Italy

Italian Financial Transaction Tax Implications of the Evolving Regulatory Landscape: The Post-MiFID II Financial Market Ecosystem

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This article outlines the Italian financial transaction tax implications of some of the new MiFID II and MiFIR rules for the EU financial markets. In particular, it focuses on the main changes to the market structure framework (distinction between bilateral and multilateral trading, MiFID II trading venues, trading obligation for shares and MiFID II trading capacities) and analyses the availability of the reduced Italian financial transaction tax rate/ charges for trades executed on regulated markets and multilateral trading facilities.

1. Introduction

The Italian financial transaction tax (IFTT) was enacted by article 1, paragraphs 491-500 of the 2013 Stability Bill.[1]The provisions of the Stability Bill only set out the main framework for the IFTT. The detailed operational rules are contained in the Treasury Decree.[2][3]

The IFTT applies to (i) the transfer of ownership of certain equity securities (IFTT equity);[4](ii) certain transactions in equity derivatives (IFTT derivatives);[5]and (iii) certain high-frequency transactions executed on Italian regulated markets and multilateral trading facilities (IFTT high-frequency transactions).

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1. IT: Law 228 of 24 Dec. 2012 (*Legge di Stabilità 2013*), Official Gazette 302 (29 Dec. 2012) [hereinafter 2013 Stability Bill].
2. IT: Decree enacted on 21 Feb. 2013 by the Ministry of Economy and Finance, as subsequently amended and restated [hereinafter Treasury Decree]. The Treasury Decree was slightly amended on 18 Mar. 2013. Further significant amendments were introduced by way of a decree enacted on 16 Sept. 2013 by the Ministry of Economy and Finance.
3. For a comprehensive overview of the Italian financial transaction tax (IFTT) rules, *see* V. Salvadori di Wiesenhoff, *Italian Financial Transaction Tax Implications of the Evolving Regulatory Landscape: The Exemption for Market Makers* , 20 Derivs. & Fin. Instrums. 1 (2018), Journals IBFD; R. Papotti & M. Gusmeroli, *Italian FTT in Practice: Issues and Solutions* , 19 Derivs. & Fin. Instrums. 4 (2017), Journals IBFD; V. Salvadori di Wiesenhoff, *Update on Financial Transaction Tax* , 15 Derivs. & Fin. Instrums. 6 (2013), Journals IBFD; and V. Salvadori di Wiesenhoff & R. Egori, *2013 Italian Financial Transaction Tax* , 15 Derivs. & Fin. Instrums. 2 (2013), Journals IBFD.
4. The IFTT equity is due in respect of the transfer of ownership of the equity instruments listed in items (1) to (3) below (chargeable equities):

   (1) shares issued by companies having their registered office in Italy and, in the case of listed shares only, an average market capitalization in Nov. of the previous year of more than EUR 500 million. Art. 15(1)(f) Treasury Decree excludes from the scope of application of the tax transactions (whether traded on an exchange or over the counter (OTC)) involving the transfer of ownership of shares traded on a regulated market or multilateral trading facility and issued by companies having an average market capitalization in Nov. of the previous year of less than EUR 500 million. This exclusion also applies when the transaction is concluded OTC or when the transfer of ownership occurs upon physical settlement of a derivative. Under art. 17 Treasury Decree, the Ministry of Economy and Finance must draft and publish on its website, by 20 Dec. of each year, a list of companies with market capitalization that does not exceed the EUR 500 million threshold;

   (2) participating financial instruments governed by art. 2346(6) Italian Civil Code (IT: Royal Decree 262 of 16 Mar. 1942), issued by companies having their registered office in Italy; and

   (3) securities representing the shares and instruments in items (1) and (2), irrespective of the residency of the relevant Issuer. This is the case for, e.g. American depositary receipts (ADRs), global depositary receipts (GDRs) and European depositary receipts (EDRs). Art. 15(1)(i) Treasury Decree excludes from the scope of application of IFTT equity transactions entailing “the transfer of the ownership of securities representing equity investment or participating financial instruments issued by companies referred to in article 17 of this Decree”. Accordingly, transactions in depositary receipts representing shares issued by Italian resident companies with an average market capitalization in Nov. of the previous year of less than EUR 500 million, as per the list published annually by the Ministry of Economy and Finance, are outside the scope of IFTT equity.
5. Based on art. 7(1) Treasury Decree, the IFTT derivatives is due in respect of transactions in the following derivative instruments (chargeable derivatives):

   – art. 7(1)(a): non-securitized financial derivative (futures, options, swaps, forwards or contracts for difference), as referred to in art. 1(3) Italian Finance Code (due to the subsequent changes to the Italian Finance Code, reference should now be made to sec. C in annex 1), traded on regulated markets or multilateral trading facilities or subscribed / traded outside these venues, when their underlying asset is predominantly represented by chargeable equities for IFTT equity purposes or when their value depends predominantly on one or more of those same chargeable equities; and

   – art. 7(1)(b): transferable securities (*valori mobiliari* , i.e. securitized derivatives), referred to in art. 1(1-bis)(c) and (d) of the Italian Finance Code (due to the subsequent changes to the Italian Finance Code, reference should now be made to art. 1(1-bis)(c)), giving the right to acquire or sell predominantly one or more of chargeable equities or giving rise to a cash settlement determined predominantly by reference to one or more chargeable equities. The 2013 Stability Bill specifically includes warrants, covered warrants and certificates within the concept of “transferable securities”.

   Based on art. 7(3) Treasury Decree, the notion of “transferable securities” in art. 7(1)(b) is deemed to include bonds and debt securities (different from those in art. 15(1)(b) and (b-bis)) – which predominantly reference chargeable equities – and subscription rights. Art. 7(3) also states that derivative financial instruments and transferable securities having as underlying or reference value dividends on shares are not included in the scope of application of the IFTT derivatives. Chargeable equities do

The IFTT provisions rely, in some circumstances, on regulatory concepts, and for these purposes they cross-reference other pieces of legislation, such as the Italian Finance Code,[6]the Short Selling Regulation,[7]MiFID I[8]and the MiFID I Implementing Regulation.[9]

MiFID I and the MiFID I Implementing Regulation, however, are no longer in force, having been replaced by the MiFID II legislative package,[10]which consists of MiFID II[11]and the MiFIR,[12]together with delegated acts and technical standards. The MiFID II legislative package started to apply on 3 January 2018. As a consequence, where the IFTT rules rely on MiFID I provisions, these should be replaced with the corresponding MiFID II/MiFIR rules.

2. MiFID II Trading Venues

2.1. Introduction

MiFID II is one of the pillars of the current EU regulation of financial markets and aims at improving market transparency and price formation, closing loopholes in the market structure framework and ensuring that more transactions take place on regulated platforms. The policy objectives of MiFID II are to achieve greater transparency for both equities and non-equities and to bring more trading of suitable equity and non-equity instruments onto regulated venues by imposing trading obligations for shares and (certain) derivatives,[13]as well as establishing a clear separation between (i) bilateral own account trading when executing client orders; and (ii) multilateral trading.[14]

2.2. Multilateral systems

Under MiFID I, the definition of a "trading venue" included both multilateral systems (regulated markets and multilateral trading facilities) and bilateral systems (systematic internalizsers).[15]Conversely, under MiFID II, all trading venues are multilateral systems, while systematic internalizers[16][17]are no longer considered a trading venue.

