Global Tax Alert
News from the Financial Services Group

Italy issues Amending Decree on Financial Transaction Tax

On 16 September 2013, the Italian Ministry of Economy and Finance approved a Decree (the Amending Decree) which amends the Decree\(^1\) on the Italian Financial Transaction Tax (IFTT) issued in order to implement the IFTT Law adopted last year on 24 December 2012.\(^2\) The Amending Decree clarifies some important aspects of the application of the Derivative IFTT and Equity IFTT. No amendments or clarifications are provided with respect to the additional levy under IFTT which applies to “high frequency trading.” The Amending Decree was published in the Italian Official Gazette\(^3\) on 20 September 2013 and enters into force 15 days later, i.e., on 5 October 2013. However, as specifically stated in the Amending Decree, the provisions on non-capital protected bonds and debt instruments (including non-capital protected structured notes) will be effective starting on the 1 January 2014.

The key changes under the Amending Decrees are summarized below.

IFTT on derivatives

**Non-capital protected structured notes and option rights are subject to the Derivative IFTT**

The Amending Decree has clarified that debt instruments which do not provide for the total reimbursement of the notional at maturity will be subject to the Derivative IFTT,\(^4\) since these instruments should be considered, for IFTT purposes only, equivalent to certificates and warrants (i.e., transferable securities). Moreover, option rights have been expressly included in the category of securities subject to the Derivative IFTT.

Non-capital protected bonds and debt instruments (including non-capital protected structured notes) will be subject to the Derivative IFTT starting from 1 January 2014.
Taxable modifications (Article 8)

Old rule: A taxable modification of a derivative contract was previously defined as a variation of the notional value, the parties, or the maturity of that contract. Where a modification of the contract occurred, the full notional value of the modified contract was taxable unless the modification was an upward modification, on an automatic and non-discretionary basis, pursuant to a provision in the contract in which case the tax only applied on the amount of variation of the notional value (i.e., the “delta”).

New rule: Under the Amending Decree, a taxable modification is now defined as a variation of the notional value, of the parties, of the maturity, or of the underlying or reference value of a contract. In addition, any variation of the underlying or reference value which is not determined by the parties to the contract will not be subject to tax, provided that the contract was already subject to tax. Furthermore, according to the Amending Decree and the comments in the accompanying explanatory notes, in the case of any variation upward or downward of the notional value of the contract not depending on a variation of the underlying or of the reference value, the tax shall only be applied on the variation of the notional value.

The Explanatory memorandum to the Amending Decree states that:

for variation of the underlying or reference value it shall be intended a variation of the proportions, on a quantitative basis, of the shares or securities constituting the index or underlying value.

Novation of the derivative contract by transfer to a new party: taxable parties

Old rule: Under the Explanatory memorandum to the IFTT Decree, the taxable parties were the stepping-in party and the remaining party.

New rule: Under the Amending Decree the taxable parties are now the stepping-in party and the stepping-out party.

Basket derivatives and calculation of the Underlying Test (50% test)

Underlying Test: Equity derivatives and transferable securities are subject to the Derivative IFTT if more than 50% of their underlying or reference value relates to Qualifying Equities.5

Old rule: The Underlying Test should be measured with respect to the market value of the relevant Qualifying Equity: (i) at the issue date for listed equity derivatives and listed transferable securities, or (ii) at the date of subscription and subsequent variation for over-the-counter (OTC) equity derivatives and OTC transferable securities.

New rule: Under the Amending Decree, the Underlying Test should be measured upon the issue date and upon any subsequent variation for: (i) OTC equity derivatives and transferable securities, and (ii) listed equity derivatives and transferable securities, where it is possible to vary the underlying or the reference value. For other listed equity derivatives and listed transferable securities (i.e., where it is not possible to vary the underlying or reference value), the Underlying Test shall be measured only upon the issue date.

