminatory measure contradicting a fundamental freedom. According to the literature, a justification based on compelling reasons of general interest could be well-founded concerning the introduction of a Financial Transaction Tax (FTT) aimed at stabilizing financial markets by reducing speculative trading**.** However, there is no relevant landmark decision from the CJEU on this matter (Ress and Ukrow, 2019).

Principle of Proportionality Regarding the Financial Transaction Tax

If compelling reasons of general interest exist, the FTT restriction must also comply with the principle of proportionality. The principle of proportionality requires that the measure is suitable to achieve the lawfully pursued objective without going beyond what is necessary for that purpose. In the case of introducing the FTT, this would mean that the specific design of the tax would represent the mildest means to achieve the lawfully pursued objective - ensuring or achieving one of the recognized compelling reasons of general interest. A comprehensive assessment would require a specific configuration of the FTT, considering the relevant objectives. Firstly, the FTT (Financial Transaction Tax) would be considered suitable if it actually contributes to the achievement of the compelling reasons of general interest. The CJEU does not impose strict requirements on the suitability of a measure and allows member states a margin of discretion in assessing suitability. However, it is required that the national regulation pursues the objective coherently and systematically. If the suitability of introducing an FTT at the national level is affirmed, the necessity of the tax would need to be examined (Uricchio and Selicato, 2021). A measure is unnecessary if the same objective can be achieved with an equally effective but less restrictive measure. Again, this depends on the specific objective and design of the FTT. Furthermore, the FTT would need to be proportionate. An analysis of the specific impact of the FTT in its concrete form would be required, which cannot be conducted at this stage (G.Gmbh v Hessischer Verwaltungsgerichthof (DB), 2020).

THE FINANCIAL TRANSACTION TAX AS A STEERING TAX ACCORDING TO THE GERMAN TAXATION PERSPECTIVE?

According to Articles 105 and 106 of the German Basic Law (GG), the steering tax is not a fixed type of tax. According to the jurisprudence of the Federal Constitutional Court (BVerfG), the steering character of a tax requires that the exercise of tax legislative competence for steering purposes must not contradict the existing legal order. "If tax steering affects a specific subject matter, the legislator may not enact regulations that contradict the regulations made by the competent legislator in the relevant subject area." The potential steering character of an FTT has been mainly discussed in relation to avoiding the "excesses of the 2008 financial crisis" and curbing the so-called computerized high-frequency trading**.** However, in the planned design of the FTT, which focuses on transactions in the secondary market exclusively related to shares of stock corporations with a market capitalization exceeding one billion euros ("blue-chip" stocks), a steering purpose is hardly discernible. The taxable subject matter would only capture a fraction of the publicly traded securities market. Computerized high-frequency trading would deliberately remain outside the scope of taxation. Such steering at the expense of acquiring shares in large stock corporations would neither be suitable for addressing the causes of the financial crisis nor for countering excessive speculative trading. Steering investors in the stock market at the expense of the taxed shares would also be incompatible with general securities and stock market law. The Securities Trading Act (WpHG) provisions do not provide special regulations for stock corporations with high market capitalization. Therefore, a clear steering effect is not apparent in the planned FTT.

FINANCIAL TRANSACTION TAX EVALUATION FROM A EUROPEAN TAXATION AND ECONOMIC PERSPECTIVE: AVOIDANCE REACTIONS, TAX EVASION, AND LEGAL BASIS OF COLLECTION