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not include shares issued by low-capitalized Italian-resident companies, as included in the list published under art. 17 Treasury Decree. As a consequence, the tax authorities have clarified that the IFTT derivatives does not apply to derivative instruments having those same shares as their underlying (or reference) asset(s).

6. IT: Legislative Decree 58 of 24 February 1998.
7. Regulation (EU) No. 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, OJ L 86/1 [hereinafter Short Selling Regulation], available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012R0236 .
8. Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ L 145 [hereinafter MiFID I].
9. Commission Regulation 1287/2006 of 10 August 2016 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards recordkeeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive, OJ L 241 [hereinafter MiFID I Implementing Regulation].
10. MiFID II (*infra* n. 11) and the MiFIR (*infra* n. 12) were approved by the European Parliament on 15 Apr. 2014 and by the European Council on 13 May 2014. They were subsequently published in the Official Journal of the European Union on 12 June 2014 and came into force on 2 July 2014. MiFID II and the MiFIR were due to apply from 3 Jan. 2017. By 3 July 2016, Member States were required to change their laws and regulations to give effect to the provisions of MiFID II (while the MiFIR, being a regulation, is a binding legislative act, which directly applies across the European Union). However, due to a lack of readiness – both of regulators and the industry – a delay was necessary. The European Commission adopted, therefore, a proposal on 10 Feb. 2016 to delay the application of MiFID II and the MiFIR by 1 year to 3 Jan. 2018, and the transposition deadline for MiFID II by 1 year to 3 July 2017. The directive amending MiFID II and the regulation amending the MiFIR were published in the Official Journal of the European Union on 30 June 2016.
11. Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173/349 [hereinafter MiFID II].
12. Regulation (EU) No. 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No. 648/2012, OJ L 173 [hereinafter MiFIR].
13. Generally, these are liquid derivatives that are required to be centrally cleared.
14. *See* recital (6) MiFIR: "It is important to ensure that trading in financial instruments is carried out as far as possible on organised venues and that all such venues are appropriately regulated. Under Directive 2004/39/EC [MiFID I], some trading systems developed which were not adequately captured by the regulatory regime. Any trading system in financial instruments, such as entities currently known as broker crossing networks, should in the future be properly regulated and be authorised under one of the types of multilateral trading venues or as a systematic internaliser under the conditions set out in this Regulation and in Directive 2014/65/EU [MiFID II]." *See also* recital (11) MiFIR: "In addition, in order to ensure that multilateral trading with respect to shares, depositary receipts, exchange-traded funds (ETFs), certificates and other similar financial instruments is properly regulated, an investment firm that operates an internal matching system on a multilateral basis should be authorised as an MTF [multilateral trading facility]."
15. Based on art. 2(8) MiFID I Implementing Regulation, a trading venue was "a regulated market, MTF or systematic internaliser acting in its capacity as such, and, where appropriate, a system outside the Community with similar functions to a regulated market or MTF".
16. The systematic internalizer (SI) regime was introduced already by MiFID I in 2007 for shares admitted to trading in a regulated market. The main purpose of the MiFID I SI regime was to ensure that internalization of order flow by investment firms did not undermine the efficiency of the price formation process for those shares. Under MiFID I, an SI was defined as an investment firm that, on an organized, frequent and systematic basis, dealt on its own account by executing client orders outside a regulated market or an MTF. The MiFID I Implementing Regulation complemented the SI definition by providing a number of qualitative criteria for determining whether an investment firm was acting as an SI. Indeed, art. 21 MiFID I Implementing Regulation states that an investment firm dealing on own account by executing client orders outside a regulated market or an MTF shall be treated as an SI when performing that activity according to the following criteria: (i) the activity has a material commercial role for the firm and is carried on in accordance with non-discretionary rules and procedures; (ii) the activity is carried out by personnel or by means of an automated technical system; and (iii) the activity is available to clients on a continuous or regular basis.
17. According to art. 4(1)(20) MiFID II, an SI is "an investment firm which, on an organised, frequent systematic and substantial basis, deals on own account when executing client orders outside a regulated market, an MTF or an OTF [(organized trading facility)] without operating a multilateral system. The frequent and systematic basis shall be measured by the number of OTC trades in the financial instrument carried out by the investment firm on own account when executing client orders. The substantial basis shall be measured either by the size of the OTC trading carried out by the investment firm in relation to the total trading of the investment firm in a specific financial instrument or by the size of the OTC trading carried out by the investment firm in relation to the total trading in the Union in a specific financial instrument. The definition of a systematic internaliser shall apply only where the pre-set limits for a frequent and systematic basis and for a substantial basis are both crossed or where an investment firm chooses to opt-in under the systematic internaliser regime". MiFID II and the MiFIR change the previous SI regime in three key ways: (i) the asset classes within the scope of the regime; (ii) the SI definition; and (iii) the pre-trade transparency requirements. With regard to the asset classes, MiFID II and the MiFIR extend the SI regime from shares to equity-like instruments (such as depositary receipts, ETFs, certificates and other similar financial instruments), and also to non-equity instruments. Furthermore, the regime is no longer limited to instruments admitted to trading on a regulated market, but now applies to all shares and

According to their express intention to move as much trading as possible from unregulated to regulated venues, MiFID II and the MiFIR reorganize the infrastructure in which financial instruments shall be traded. As pointed out in recital (6) of the MiFIR, any financial-instrument-trading system shall be "properly regulated and be authorised" as either one of the multilateral trading venues described below or as a systematic internalizer.

Article 4(1)(24) of MiFID II[18] provides for three different types of (multilateral) trading venues: (i) multilateral trading facilities (MTFs);[19] (ii) organized trading facilities (OTFs);[20] and (iii) regulated markets.[21] A trading venue is a multilateral system that operates in accordance with the provisions of title II of MiFID II, concerning MTFs and OTFs, or the provisions of title III, concerning regulated markets.[22] Based on article 4(1)(19) of MiFID II, a multilateral system is "any system or facility in which multiple third-party buying and selling trading interests in financial instruments are able to interact in the system". As clarified in recital (7) of the MiFIR, the term "system" encompasses both markets that are composed of a set of rules and a trading platform and markets that only function on the basis of a set of rules. The term "buying and selling interests" is to be understood in a broad sense and includes orders, quotes and indications of interest.

2.3. Regulated markets and MTFs

MiFID II defines regulated markets and MTFs using very comparable wording.[23] Indeed, they are both multilateral systems that bring together or facilitate the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with non-discretionary rules set by the system operator – in a way that results in a contract. Regulated markets and MTFs are therefore multilateral trading systems that provide forms of organized trading functionality very similar to each other. However, operating a regulated market, unlike operating an MTF, does not fall within the list of investment services and activities.[24]

The key aspect of the two definitions is that multiple third-party buying and selling interests in financial instruments must be brought together within the system, on the basis of non-discretionary rules set by the system operator, in a way that results in a contract for the purchase or sale of the instruments. According to recital (7) of the MiFIR, this occurs when multiple third-party buying and selling interests are brought together under the system's rules or by means of the system's protocols or internal operating procedures (including procedures embodied in computer software). The term "non-discretionary rules" means rules that leave the regulated market or the market operator or investment firm operating an MTF with no discretion in how interests may interact.[25]

Regulated markets and MTFs are not obliged to operate a "technical" system for matching orders and should be able to operate other trading protocols, including systems whereby users are able to trade against quotes that they request from multiple providers. A market that is only composed of a set of rules that governs aspects related to membership, admission of instruments to trading, trading between members, reporting and, where applicable, transparency obligations is a regulated market or an MTF, and the transactions concluded under those rules are considered to be concluded under the systems of a regulated market or an MTF.