Equity IFTT

Transfer of bare ownership of Qualifying Equities subject to tax

It has been clarified that where the ownership of Qualifying Equities is transferred partially in the form of transfer of bare ownership, such transfer will be subject to the Equity IFTT.

Physical settlement of equity derivatives: Simplification of the rules for computation of taxable base

The Amending Decree simplifies the calculation of the tax arising on physical settlements of equity derivatives.

Old rule: Previously, the taxable base was the higher of the exercise price and the “fair market value” of the equities being transferred, as determined according to Italian income tax rules (e.g., for listed Qualifying Equities, the “fair market value” is represented by the arithmetic average of prices reported during the last month). Accordingly, the intermediary was required to make a comparison between these two values of the Qualifying Equities.
New rule: With respect to listed equity derivatives and listed transferable securities, the taxable basis will be the exercise price. In respect of OTC equity derivatives and OTC transferable securities, the comparison should be made between the exercise price and the “liquidation price” of the Qualifying Equities contractually provided.

If the “liquidation price” is not available, the following fallback provisions apply:

- Listed equities: reference is made to the official exchange price of the day before the exercise date of the derivative contract.
- Non listed equities: reference is made to the “fair market value” as determined in accordance with the Italian income tax (e.g., in proportion to the net equity value of the issuing company).

Exemptions and exclusions

Market Making Exemption (MME) for Non EU intermediaries has been clarified

The rules relating to the procedure for the application of the MME for Non EU intermediaries has been clarified by providing a list of Non EU foreign regulators and related markets which would qualify for the Consob (the Italian Securities and Exchange Commission) procedure to qualify for the MME exemption. The list is based on the bilateral and multilateral cooperation agreements Consob has with foreign regulators as published on the Consob website and IOSCO (International Organization of Securities Commissions) website.

Liquidity provider exemption has been extended to Non EU intermediaries

A specific procedure for Non EU Intermediaries has been set up in order to extend to them the liquidity provider exemption. The procedure will be specified in a regulation to be issued by Consob. In any case in order to benefit of the exemption an application will have to be submitted to Consob.

Central Counterparties Exemption

The Central Counterparties Exemption has been extended to include Non EU Central Counterparties.

Intragroup exclusion

The intragroup exclusion has been extended to cover master feeder funds structures.

Broader categories of corporate actions are excluded from Equity IFTT

- The allotment of shares and participating financial instruments in case of distribution of profits or reserves or reimbursement of subscribed capital are not subject to tax, even in case of allotment of old shares and old participating financial instruments.

- It is clarified that the primary market exemption also covers the acquisition of newly issued shares following to bond-exchange transaction or to reimbursement of bonds.

Equity derivatives and transferable securities on dividends

Equity derivatives and transferable securities on dividends are not subject to the Derivative IFTT.
Endnotes

1. The Decree of the Minister of the Economy and Finance of 21 February 2013, published in the Official Gazette No 50 of 28 February 2013, implementing paragraphs 491 to 499 of Article 1 of Law No 228 of 24 December 2012. In particular, please refer to Article 1, paragraph 500 of the above-mentioned Law No 228 of 2012, which provides that a Decree of the Minister of the Economy and Finance shall establish the procedures for applying the tax referred to in paragraphs 491 to 499 of Article 1, including any reporting obligations.


4. Derivative IFTT applies to any equity derivative (the Equity Derivative) which has an underlying Qualifying Equity (see definition below) and to the following further instruments: (i) notes or instruments which allow to buy or sell Qualifying Equities and which are normally negotiated, (ii) structured notes other than bonds which incorporate an Equity Derivative and which may be negotiated on the capital markets and are cash-settled, and (iii) warrants, covered warrants and certificates on Qualifying Equity are expressly included in the scope of the IFTT (collectively the Transferable Securities). The Qualifying Equities are: Italian shares, Italian participating financial instruments and any securities representing Italian shares or Italian participating financial instruments.

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