

FTT Newsletter

A Round-Up of FTT developments across Europe



Various media sources reported that a document originating from the Legal Service of the Council of the European Union has called into question the legality of the FTT insofar as it might apply to parties outside the FTT zone. The document takes the view that the imposition of the FTT on financial institutions deemed to be established in the FTT zone by virtue only of the location of their counterparty would breach EU law, and reaches this view on a number of different grounds. This might give participating member states further cause to reconsider the proposed scope of the FTT. This opinion is confined to the deemed establishment of non-FTT zone financial institutions and does not comment on the legality of other aspects of the FTT directive.

The Italian FTT (“IFTT”) amending decree which was released on 22 August 2013 has now been finalised. There have been some changes made from the draft previously released for public consultation. The key changes are set out below. Furthermore Monte Titoli S.p.A. has released its IFTT service model in English which will be of interest to intermediaries who are tasked with paying and reporting the IFTT. Monte Titoli also issued a circular extending the first payment deadline for intermediaries who have elected to use their Italian FTT (“IFTT”) service model.

EU FTT



The document specifically deals with Article 4(1)(f) of the proposed FTT directive of February 2013 (“the FTT directive”). This provision deems a party not established in a member state which adopts the FTT and that transacts with a financial institution which is established in a participating member state, to also be established in that participating member state. For example, a UK bank entering into a financial transaction with a German counterparty would be deemed to be established in Germany for FTT purposes under Article 4(1)(f).

The document offers the opinion that this provision:

- exceeds Member States’ jurisdiction under international customary law;
- is discriminatory and likely to lead to a distortion of competition to the detriment of non-participating Member States; and
- is not compatible with Article 327 of the treaty of Functioning of the European Union which states “any enhanced cooperation shall respect the competencies, rights and obligations of those Member States which do not participate in it. Those Member States shall not impede its implementation by the participating Member States”

The third point is particularly noteworthy as the UK’s legal challenge against the use of the enhanced cooperation procedure (“ECP”) to introduce FTT is based on this argument.

It is however important to note that the document is non-binding. It remains for the participating Member States to decide how to implement the FTT directive. A spokesperson for the European Commission has already been quoted as saying that it “strongly disagrees” with the document.

It is worth emphasising that the document does not declare the whole FTT project to be illegal, nor the use of ECP, as it confines itself to the extra-territoriality of Article 4(1)(f). For example, nothing in the document calls into question the legality of an FTT which only applies to financial institutions established in participating member states or which applies to financial instruments issued in those participating member states (wherever the parties are located), similar to UK stamp duty reserve tax and the existing French and Italian financial transaction taxes.

Italy



Final Amending Decree

Following the closure of the public consultation on 30 August 2013, the amending decree referred to in our newsletter of 27 August 2013 has now become final. Some changes have been made between the version released for consultation. The key additional points are set out below:

Transfer of bare ownership of in-scope financial instruments: the transfer of the bare ownership of shares and other in-scope financial instruments represents a taxable event for the purpose of the IFTT. Unlike the draft amending decree, the final Amending Decree does not contain a similar provision in respect of the transfers of the usufruct (e.g. rights to dividends). Therefore transfers of usufruct should be out of scope of the tax.

Bonds and debt instruments excluded from the IFTT: the IFTT exclusion provided for by Art. 15 (1) (b) of the IFTT Decree applies in respect of principal protected debt instruments (such as bonds), being those which provide an unconditional obligation to pay at maturity an amount not less than the par value. A new IFTT exclusion (provided for by the new letter b-bis) applies in respect of bonds and debt instruments falling within the scope of the Capital Adequacy Regulations set forth by the EU legislation (as well as domestic laws), which are issued by intermediaries subject to supervision of Bank of Italy or the Italian Insurance Supervisory Authority (i.e. IVASS – Istituto per la Vigilanza sulle Assicurazioni). Other bonds, not benefiting from an exemption, are within scope of IFTT from 1 January 2014.

In-scope derivatives: IFTT applies on derivatives and other in-scope transferable securities provided that the underlying or reference value consists of more than 50% of the market value of Italian shares (and other in scope participating financial instruments) at the following points:

- in respect of derivatives/transferable securities negotiated on a regulated market (or a multilateral trading facility) where the terms and conditions do not allow for a modification of the underlying or the reference value: at the date of issue and at the date of any modification of the relevant notional/reference value; and
- in respect of over the counter (OTC) derivatives/transferable securities not negotiated on a regulated market (or a multilateral trading facility): at the date of entering into the derivative as well as at the date of any modification of the relevant underlying/reference value. Modification of terms and conditions of derivatives: modifications of the terms and conditions of derivatives consisting in a variation of the underlying and/or the reference value are subject to IFTT in the same way of contractual changes affecting notional value, parties and maturity date. Any modification in the underlying/reference value of the derivative not deriving from a decision of the parties (e.g. upon a market event) is out of scope of IFTT, provided that the relevant contract was subject to IFTT under the ordinary rules.

Decision Tree

With the first IFTT payment due on 16 October 2013, the Deloitte FTT team have put together a decision tree with respect to who is responsible for the reporting and payment of IFTT.

Monte Titoli – Service Model

The IFTT decree allows the person responsible for the reporting and payment of IFTT to appoint Monte Titoli S.p.A (the Italian Central Securities Depository) to submit declarations and tax payments to the Italian tax authority. Monte Titoli's guidelines and service offering in respect of IFTT compliance has now been released in English. Furthermore, Monte Titoli has issued a circular to inform intermediaries using its IFTT service model that the first deadline to pay the tax (to Monte Titoli) has been extended to 10 November. For those paying the tax directly to the Italian authorities, the payment date remains 16 October.