2.4. OTFs

In order to make EU financial markets more transparent and efficient and to level the playing field between various venues offering multilateral trading services, MiFID II introduces OTFs as a new type of trading venue, alongside regulated markets and MTFs. Under article 4(1)(23) of MiFID II, an OTF[26] is a multilateral trading system, operated by an investment firm or a market operator, that organizes the interaction of multiple third-party buying and selling interests in non-equity instruments (bonds, structured finance products, emission allowances and derivatives). Equity instruments, therefore, may not be traded on an OTF.

This new category of trading venues "is broadly defined so that now and in the future it should be able to capture all types of organised execution and arranging of trading which do not correspond to the functionalities or regulatory specifications of existing venues".[27] According to recital (8) of the MiFIR, the OTF definition, however, "does not include facilities where there is no genuine trade execution or arranging taking place in the system, such as bulletin boards used for advertising buying and selling interests".

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equity-like instruments that are solely traded on an MTF. With regard to the SI definition, whereas MiFID I set qualitative criteria only, MiFID II and the MiFIR establish quantitative criteria for assessing whether the activity of dealing on own account by executing client orders is frequent, systematic, organized and substantial. The purpose of introducing quantitative criteria is to establish a clearer legal framework that would assist investment firms in assessing whether they need to register as an SI in a particular financial instrument and to comply with the relevant pre-trade transparency obligations and other requirements.

18. Under art. 4(1)(24) MiFID II, a "trading venue" means "a regulated market, an MTF or an OTF".
19. According to art. 4(1)(22) MiFID II, an MTF is "a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments – in the system and in accordance with non-discretionary rules – in a way that results in a contract in accordance with Title II of this Directive".
20. According to art. 4(1)(23) MiFID II, an OTF is "a multilateral system which is not a regulated market or an MTF and in which multiple third-party buying and selling interests in bonds, structured finance products, emission allowances or derivatives are able to interact in the system in a way that results in a contract in accordance with Title II of this Directive".
21. Pursuant to art. 4(1)(21) MiFID II, a regulated market is "a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with Title III of this Directive".
22. According to art. 1(7) MIFID II, "all multilateral systems in financial instruments shall operate either in accordance with the provisions of Title II concerning MTFs or OTFs or the provisions of Title III concerning regulated markets".
23. This was also the case under MiFID I.
24. *See* the services and activities listed in sec. A of annex I MiFID II.
25. In contrast to OTFs, regulated markets and MTFs must execute transactions on a non-discretionary basis and are not limited to specific types of financial instruments.
26. Under sec. A(8) of annex I MiFID II, the operation of an OTF is an investment activity that requires prior authorization.
27. Recital (8) MiFIR.

In addition to the limited range of instruments that may be traded on OTFs, these platforms distinguish themselves from regulated markets and MTFs by the existence of the operator's discretion in determining whether to place or retract an order on the OTF and/or when deciding to match the potential matching orders available in the system. Indeed, while regulated markets and MTFs have non-discretionary rules for the execution of transactions, article 20(6) of MiFID II requires the operator of an OTF to carry out order execution on a discretionary basis. The investment firm or the market operator operating an OTF shall exercise discretion only in either or both of the following circumstances: (i) when deciding to place or retract an order on the OTF; and/or (ii) when deciding not to match a specific client order with the orders available in the system at a given point in time, provided that this complies with specific instructions received from clients and with best-execution obligations. In essence, the exercise of discretion can be split into order discretion[28]and execution discretion.[29]

Article 20(6) of MiFID II identifies two types of systems operated by an OTF: (i) systems that cross client orders, in which the OTF operator may decide if, when and how much of two or more orders it wants to match within the system; and (ii) systems that arrange transactions in non-equities, in which the operator of the OTF may facilitate negotiations between clients so as to bring together two or more potentially compatible trading interests in a transaction.

The European Securities and Market Authority (ESMA) is of the view that an entity should seek authorization to operate an OTF[30]when the three following conditions are met: (i) trading is conducted on a multilateral basis;[31](ii) the trading arrangements in place have the characteristics of a system;[32]and (iii) the execution of the orders takes place on a discretionary basis through the systems or under the rules of the system.[33]

ESMA also highlights that "OTFs are only one of the three categories of multilateral trading systems foreseen by MiFID II. Market participants operating a platform that meets the characteristics of a multilateral trading facility should therefore exercise judgment to assess, based on their business model, whether they need to seek authorisation for the operation of a multilateral trading facility (MTF), an OTF or, potentially of a regulated market".[34]