The empirical findings described for France and Italy suggest that the goals associated with introducing the financial transaction tax have not been met. Significant market characteristics have changed negatively, including market liquidity and price volatility. The actual tax revenues have fallen significantly short of the initial projections. These and other aspects will be further examined and evaluated below (Uricchio, 2022). The participants in the trading activities have reacted significantly to the tax by limiting their trading activity, shifting their trading to exchanges not covered by the tax, and moving towards non-taxable financial instruments. The strength of these reactions can be seen, for example, in the disappointingly low tax revenues in Italy and France compared to the initial expectations. Avoidance reactions are particularly problematic because the legal framework for collecting the tax does not exist outside the EU (Uricchio and Treglia, 2022), and it is unclear to what extent financial institutions in those countries will comply with the provisions of the financial transaction tax. It can be assumed that the tax cannot be collected for trading in share stocks or American Depositary Receipts (ADRs) in non-EU countries. This is especially problematic for Germany, where many large companies have issued share stocks. If avoidance reactions lead to significant tax collection deficits, the tax's constitutionality in Germany could be questioned due to a possible structural implementation deficit. Avoidance reactions are expected, especially due to the impending Brexit, which will likely place a significant financial market, already under pressure, beyond the reach of the tax. Although the UK imposes a financial transaction tax, Stamp Duty Reserve Tax at a rate of 0.5%, it is mainly imposed on British companies (Uricchio, 2022). Foreign companies are not subject to the tax unless they maintain a UK shareholder register, which is only the case in exceptional circumstances. Another issue regarding avoidance reactions is that they are likely to be highly non-linear (Uricchio, 2022). The advantages of trading in liquid markets are expected to result in only minor avoidance reactions at low tax rates. However, if the tax rates are raised significantly, market participants could coordinate their trading activities on exchanges where the tax is not levied, resulting in a sudden and significant decrease in liquidity in EU exchanges (Gallo and Uricchio, 2022). The disastrous outcome of introducing a 1% tax (cumulative for buying and selling transactions) in Sweden in 1984, where liquidity in Swedish markets collapsed in certain cases and trading shifted to England, illustrates the potential intensity of avoidance reactions. Furthermore, future technological revolutions, such as the emergence of new alternative trading platforms on the Internet, could make tax collection more challenging and facilitate avoidance reactions.

EU TAXATION: POSSIBLE OWN RESOURCES

The European Union (EU) finances its expenditures through its own resources, also known as own funds. In the budget for the year 2020, the total revenue of the EU amounted to 174.3 billion euros. Of this amount, 125.4 billion euros were derived from contributions based on member states' Gross National Income (GNI), accounting for 76.5 percent of the total revenue (Uricchio, 2022c). Additionally, there were revenues of 17.8 billion euros from Value Added Tax (VAT), referred to as VAT own resources. Together, these two sources of revenue are also known as national contributions and accounted for 80.4 percent of the total revenue in 2020. Another 11.4 percent of the revenue came from the EU's customs duties, amounting to 19.9 billion euros. The remaining 8.2 percent, equivalent to 14.2 billion euros, comprised other income sources such as taxes on EU staff, fines for competition violations, and similar revenue streams. These other income sources, however, are not considered as own resources of the EU. The revenues from customs duties (including agricultural levies) are regarded as traditional or genuine own resources because, in the internal market, the country collecting the customs revenue does not necessarily correspond to the country where the imported goods from third countries are actually consumed. This is also known as the Rotterdam effect. When goods arrive at the port of Rotterdam, they are subject to customs duties but often do not remain in the Netherlands; instead, they are shipped to consumers in other countries. Therefore, it is widely accepted that these own resources rightly belong to the EU (Uricchio, 2022d). The traditional own resources stem from an original policy area of the EU, namely the customs union. The allocation of customs revenues to the EU budget began in 1971 and was gradually transferred as member states' financial contributions were replaced by their own resources, along with the then-applied agricultural levies. Since customs revenues arise from a shared policy area, the customs union, and the EU has jurisdiction over these revenues. The Own Resources Decision of 1970 introduced the VAT's own resources, but revenue from them only started in 1979. The VAT own resources are determined based on a computationally harmonized tax base. To calculate them, the VAT collected by a country is divided by an estimated weighted average tax rate. Therefore, VAT's own resources do not represent a share of national revenues from VAT. In Germany, these resources are covered by the federal government from general tax revenues. In the context of the Multiannual Financial Framework (MFF) for 2021 to 2027, the European Commission proposed three new resources (Uricchio, 2022). This includes, among others, a levy on the common consolidated corporate tax base. A common consolidated corporate tax base would become mandatory for companies with an annual turnover exceeding 750 million euros. At a tax rate of 3 percent, this would generate annual revenue of 12 billion euros. The European Commission argued that multinational companies benefit particularly from the internal market, and a common consolidated corporate tax base would also contribute to combating the erosion of the tax base. The Commission was supposed to suggest new ways of generating income through CO2 border adjustment mechanisms and digital levies by June 2021.These proposals aimed to be implemented by January 1, 2023. The Commission was also planning to suggest generating income through the EU Emissions Trading System, possibly extending it to cover the aviation and maritime sectors. However, these proposals may be delayed until December due to unforeseen circumstances. Additionally, the Commission will suggest new ways of generating income after conducting an impact assessment by June 2024 (Uricchio, 2022e). This could include a financial transaction tax and a "financial contribution related to the corporate sector or a new common corporate tax base."

