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FTT Newsletter

A Round-Up of FTT developments across Europe

A draft decree ("the Amending Decree") has been released by the Italian Ministry of Economy and Finance proposing certain amendments to the Italian Financial Transaction Tax ("IFTT") decree that was released in February 2013. This Amending Decree proposes certain amendments and clarifies whether certain instruments/transactions are in scope. The key points of the Amending Decree are set out below.

On 8 August 8 2013, the Italian Ministry of Economy and Finance published a FAQ document on shares and other in-scope equity instruments concerning frequently asked questions regarding the application of the Italian financial transaction tax ("IFTT"). This provides a useful clarification on some aspects of the IFTT, and in other places reinforces and expands our understanding of certain issues.

Following the FAQ provided for Italian Financial Transaction Tax ("IFTT") on shares, the Italian Ministry of Economy and Finance has issued a FAQ document on the application of IFTT to derivatives (which comes into force on Sunday 1 September). While this does not provide all the clarity lacking in the IFTT decree of February 2013, it does contain some useful clarifications and guidance.

We also provide an update on political developments in the Czech Republic and the possible impact this may have on the Czech official position towards the EU FTT.

EU FTT

The President of the Czech Republic formally dissolved the Czech Parliament earlier this week. Jiri Rusnok, the Prime Minister of the caretaker government, has publicly stated that his cabinet has decided not to support the UK's legal challenge of the use of enhanced co-operation procedure to introduce the FTT, reversing the position taken by his predecessor. Should there, as expected, be a change in the composition of the governing coalition in the upcoming October 2013 elections, this may result in a change in the formal position of the Czech government, who to date have opposed the FTT.

Italy

Amending Decree

On 22 August 2013 the Italian Ministry of Economy and Finance issued the Amending Decree proposing certain amendments to the IFTT Decree previously issued in February 2013 (“the IFTT Decree”). The Amending Decree is currently subject to a public consultation procedure. Interested parties (such as financial intermediaries and investors) are able to submit comments in respect of the proposed amendments until 30 August 2013.

The main amendments proposed by the Amending Decree are set out below:
Transfer of the bare ownership and/or usufruct on financial instruments: both the transfer of the bare ownership and the usufruct on shares and other in-scope financial instruments are to represent a taxable event for the purpose of the IFTT, similar to the transfer of the full ownership.

Calculation of the purchase price: where shares and other in-scope financial instruments are purchased pursuant to derivatives traded on a regulated market, the purchase price will be the established exercise value of such shares/financial instruments. Where shares and other in-scope financial instruments are purchased pursuant to derivatives traded on over the counter (“OTC”) markets, the amount of the relevant transaction will be the higher amount of the established exercise value of such shares/financial instruments and the settlement price of the same shares/financial instruments contractually agreed in respect of the OTC derivative (instead of the “normal value” determined pursuant to Art. 9 (4) of Presidential Decree No. 917 of 22 December 1986 – “TUIR”).

Exchange/refund of bonds with securities representing equity investments: as is currently the case for shares and other participating instruments, the exchange and/or the refund of bonds with in-scope securities is a “transfer of ownership” subject to IFTT.

Bonds and debt instruments excluded from the IFTT: the IFTT exclusion for bonds and debt instruments applies only in respect of bonds and debt instruments governed by Art. (44) (2) (c) of TUIR, i.e. financial instruments granting the repayment at maturity of an amount not less than par value (with or without the payment of interest) and which do not attribute any right to participate (directly or indirectly) in the management or control of the issuer or the business in relation to which the bonds and debt instruments are issued.

Transactions in derivatives excluded from IFTT: transactions of derivatives having as an underlying (or as a reference value) dividends on shares are out of scope of the IFTT.

Transactions involving “master-feeder” fund structures: the intra-group exclusion in respect of transactions entered into between the parent company and its controlled companies is to be extended to the transactions entered into between master funds and feeder funds referred to in Art 1 (1) of Legislative Decree No. 58 of 24 February 1998.

FAQ document on shares

We have provided a summary of some of the key points raised in the FAQ document here. References to shares are to Italian shares in scope to IFTT.