28. According to the European Securities and Market Authority (ESMA), "when an investment firm or a market operator receives an order from a client, the 'order discretion' refers to the judgement exercised by the OTF operator whether to place the order at all on the OTF, whether to place the whole order or just a portion of it on the OTF, and when to do so. This may be the case for instance where an investment firm would receive a buy order for a 500 lots and would decide to place an order for 200 lots only on the OTF, the remaining 300 lots being executed elsewhere. Similarly, and as opposed to the operator of an MTF which may not withdraw an order from the MTF at its own initiative unless for fair and orderly market purposes, the operator of the OTF is expected to make a judgement as to whether and when an order should be retracted from the OTF. This may be the case where, at a given point of time, the OTF operator considers that a more favourable outcome would be obtained by executing the order on another execution venue foreseen in the best execution policy. The OTF operator may also have placed the order on the OTF, sent it to another trading venue simultaneously, subsequently decided to have the order executed on the trading venue and retracted it from the OTF. The exercise of order discretion would always have to comply with the OTF best execution policy and with client order handling rules. Where clients would be providing a specific instruction to the operator of the OTF, the OTF operator would not be considered as exercising order discretion when complying with that specific instruction".
29. Under art. 20(6) MiFID II, the exercise of discretion at execution level has to be in compliance with client-specific instructions and the best execution policy. ESMA is of the view that "the mere implementation of client specific instructions or of best execution obligations would not be the exercise of discretion". Rather, "the operator of the OTF is expected to exercise a judgement as to if, when, and how much of two matching orders in the system should be matched. For instance, assuming a buy side order for 500 bonds and an opposite order of 200 bonds have been placed into the OTF, the operator of the OTF would exercise discretion when deciding whether the 500 buy side order should not be matched with the sell side order".
30. *See* ESMA Q&A On MiFID II and MiFIR market structure topics (ESMA70-872942901-38), available at https://www.esma.europa.eu/system/files_force/library/esma70-872942901-38_qas_markets_structures_issues.pdf .
31. This means that the interaction with a view to trading in a financial instrument is conducted in such a way that a trading interest in the system can potentially interact with other opposite trading interests. Based on art. 18(7) MiFID II, OTFs are required to "have at least three materially active members or users, each having the opportunity to interact with all the others in respect to price formation". As a consequence, an OTF user's trading interests can potentially interact with those of at least two other users. On OTFs, the interaction of user trading interest can take place in different ways, including through matched-principal trading or market-making, within the limits set out in art. 20(2) and art. 20(5) MiFID II.
32. MiFID II and the MiFIR are technology-neutral and accommodate a variety of "systems". A system would be easily identified when embedded in an automated system. This would include a situation in which, for instance, the arrangements in place consist of the automated crossing of client trading interests, subject to the exercise of discretion by the OTF operator. However, other non-automated systems or repeatable arrangements that achieve a similar outcome as a computerized system (including, for instance, when a firm reaches out to other clients to find a potential match when receiving an initial buying or selling interest) would also be characterized as systems. Conversely, when a firm, by coincidence and accidentally, receives matching buying and selling interests and decides to execute those orders internally, such unpredictable circumstances would not qualify as the operation of a system.
33. According to ESMA, "the execution of the orders would be considered to be taking place under the rules of the system including where, once the trade price, volume and terms have been agreed through a firm, the counterparties' names are disclosed, the firm steps away from the transaction and the transaction is then legally formalised between the counterparties outside a trading venue". However, "if an investment firm [operating an OTF] arranges a transaction between two clients and the clients decide to formalise the trade on a regulated market or an MTF, the transaction would not be considered as taking place under the rules of the system because a transaction cannot be concluded on more than one venue".
34. MTFs and OTFs are both multilateral trading systems that can be operated by an investment firm or a market operator. However, compared to MTFs, OTFs have some distinct key features. First, OTFs may only trade in bonds, structured finance products, derivatives and emission allowance (non-equity instruments). Second, while regulated markets and MTFs are governed by non-discretionary rules, the OTF operator must exercise discretion when deciding to place or retract an order on the platform and/or when deciding not to match potential matching orders available in the system. Finally, as opposed to regulated markets and MTFs that have members or participants, OTFs have clients. Therefore, transactions concluded via OTFs have to comply with client-facing rules, including best execution rules, regardless of whether the OTF is operated by an investment firm or a market operator.

3. The Share-Trading Obligation

3.1. General

In order to ensure that more trading takes place on regulated trading venues (i.e. regulated markets and MTFs) and systematic internalizers, article 23 of the MiFIR[35]sets out a trading obligation for shares admitted to trading on a regulated market or traded on a trading venue (TOTV shares). That share-trading obligation (STO) requires investment firms to undertake all trades involving TOTV shares (including trades dealt on own account and trades dealt when executing client orders) on a regulated market, an MTF, a systematic internalizer or an equivalent third-country trading venue. However, article 23 also acknowledges that there may be legitimate reasons for the trades to be executed outside a regulated venue. Accordingly, two specific exemptions are available. First, the STO does not apply when trades are non-systematic, ad hoc, irregular and infrequent. Second, transactions that are carried out between eligible and/or professional counterparties and do not contribute to the price discovery process, as listed in article 2 of Commission Delegated Regulation (EU) 2017/587 of 14 July 2016 (e.g. give-up or give-in transactions, securities-financing transactions or transactions that are part of a portfolio trade),[36]are also exempt from the STO.

The intended purpose of the STO is to move more over-the-counter trading in TOTV shares onto platforms providing market transparency (e.g. EU regulated markets, MTFs, systematic internalizers and equivalent third-country trading venues).

The STO applies in respect of shares that are "admitted to trading on a regulated market or traded on a trading venue",[37]including, therefore, shares that are traded or admitted to trading in an EU trading venue but have their primary listing (and often, most liquidity) outside the European Union (dual listings), on the condition that the trading in the European Union constitutes a significant percentage of the share's global trading volume.

According to recital (11) of the MiFIR, the option for trades to be done via a systematic internalizer to comply with the STO is without prejudice to the systematic internalizer regime laid down in the MiFIR. The intention is that if an investment firm itself meets the relevant criteria laid down in the MiFIR to be deemed a systematic internalizer in that particular share, the trade may be dealt in that way; however, if it is not deemed a systematic internalizer in that particular share, the investment firm should still be able to undertake the trade via another systematic internalizer when that complies with its best execution obligations and the option is available to it.

3.2. The European Commission decisions on the equivalence of third-country venues

With regard to granting equivalence to third-country venues for the purposes of the STO, article 23 of the MiFIR refers to article 25(4) of MiFID II.[38]According to this latter provision, the national competent authority (NCA) of a Member State may request the Commission to adopt an equivalence decision regarding a third country, indicating why it considers the respective third country equivalent, and provide the relevant information to demonstrate said equivalence. Before a decision is taken, it will be discussed by the Expert Group of the European Securities Committee (EGESC). The Commission is required to assess whether the legal and supervisory framework of the third country ensures that (i) a trading venue authorized in that third country complies with legally binding requirements that are equivalent

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35. Art. 23(1) of the MiFIR states that "[a]n investment firm shall ensure the trades it undertakes in shares admitted to trading on a regulated market or traded on a trading venue shall take place on a regulated market, MTF or systematic internaliser, or a third-country trading venue assessed as equivalent in accordance with Article 25(4)(a) of Directive 2014/65/EU [MiFID II], as appropriate, unless their characteristics include that they:
(a) are non-systematic, ad-hoc, irregular and infrequent; or
(b) are carried out between eligible and/or professional counterparties and do not contribute to the price discovery process".

36. Commission Delegated Regulation (EU) 2017/587 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on transparency requirements for trading venues and investment firms in respect of shares, depositary receipts, exchange-traded funds, certificates and other similar financial instruments and on transaction execution obligations in respect of certain shares on a trading venue or by a systematic internaliser, OJ L 87/387, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32017R0587&from=GA .

37. The trading obligation does not comprise other equity instruments, such as depositary receipts, ETFs, certificates and other similar financial instruments.

38. The second subpara. of art. 25(4)(a) of MiFID II states the following: "For the purpose of this point, a third-country market shall be considered to be equivalent to a regulated market if the requirements and the procedure laid down under the third and the fourth subparagraphs are fulfilled." The procedure that needs to be followed for the purposes of the equivalence decisions by the Commission is laid down in the third subpara.: "At the request of the competent authority of a Member State, the Commission shall adopt equivalence decisions in accordance with the examination procedure referred to in Article 89a(2), stating whether the legal and supervisory framework of a third country ensures that a regulated market authorised in that third country complies with legally binding requirements which are, for the purpose of the application of this point, equivalent to the requirements resulting from Regulation (EU) No 596/2014, from Title III of this Directive, from Title II of Regulation (EU) No 600/2014 and from Directive 2004/109/EC, and which are subject to effective supervision and enforcement in that third country. The competent authority shall indicate why it considers that the legal and supervisory framework of the third country concerned is to be considered equivalent and shall provide relevant information to that end." According to the fourth subpara., "such third-country legal and supervisory framework may be considered equivalent where that framework fulfils at least the following conditions:

(i) the markets are subject to authorisation and to effective supervision and enforcement on an ongoing basis;

(ii) the markets have clear and transparent rules regarding the admission of securities to trading so that such securities are capable of being traded in a fair, orderly and efficient manner, and are freely negotiable;

(iii) security issuers are subject to periodic and ongoing information requirements ensuring a high level of investor protection; and

(iv) market transparency and integrity are ensured by the prevention of market abuse in the form of insider dealing and market manipulation".

to the requirements applicable to EU regulated markets under the Market Abuse Regulation,[39] title III of MiFID II, title II of the MiFIR and the Transparency Directive;[40] and (ii) those requirements are subject to effective supervision and enforcement in that third country. This should be read in light of the objectives pursued by these acts, in particular the contribution to the establishment and functioning of the internal market, market integrity, investor protection and, ultimately, but no less importantly, financial stability. Equivalence decisions are always based on the specific circumstances of the country concerned, and there is no automatic right to equivalence.