Possible EU Transaction Tax

Implementing a financial transaction tax has been a topic of discussion in tax policy reforms for a long time. John Maynard Keynes initially suggested it in the 1930s as a way to reduce the influence of speculation over enterprise in the United States after the Great Depression. However, he also acknowledged that it could affect trading volume and market liquidity. A financial transaction tax generally involves taxing securities transactions and other financial activities, like stocks and bonds. James Tobin is often associated with taxing international currency transactions in the 1970s to discourage them, to disrupt international financial markets (Uricchio, 2022f).

The idea of a financial transaction tax can be controversial as it may affect the efficiency of capital markets and the signals they send. Supporters argue that short-term capital flows can have a destabilizing influence, but this assumption is up for debate. If the tax included commodity derivatives trading or currency hedging for export transactions, it could also impact the real economy. Implementing a comprehensive financial transaction tax has proven difficult despite many political efforts. In 2011, the European Commission proposed a financial transaction tax that could generate up to 57 billion euros in revenue (EC, 2011b; Uricchio and Carabbellese, 2022). Subsequently, eleven member states sought to introduce a financial transaction tax through "enhanced cooperation" within the EU. However, disagreements arose regarding the taxable transactions. Currently, there is an agreement on a German-French proposal to tax only purchases and sales of stocks. However, this narrower tax base suggests the expected revenue would be in the single-digit billion range (Pichler, 2019).

Nonetheless, the implementation has experienced delays, resulting in specific financial transaction taxes in certain member states such as France and Italy. While a comprehensive financial transaction tax could significantly contribute to EU financing, it is doubtful that member states will reach a consensus on a broader tax base in the future due to concerns about their domestic financial markets. Thus, with the current proposal's limited scope, the financial transaction tax would primarily serve as a symbolic political measure rather than a substantial revenue generator. Should an agreement be reached on implementing a financial transaction tax, it would be logical to establish it at the EU level due to the mobility of capital across borders. However, determining whether the generated revenue should be allocated to the EU budget or to member states remains an open question. Additionally, it is important to consider that relying on a financial transaction tax for EU budget financing would introduce revenue instability (EC, 2011b).

CONCLUSIONS

The German Ministry of Finance advisory board does not recommend introducing a financial transaction tax on stock transactions due to potential negative effects. Studies show that such a tax can lead to reduced trading volumes and increased price volatility, which decreases market efficiency. Additionally, investors may avoid paying the tax through evasion and avoidance tactics, resulting in lower actual tax revenues than projected. This may be particularly problematic in EU countries, including the UK, where there is no legal basis to enforce taxation. The constitutionality of such a tax may also be questioned due to potential enforcement deficits. Taxing equity instruments unilaterally goes against the widely held belief that strengthening the equity base of economic actors is important for financial stability, as demonstrated by the recent financial crisis. If the German government were to introduce this tax alongside other EU countries, the advisory board warns of significant politico-economic and financial risks (EC, 2011b; Uricchio, 2022g). This would be especially true if the tax were to be introduced through the mechanism of enhanced cooperation (EC), as is currently being discussed. The requirement to obtain the participation of at least nine states within the framework of enhanced cooperation is particularly problematic. It carries the risk that individual countries may demand compensation for their participation through a redistribution mechanism ("mutualization") of tax revenues. In the future, it could cause problems if some states are only slightly impacted by the tax. If the regulations established through enhanced cooperation are unfavorable or harmful, changes would require unanimous agreement. Less affected countries could then demand high costs to accept necessary changes that are economically viable. Ultimately, it can be concluded that implementing a financial transaction tax on stock transactions is not a wise economic decision (BMF, 2020, p.9).