In scope transactions

- **Bearer Shares:** Transfers of both registered and bearer shares are within scope of IFTT, as are shares issued by consortium companies.
- **Share buybacks:** No IFTT should arise where shares are repurchased in order to cancel them. In other cases, the IFTT is payable (including situations where the decision to cancel the shares is made after the repurchase).
- **Share for share exchanges:** Both parties are subject to IFTT (unless the shares exchanged are newly issued).
- **Depositary Receipts:** The transfer of a share to a depositary bank and the creation of a depositary receipt are not taxable events. An IFTT charge arises where the depositary receipt is transferred to a purchaser.

Timing

- **The relevant date**: When determining the relevant date for IFTT purposes the tax payer can elect between the date of settlement and the contractual date. This election will remain in force for all future transactions until its revocation.
- **Physical settlement of derivatives:** The key date for IFTT purposes is the date on which the shares are transferred (subject to the ‘relevant date’ above) as opposed to when the derivative was entered into.

Taxable Base

- **Net daily value:** This can include operations that have taken place on different trading dates provided they are regulated on the same date.
- **Earn out clauses:** Where the price of a share increases due to an earn out clause, the increase will also be subject to IFTT. Similarly, in cases where the price decreases, the taxable base of the IFTT is reduced and the tax payer is entitled to ask for a refund of any excess tax paid.

Exemptions & Exclusions

- **Riskless Principal (1):** When determining whether the price on the buy and sell transactions undertaken is identical (for the purposes of accessing the riskless principal exclusion), any brokerage fee charged should be disregarded. The other requirements for the riskless principal exemption are symmetry in the date of settlement and total number of securities.
- **Riskless Principal (2):** The application of the reduced tax rate depends on the effective purchase conditions followed by the intermediary. As a consequence, the reduced tax rate should be applicable only with reference to the portion of the orders performed in regulated markets and in multilateral trading systems.
- **Pension Pooling Vehicles:** The exemption for pension pooling vehicles and supplementary pension schemes is available regardless of the residence of the participated entities. Please note however, that only (broadly) EEA pension schemes can be exempt.
- **Sovereign wealth funds:** These are exempt to the extent that they are managing the official reserves of their relevant state.
- **Ethical and socially responsible:** Whereas purchases of units in “ethical and socially responsible” collective investment undertakings are exempt from IFTT, purchases of shares by such “ethical and socially responsible” undertakings are not exempt.

FAQ document on equity derivatives

IFTT on in-scope equity derivatives comes into force on Sunday 1 September 2013. The FAQ released by the Italian Ministry of Economy and Finance is therefore welcome as it clarifies certain issues, as well as confirming our understanding of others. The main points raised by the FAQ are detailed below. Should any uncertainties remain in the application of IFTT to derivatives in your business, please contact us to discuss.

In scope derivatives: derivatives whose underlying reference is represented by indices, measures, returns on shares or indices fall within the scope of the IFTT, provided that these measures are linked to the value of the shares (represented by their market price) so that the price change causes a change of the measure or of the subordinated return. Consequently, transactions concerning derivatives which do not have such characteristics (e.g. dividend swaps; credit default swaps; future on index dividends) are out of scope of the IFTT.

Derivatives on “small-cap” companies' shares: transactions concerning derivatives having as an underlying shares issued by Italian resident companies with a market capitalisation of under €500m are not subject to the IFTT.

Transferable securities buyback: IFTT should not arise where transferable securities are repurchased in order to cancel them. IFTT also does not apply in cases of cash settlement at maturity (or at predefined dates) and in cases of early termination by the issuer. In other cases, the IFTT should be levied.

Derivatives on equity funds’ share/quotas: transactions concerning derivatives (or transferable securities) having as an underlying an Exchange Traded Fund (“ETF”) and/or a mutual fund investing primarily in shares and/or in scope equity like financial instruments should be subject to the IFTT.

Early termination of OTC derivatives: the full/partial termination of a derivative traded OTC does not represent a taxable event subject to IFTT where such full/partial termination is provided for by the relevant contract. However, where a full/partial termination clause was not originally contemplated in the contract or the termination is required by the parties for reasons not covered by the contract, such a termination will be a modification of the contract subject to IFTT pursuant to Art. 8 of the IFTT Decree of February 2013.

Derivatives traded on regulated markets: the financial intermediary responsible for the payment of the IFTT should be the clearing broker (rather than the executing broker).