In accordance with article 25(4)(a), fourth subparagraph of MiFID II, a third-country legal and supervisory framework may be considered equivalent when that framework fulfils at least the following conditions:

– the markets are subject to authorization and effective supervision and enforcement on an ongoing basis;

– the markets have clear and transparent rules regarding the admission of securities to trading so that such securities are capable of being traded in a fair, orderly and efficient manner and are freely negotiable;

– security issuers are subject to periodic and ongoing information requirements, ensuring a high level of investor protection; and

– market transparency and integrity is ensured by the prevention of market abuse in the form of insider dealing and market manipulation.

The adoption of an equivalence decision by the Commission (which may be limited to a category or categories of trading venues or even to specific trading venues) in relation to a particular third country implies that EU investment firms are able to satisfy the STO by undertaking trades in TOTV shares on the trading venues of that third country that are recognized as equivalent.

In December 2017, the European Commission adopted a series of equivalence decisions for the STO. These decisions relate to trading venues in Australia,[41] Hong Kong,[42] Switzerland[43] and the United States[44] and enable EU investment firms to trade dual-listed shares in those third-country venues in satisfaction of the MiFIR requirement to trade the share on either an EU trading venue, an EU systematic internalizer or a third-country venue deemed equivalent to an EU regulated market. These decisions acknowledge that a significant number of shares that are issued and admitted to trading in those jurisdictions are also traded on trading venues in the European Union and that, accordingly, it is appropriate to ensure that all investment firms subject to the STO as set out in article 23(1) of the MiFIR preserve the ability to undertake trades in shares admitted to trading on those third-country venues where their primary liquidity resides.

In selecting the third-country trading venues that benefit from an equivalence decision, the Commission focuses on whether EU trading in the shares admitted to trading on the relevant third country's regulated markets is of such significance in the European Union (being

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39. Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJ L 173.

40. Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, OJ L 390/38.

41. Commission Implementing Decision (EU) 2017/2318 of 13 December 2017 on the equivalence of the legal and supervisory framework in Australia applicable to financial markets in accordance with Directive 2014/65/EU of the European Parliament and of the Council, OJ L 331, art. 1: "[F]or the purposes of Article 23(1) of Regulation (EU) No 600/2014, the legal and supervisory framework in Australia applicable to financial markets authorised therein and set out in the Annex to this Decision shall be considered to be equivalent to the requirements resulting from Directive 2014/65/EU, Regulations (EU) No 600/2014 and (EU) No 596/2014 and Directive 2004/109/EC and to be subject to effective supervision and enforcement." Based on the annex to this decision, the financial markets ASX Limited and Chi-X Australia Pty Ltd are considered equivalent to MiFID II regulated markets for purposes of the share-trading obligation (STO).

42. Commission Implementing Decision (EU) 2017/2319 of 13 December 2017 on the equivalence of the legal and supervisory framework applicable to recognised exchange companies in Hong Kong Special Administrative Region in accordance with Directive 2014/65/EU of the European Parliament and of the Council, OJ L 331, art. 1: "[F]or the purposes of Article 23(1) of Regulation (EU) No 600/2014 the legal and supervisory framework in Hong Kong Special Administrative Region applicable to recognised exchange companies authorised therein and as set out in the Annex to this Decision shall be considered to be equivalent to the requirements resulting from Directive 2014/65/EU, Regulations (EU) No 600/2014 and (EU) No 596/2014 and Directive 2004/109/EC and to be subject to effective supervision and enforcement." Based on the annex to this decision, the Stock Exchange of Hong Kong Limited (SEHK) is considered equivalent to MiFID II regulated markets for purposes of the STO.

43. Commission Implementing Decision (EU) 2017/2441 of 21 December 2017 on the equivalence of the legal and supervisory framework applicable to stock exchanges in Switzerland in accordance with Directive 2014/65/EU of the European Parliament and of the Council, OJ L 334, art. 1: "[F]or the purposes of Article 23(1) of Regulation (EU) No 600/2014 the legal and supervisory framework applicable to stock exchanges in Switzerland set out in the Annex to this Decision shall be considered to be equivalent to the requirements resulting from Directive 2014/65/EU, Regulation (EU) No 600/2014, Regulation (EU) No 596/2014 and Directive 2004/109/EC and to be subject to effective supervision and enforcement." Based on the annex to this decision, the stock exchanges in Switzerland that are considered equivalent to MiFID II regulated markets, for purposes of the STO, are SIX Swiss Exchange AG and BX Swiss AG. Swiss venues are granted equivalence for just 1 year (i.e. until 31 Dec. 2018). The equivalence can be extended by the Commission, provided that there is sufficient progress in a common institutional framework. Switzerland differs from the other jurisdictions that were granted equivalence in several ways. Indeed, as clarified in European Commission, Press release IP/17/5403, *MiFID II: Commission adopts equivalence decision on Swiss share trading venues*, available at http://europa.eu/rapid/press-release_IP-17-5403_en.pdf , announcing its equivalence decision on Swiss trading venues, the scope of that decision "is much greater, as the trading of Swiss shares in the EU – and vice versa – is more widespread than with the other jurisdictions – the US, Hong Kong and Australia – which were recently recognised. For example, every share in the Swiss top 20 index is traded in the EU. Therefore trading in Switzerland will have a bigger and more immediate impact on the integrity of EU financial markets, including in the case of prevention of market abuse".

44. Commission Implementing Decision (EU) 2017/2320 of 13 December 2017 on the equivalence of the legal and supervisory framework of the United States of America for national securities exchanges and alternative trading systems in accordance with Directive 2014/65/EU of the European Parliament and of the Council, OJ L 331. The Commission concluded that the legal and supervisory framework governing national securities exchanges (NSEs) and alternative trading systems (ATSs) established in the United States and registered with the Securities and Exchange Commission (SEC) complies with the four conditions set out in art. 25(4)(a), fourth subpara. MiFID II for legal and supervisory arrangements. On that basis, art. 1 of this Commission Implementing Decision states that, for the purposes of art. 23(1) MiFIR, the legal and supervisory framework in the United States applicable to NSEs and ATSs registered with the SEC "shall be considered to be equivalent to the requirements for regulated markets as defined in Directive 2014/65/EU resulting from Regulation (EU) No 596/2014, from Title III of Directive 2014/65/EU, from Title II of Regulation (EU) No 600/2014 and from Directive 2004/109/EC and to be subject to effective supervision and enforcement". The equivalence applies to the venues in the annex to this decision, which lists 21 NSEs (including the Chicago Stock Exchange Inc., the Nasdaq Stock Market, the New York Stock Exchange LLC and NYSE National, Inc) and 33 ATSs (including Barclays DirectEx, Deutsche Bank Securities Inc., J.P. Morgan ATS and XE). A specific caveat is, however, introduced regarding ATSs: a review for equivalence of these trading venues will take place 1 year after the entry into force of that equivalence decision.

systematic, regular and frequent) that the EU trading obligation in article 23 of the MiFIR is triggered with respect to shares admitted to an exchange in the third country. The Commission concluded that this is indeed the case for shares admitted to the (two) Swiss exchanges and, to a lesser extent, for shares admitted to trading on exchanges in Australia, Hong Kong and the United States.