According to consistent case law of the Court of Justice, measures that restrict the free movement of capital, as prohibited by Article 63(1) of the Treaty on the Functioning of the European Union (TFEU), including those that are capable of deterring non-residents from investing in a Member State or residents of that Member State from investing in other states such as in the cases of Haribo v Finanzamt Linz (DB)

(2020). Article 65(1)(a) of TFEU allows Member States to apply tax laws that treat taxpayers differently based on their residence or capital investment location. However, this exception to the free movement of capital principle is limited by Article 65(3) of TFEU, which prohibits arbitrary discrimination or disguised restrictions on the free movement of capital and payments, as stated in the case S v Ministre de l'Action et des Comptes publics (Deutscher Bundestag) (2020). The Court of Justice emphasizes that the differences permitted under Article 65(1)(a) of TFEU are distinct from discriminatory practices that are prohibited by Article 65(3) of TFEU. For a national tax regulation to comply with the Treaty provisions on the free movement of capital, it must either pertain to situations that are not objectively comparable or be justified by an overriding reason of general interest. This was established in the case S v Ministre de l'Action et des Comptes publics (Deutscher Bundestag) (2020) and is supported by previous case-law. Additionally, when assessing whether a cross-border situation is comparable to a purely internal situation in a Member State to determine discrimination, the objective pursued by the national provisions must be considered. This was confirmed in the case X Gmbh [Intermediary companies resident in third countries] v Finanzamt Stuttgart (Deutscher Bundestag) (2020) and is also supported by previous case-law. According to this provision, the situation of resident and non-resident taxpayers is treated equally, even though they are different, and the investment in derivative financial instruments based on securities issued by an Italian company is made less advantageous for non-residents compared to the investment in instruments based on securities issued by another state. The tax on derivative financial instruments makes accessing the market harder (Giusti and Giambrone, 2023; Uricchio, 2022f). This is because it adds administrative and reporting obligations on top of those already required in the countries where the financial actors and intermediaries are based. The tax targets transactions involving derivative financial instruments connected to the Italian State, as stated in Article 1(492) of Law No 228/2012.This tax applies to all parties involved in a transaction, regardless of where it takes place or where the parties and intermediaries are based. It applies equally to residents and non-residents, regardless of whether the transaction occurs within the Member State or outside of it. The amount and nature of the instruments involved determine the tax, not the location of the transaction or parties. National transactions are treated the same as cross-border transactions for tax purposes, and there is no difference in treatment between residents and non-residents. The referring court has stated that the national regulation in question aims to ensure that those engaging in financial transactions with relevant financial instruments contribute to public expenses. Despite Société Générale's argument, residents and non-residents who participate in transactions involving derivative financial instruments based on securities issued in Italy and are subject to the tax outlined in the national regulation are in a comparable situation. However, the Advocate General has noted that derivative financial instruments with underlying securities subject to Italian law and tax are not comparable to those with underlying securities not subject to Italian law and tax, as explained in point 52 of their opinion. The tax imposed by Article 1(492) of Law No. 228/2012 does not violate the prohibition of discrimination in EU law. Non-discriminatory differences in taxation between Member States do not restrict free movement of goods, services, or capital. Member States are not required to align their tax systems to eliminate inequalities arising from national tax regulations. Regarding the administrative and reporting obligations associated with the payment of this tax, the preliminary ruling request does not provide specific details or explanations about these obligations or the relevant provisions. The referring court needs to establish whether non-residents are subject to different obligations compared to residents and whether these obligations go beyond what is necessary to collect the tax under Article 1(492) of