3.3. ESMA guidance on the STO

On 13 November 2017, ESMA updated its Q&A "On MiFID II and MiFIR transparency topics",[45]clarifying the scope of the STO under article 23(1) of the MiFIR. According to ESMA, when there is a chain of transmission of orders concerning TOTV shares, all EU investment firms that are part of the chain (either initiating the orders or acting as brokers) are required to ensure that the ultimate execution of the orders complies with the requirements under article 23(1) of the MiFIR. As an example, when an EU investment firm transmits an order for a TOTV share to another EU investment firm that subsequently passes it on to a non-European Economic Area (EEA) firm, both EU investment firms should ensure that the trade is undertaken in a regulated market, MTF, systematic internalizer or equivalent third-country venue.

In the press release announcing its long-awaited clarification on the STO,[46]ESMA also stated the following:

> ESMA is aware that the scope of the trading obligation in Article 23, and the absence of the relevant equivalence decisions, might cause issues for investment firms that wish to undertake trades in non-EEA shares in the primary listing venues of such shares. ESMA and the European Commission are working closely together to resolve those issues. While the Commission is preparing equivalence decisions for the non-EU jurisdictions whose shares are traded systematically and frequently in the EU, the absence of an equivalence decision taken with respect to a particular third country's trading venues indicates that the Commission has currently no evidence that the EU trading in shares admitted to trading in that third country's regulated markets can be considered as systematic, regular and frequent.

The statement in the press release was particularly welcomed by the industry, which was concerned about the application of the trading obligation to shares that have their primary pool of liquidity outside the European Union. Indeed, based on a literal interpretation, the STO could have prohibited investment firms from accessing such material pools of liquidity.[47]According to ESMA, in the absence of an equivalent decision, transactions in non-EEA shares that are also admitted to trading or traded on a (European) trading venue are not subject to the STO, as there is no evidence that the EU trading in shares that are admitted to being traded in third countries for which no equivalence decision is adopted can be considered systematic, regular and frequent.[48]

4. MiFID II Trading Capacities

4.1. Introduction

According to article 26(1) of the MiFIR, "[i]nvestment firms which execute transactions in financial instruments shall report complete and accurate details of such transactions to the competent authority as quickly as possible, and no later than the close of the following working day".

Based on article 26(2) of the MiFIR, the above transaction reporting obligation applies to the following financial instruments (irrespective of whether the transactions are carried out on a trading venue): (i) financial instruments that are admitted to trading or traded on a trading venue or for which a request for admission to trading has been made; (ii) financial instruments of which the underlying instrument is a financial instrument traded on a trading venue; and (iii) financial instruments of which the underlying instrument is an index or basket composed of financial instruments traded on a trading venue.

Article 26 of the MiFIR is supplemented by the provisions of Commission Delegated Regulation (EU) 2017/590 (RTS 22).[49]As stated therein (in field 29), there are three different trading capacities that may be reported: (i) "dealing on own account"; (ii) "matched principal"; and (iii) "any other capacity". The reported trading capacity should reflect the capacity in which the investment firm actually traded.

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45. *See* ESMA Q&A On MiFID II and MiFIR transparency topics, available at https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-35_qas_transparency_issues.pdf .
46. ESMA, Press release, *ESMA clarifies trading obligation for shares under MiFID II* (13 Nov. 2017), available at https://www.esma.europa.eu/press-news/esma-news/esma-clarifies-trading-obligation-shares-under-mifid-ii .
47. *See* , in this respect, Association for Financial Markets in Europe (AFME), *Share Trading Obligation: Scope of the Obligation* , paper (24 July 2017), available at https://www.afme.eu/globalassets/downloads/briefing-notes/2017/afme-eqt-share-trading-obligation-scope-of-the-obligation.pdf .
48. *See* , in this respect, the Canadian Securities Administrators Staff Notice 21-321 (21 Dec. 2017), available at https://www.osc.gov.on.ca/documents/en/Securities-Category2/csa_20171221_21-321_equivalency.pdf : "During 2017, the staff (we) of the Canadian Securities Administrators have been working closely with the [European Commission (EC)] to determine the applicability of the Share Trading Obligation to equity marketplaces in Canada. Guidance from the European Securities and Markets Authority (ESMA) provides that 'the absence of an equivalence decision taken with respect of a particular third country's trading venues indicates that the [European] Commission has currently no evidence that the EU trading in shares admitted to trading in that third country's regulated markets can be considered as systematic, regular and frequent', and therefore does not trigger the Share Trading Obligation. We have been advised by the EC that, based on the volumes of Canadian equity securities currently traded on EU trading venues, Canadian securities do not meet the threshold in the ESMA guidance (i.e. that trading is not considered to be systematic, regular and frequent) and therefore the Share Trading Obligation is not triggered. As a result, after January 3, 2018, the status quo will remain and EU investment firms can continue to trade in all Canadian equity securities as is currently the case."
49. Commission Delegated Regulation (EU) 2017/590 of 28 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the reporting of transactions to competent authorities, OJ L 87, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0590&from=EN .

ESMA clarified the scope of the transaction reporting, also providing guidance on the different trading capacities, in its guidelines "on transaction reporting, order record keeping and clock synchronisation under MiFID II".[50]

Depending on the trading capacity of the investment firm and whether or not it is dealing for a client, a transaction may have to be reported in more than one report, and the individual reports for a transaction should be consistent and accurately reflect the roles of the investment firm, its counterparties, the clients and the parties acting for the clients under a power of representation.[51]

When two investment firms trade with each other, each will make its own transaction report that reflects the transaction from its own perspective. At the same time, the content for the fields describing the common objective elements of the transaction concluded between the two investment firms should match in the respective equivalent reports of each of the two investment firms.[52]

An investment firm's transaction reports should include not only the information about the market side of the transaction, but also information about any associated allocation to the client, when relevant.

It is worth noting that the reporting requirements are not intended to capture the investment firm's or the investment firm's client's actual position. Indeed, what is of interest is the change in position resulting from reportable transactions.

4.2. Dealing on own account

According to article 4(1)(6) of MiFID II, "dealing on own account" means "trading against proprietary capital resulting in the conclusion of transactions in one or more financial instruments". Recital (24) of MiFID II provides further commentary on that trading capacity and states the following:

> Dealing on own account when executing client orders should include firms executing orders from different clients by matching them on a matched principal basis (back-to-back trading), which should be regarded as acting as principal and should be subject to the provisions of this Directive covering both the execution of orders on behalf of clients and dealing on own account.

According to ESMA:[53]

> Where an Investment Firm is dealing on own account it should be reported as either the buyer or seller in the transaction report. The corresponding seller or buyer will be the counterparty or client or Trading Venue that the Investment Firm is dealing with. The Investment Firm may be acting purely to action its own proprietary trades or may be acting on own account with a view to filling orders that it has received from a client. In the latter case, the trading time and date for the client side report may be the same as for the market side report or could be later and the price of the market side and client side report could be the same or could differ.

4.3. Matched principal trading

"Matched principal trading" is defined in article 4(1)(38) of MiFID II as follows:

> [A] transaction where the facilitator interposes itself between the buyer and the seller to the transaction in such a way that it is never exposed to market risk throughout the execution of the transaction, with both sides executed simultaneously, and where the transaction is concluded at a price where the facilitator makes no profit or loss, other than a previously disclosed commission, fee or charge for the transaction.

According to ESMA,[54]in the event of matched principal trading:

> the transaction report should show that the executing Investment Firm does not have a change of position as a result of the transaction. Where there is only one client a single transaction report should be submitted including both the market side and client side information. The client(s) should be populated in the buyer/seller field while the venue or counterparty should be populated in the seller/buyer field. When more than one client is involved, the aggregate client account … can be used to link the market side with the allocations to each client … and the client side reports should include all applicable fields.

4.4. Any other capacity

All other activity that does not fall under the definitions of "own account trading" or "matched principal trading" should be reported with a trading capacity of "any other capacity", which includes where the activity is taking place on an agency basis.[55]

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50. ESMA, Guidelines: Transaction reporting, order record keeping and clock synchronization under MiFID II (last updated on 7 Aug. 2017) [hereinafter Transaction Reporting Guidelines], available at https://www.esma.europa.eu/sites/default/files/library/2016-1452_guidelines_mifid_ii_transaction_reporting.pdf .
51. The power of representation refers to a third party or third parties that are external to the client and have been granted authority to take investment decisions on behalf of the client.
52. These fields are: venue (for market-side transactions executed in a trading venue, i.e. as opposed to the associated allocation to the client), trading date time, quantity, quantity currency, price, price currency, upfront payment, upfront payment currency, and instrument details, where relevant.
53. *See* para 5.2.1 Transaction Reporting Guidelines.
54. Id., at para 5.2.2.
55. Id., at para 5.2.3.

5. The IFTT Rates/Charges for Transactions Executed on Regulated Markets and MTFs

5.1. General

Based on article 6 of the Treasury Decree, the IFTT rate applicable to transactions in chargeable equities is 0.2%. The rate is, however, reduced to 0.1% in the following circumstances:

– when the transfer of ownerships occurs "as a result of transactions executed on regulated markets or multilateral trading facilities";[56]

– when transactions in chargeable equities satisfy the conditions in article 6(1), second paragraph, of the Treasury Decree, being executed "through a financial intermediary, interposed between the parties to the transaction, purchasing the above instruments on a regulated market or a multilateral trading facility, provided that price, total number and date of settlement of buying and selling transactions coincide";[57]and

– when transactions in chargeable equities qualify as "negotiated transactions" under article 19 of the MiFID I Implementing Regulation.[58]'[59]

Pursuant to article 11(1) of the Treasury Decree, the IFTT on equity derivative trades is due at a flat amount, which varies (from EUR 0.01875 to EUR 200) depending on the nature of the relevant chargeable derivative and its notional value, according to the schedule in table 3 attached to the 2013 Stability Bill. This flat tax is reduced to one fifth of its ordinary amount in the following circumstances:

– when the derivative trades take place on regulated markets or multilateral trading facilities;[60]

– when the conditions in article 11(1), second paragraph of the Treasury Decree are satisfied and, accordingly, securitized derivatives "are purchased through a financial intermediary, interposed between the parties to the transaction, purchasing the above instruments on a regulated market or a multilateral trading facility, provided that price, total number and date of settlement of buying and selling transactions coincide";[61]and

– when transactions in chargeable derivatives qualify as "negotiated transactions" under article 19 of the MiFID I Implementing Regulation.[62][63]

5.2. Transactions executed on EU/EEA regulated markets and multilateral trading facilities

Under article 1(2)(f) of the Treasury Decree, regulated markets and multilateral trading facilities are defined as follows:

> [T]he markets and systems recognized pursuant to Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 [MiFID I], relevant to the Economic European Area, as included in the list published in the specific section of the European Securities and Market Authority's website (http://mifiddatabase.esma.europa.eu/) for the purposes provided for in paragraph 2 of article 13 of (EC) Regulation 1287/2006 of the Commission of 10 August 2006 [MiFID I Implementing Regulation], provided that they are established in States and territories included in the list referred to in the Ministerial Decree issued in accordance with article 168-bis of [the Italian Income Tax Code].

The IFTT rules have not been updated to reflect the entry into force of MiFID II, and, accordingly, they still refer to MiFID I and the MiFID I Implementing Regulation. These references should be replaced with references to the corresponding MiFID II/MiFIR rules.

Based on the above, for the purposes of the reduced IFTT rate/charges under articles 6(1) and 11(1) of the Treasury Decree, regulated markets and multilateral trading facilities are multilateral trading systems that (i) qualify as either regulated markets or MTFs under the MiFID II provisions (being listed in the ESMA register);[64]and (ii) are established within the European Union or in an EEA country.[65]

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56. Art. 6(1), first para. Treasury Decree.
57. Art. 6(1), second para. Treasury Decree. *See* , in this respect, sec. 6.
58. Reference, however, should now be made to art. 4(1)(b) MiFIR.
59. Art. 6(4) Treasury Decree.
60. Art. 11(1), first para. Treasury Decree.
61. Art. 11(1), second para. Treasury Decree. *See* in this respect, sec. 6.
62. Reference, however, should now be made to art. 4(1)(b) MiFIR.
63. Art. 11(1), third para. Treasury Decree.
64. The ESMA register is currently available at https://registers.esma.europa.eu/publication/ . Indeed, on 7 May 2018, ESMA announced a new portal for investors seeking information on whether a financial services provider is authorized within the European Union; *see* ESMA, Press release, *ESMA provides one-stop company portal* (7 May 2018), available at https://www.esma.europa.eu/press-news/esma-news/esma-provides-one-stop-company-portal . The portal provides investors with a one-stop shop register, including for MiFID II trading venues.
65. As the Ministerial Decree referred to in art. 168-bis of the Italian Income Tax Code has not been issued, reference should be made to the list of countries allowing for adequate exchange of information, contained in the Decree of 4 September 1996 (as subsequently amended and restated). The list includes, amongst others) all EU Member States and EEA countries.

The introduction of OTFs as a new category of trading venue has no impact on the reduced IFTT rate under article 6(1) of the Treasury Decree since equity instruments may not be traded on an OTF. Transactions in chargeable derivatives that are executed on an OTF arguably should not benefit from the reduced on-exchange IFTT-derivatives charges under article 11(1) of the Treasury Decree, as OTFs are not specifically mentioned in the IFTT framework.