Law No. 228/2012. Efficient tax collection can limit fundamental rights, but measures must be effective and not excessive (DB, 2020a; Uricchio, 2022). The Court of Justice evaluates and decides on these matters. In response to the preliminary question, it can be concluded that Article 63 of the Treaty on the Functioning of the European Union (TFEU) should be interpreted as not precluding the regulation of a Member State that subjects financial transactions involving derivative financial instruments to a tax burden, regardless of the place of conclusion of the transaction or the Member State of residence of the parties involved and any intermediary participating in the execution of the transaction, as long as these instruments have underlying securities issued by a company based in that Member State. However, the administrative and reporting obligations associated with this tax, imposed on non-residents, should not go beyond what is necessary to collect this tax. Therefore, Article 63 of the TFEU should be interpreted as not precluding the regulation of a Member State that subjects financial transactions involving derivative financial instruments to a tax burden, regardless of the place of conclusion of the transaction or the Member State of residence of the parties involved and any intermediary participating in the execution of the transaction, as long as these instruments have underlying securities issued by a company based in that Member State. The administrative and reporting obligations imposed on non-residents in relation to this tax should, however, be limited to what is necessary to collect this tax (DB, 2020). Critics argue that the current EU system of own resources, such as GNI and VAT-based ones, does not significantly contribute to core EU strategies and policies. The introduction of new own resources is seen as a way to align with political objectives and support key policies, such as strengthening the internal market, implementing environmental protection measures, promoting energy union, and reducing fiscal disparities. The High-Level Group on Own Resources supports this viewpoint (HLGOR, 2016; Uricchio, 2022). Experts agree that owning resources based on Gross National Income (GNI) are the most fair and appropriate for funding the EU budget, as they reflect member states' economic performance comprehensively and serve as an economic benefits indicator. (Hey, 2021, p.278) In summary, introducing new own resources in the EU poses challenges and potential conflicts with existing criteria such as economic performance and fairness. Pursuing additional goals, such as climate protection, can complicate the debate on future financial frameworks and require complex correction mechanisms. Maintaining a stable, fair, and performance-oriented financing system is important. The current EU treaties do not grant the EU the authority to impose its own taxes, and there is a lack of consensus on the establishment of EU-wide taxes. However, transferring revenue competencies for specific taxes within the EU's own resources decision is permissible (Deutsche Bundesbank, (DB), 2020; Feld, 2009). The debate on new own resources in the EU raises fundamental questions regarding the nature of the EU as a confederation of states and the preservation of national control over the budget. There are concerns about the role of the European Parliament in representing national interests and the potential burden of new revenue sources on citizens. In summary, the focus is on protecting the interests of national taxpayers at the EU level (Mayer, 2011; Uricchio, 2022).

Germany and France have jointly proposed implementing a financial transaction tax (FTT) in 10 EU member states. The tax would be based on the existing French FTT, which applies to transactions of shares in French-resident corporations with a market capitalization exceeding one billion euros. The FTT would be levied on the buyer side, while certain activities and primary market emissions would be exempted. However, there are concerns about the compatibility of a German FTT with the constitutional requirements of the Basic Law, particularly regarding the legislature's power to create new taxes. The Financial Constitution, guided by typus concepts outlined in Articles 105 and 106 of the Basic Law, emphasizes the need for clarity, adherence to established forms, and preserving financial constitutional jurisdictions. Any new taxes should conform to the typus-defining features of existing tax categories, and deviations should be carefully evaluated. While the legislature has some flexibility to create new taxes within the established typus concepts, adherence to conventional features is crucial (DB, 2020a; Uricchio, 2022).

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