5.3. Transactions executed on third-country trading venues

The reduced IFTT rates/charges under articles 6(1) and 11(1) of the Treasury Decree may also apply in respect of transactions executed on non-EU/EEA trading venues. Indeed, article 1(2)(f) of the Treasury Decree also states the following:

> [I]n the case of the States to which the […] [MiFID I] provisions do not apply, regulated markets and multilateral trading facilities are considered those in regular operation and authorized by a National Public Authority with State supervision, including therein those recognized by [*Commissione Nazionale per le Società e la Borsa* (CONSOB)][66] pursuant to article 67, paragraph 2 of the Italian Finance Code,[67] provided that they are established in States and territories included in the list referred to in the above Ministerial Decree.

Based on the above, the reduced IFTT rate/charges are available in respect of equity and derivative trades that are executed on third-country (multilateral) trading venues that are established in countries with adequate exchange of information[68] and are (i) in regular operations and authorized by a national public authority with State supervision; or (ii) recognized by the CONSOB based on article 70(1) of the Italian Finance Code.[69]

In the author's opinion, a third-country trading venue (different from those recognized by the CONSOB)[70] needs to meet all of the following objective criteria in order to be considered eligible for the reduced IFTT rate/charges for equity and derivative trades:

– it is established in a state with an adequate exchange of correspondence with Italy;[71]

– it operates a multilateral system, i.e. a system or facility in which multiple third-party buying and selling interests in financial instruments are able to interact on the basis of non-discretionary rules set by the system operator (governing aspects related to membership, admission of instruments to trading, trading between members, reporting and, when applicable, transparency obligations);[72]

– it is subject to authorization in accordance with the legal and supervisory framework of the third country;

– it is subject to supervision and enforcement on an ongoing basis by a competent authority in accordance with the legal and supervisory framework of the third country; and

– it is in regular operation.

As far as equity trades are concerned, the above criteria should be deemed to be met, in the author's opinion, by the trading venues that the European Commission has considered to be equivalent to EU regulated markets for the purposes of the STO in article 23 of the MiFIR.[73] In December 2017, the European Commission adopted a series of equivalence decisions for the STO relating to trading venues in Australia, Hong Kong, Switzerland and the United States. Each of these decisions lists the trading venues in those jurisdictions that are deemed equivalent to MiFID II EU regulated markets. For the purposes of the equivalence decisions, the European Commission has assessed and confirmed, inter alia, that those venues (i) operate a multilateral system in accordance with non-discretionary rules, (ii) are subject to authorization and effective supervision and enforcement on an ongoing basis; and (iii) have clear and transparent rules

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66. The *Commissione Nazionale per le Società e la Borsa* (CONSOB) is the supervisory authority responsible for regulating the Italian financial markets.
67. Reference is now to art. 70(1) Italian Finance Code.
68. Reference should be made to the list of countries allowing for adequate exchange of information, as contained in the Decree of 4 September 1996. The list was significantly broadened by the Ministerial Decree of 9 August 2016, which added 50 additional jurisdictions (including Hong Kong and Switzerland) and grants the Italian authorities the right to remove from the list countries that repeatedly do not comply with their exchange of information obligations.
69. Based on art. 70(1) of the Italian Finance Code, the CONSOB, after concluding agreements with the corresponding foreign authorities, may recognize non-EU trading venues in order to extend the scope of their operations to Italy. Currently, the CONSOB has recognized trading venues in Switzerland (SIX Swiss Exchange) and the United States (e-cbot, Globex, NYSE Liffe, ICE Futures U.S., NYMEX and COMEX); ***see*** http://www.consob.it/web/consob-and-its-activities/agreements-markets .
70. *Supra* n. 69 .
71. *Supra* n. 68 .
72. Indeed, a third-country trading venue should be somehow equivalent to a MiFID II regulated market or an MTF. In this respect, it is worth noting that, as clarified in recital (7) MiFIR, the definitions of "regulated market" and "MTF" "should exclude bilateral systems where an investment firm enters into every trade on own account, even as a riskless counterparty interposed between the buyer and seller […]. The term 'system' encompasses all those markets that are composed of a set of rules and a trading platform as well as those that only function on the basis of a set of rules. Regulated markets and MTFs are not obliged to operate a 'technical' system for matching orders and should be able to operate other trading protocols including systems whereby users are able to trade against quotes they request from multiple providers. A market which is only composed of a set of rules that governs aspects related to membership, admission of instruments to trading, trading between members, reporting and, where applicable, transparency obligations is a regulated market or an MTF within the meaning of this Regulation and the transactions concluded under those rules are considered to be concluded under the systems of a regulated market or an MTF". The obligation that the interests be brought together in the system by means of non-discretionary rules set by the system operator "means that they are brought together under the system's rules or by means of the system's protocols or internal operating procedures, including procedures embodied in computer software. The term 'non-discretionary rules' means rules that leave the regulated market or the market operator or investment firm operating an MTF with no discretion as to how interests may interact. The definitions require that interests be brought together in such a way as to result in a contract which occurs where execution takes place under the system's rules or by means of the system's protocols or internal operating procedures".
73. *See* , in this respect, sec. 3.2.

regarding the admission of securities to trading so that such securities are capable of being traded in a fair, orderly and efficient manner and are freely negotiable.

6. The IFTT Rates/Charges when a Financial Intermediary Is Interposed between the Parties: The Exclusion in Article 15(2)(a) of the Treasury Decree

The IFTT equity is charged at the reduced 0.1% rate also when transactions in chargeable equities satisfy the conditions required by article 6(1), second paragraph of the Treasury Decree, being executed "through a financial intermediary, interposed between the parties to the transaction, purchasing the above instruments on a regulated market or a multilateral trading facility, provided that price, total number and date of settlement of buying and selling transactions coincide". Similarly, the flat IFTT derivatives charges are reduced to one fifth of their ordinary amounts when the conditions in article 11(1), second paragraph of the Treasury Decree are satisfied and accordingly, securitized derivatives "are purchased through a financial intermediary, interposed between the parties to the transaction, purchasing the above instruments on a regulated market or a multilateral trading facility, provided that price, total number and date of settlement of buying and selling transactions coincide".

The above provisions clearly refer to cases in which an intermediary buys chargeable equities or derivatives on exchange (leg 1) and sells them over the counter (OTC) to a client (leg 2). Under the second paragraph of articles 6(1) and 11(1) of the Treasury Decree, the OTC leg (leg 2) qualifies for the reduced IFTT rate/charges if the relevant conditions (coincidence of prices, total quantity and settlement dates) are satisfied. The on-exchange purchase (leg 1) qualifies, by definition, for the reduced IFTT rate/charges under the first paragraph of articles 6(1) and 11(1). However, no IFTT is due in leg 1 if the exclusion in article 15(2)(a) of the Treasury Decree or the market-making exemption in article 16(3)(a) are applicable.[74]

Article 15(2)(a) of the Treasury Decree[75]excludes from the scope of application of the IFTT the purchases of chargeable equities and transactions in chargeable derivatives that satisfy the conditions stated therein, being executed by a financial intermediary that is interposed between two parties, acting as a counterparty on both sides, purchasing and selling securities or other financial instruments, when, for both legs, the price, total quantity and date of settlement of buying and selling transactions coincide (except for when the person to whom the financial intermediary transfers the securities or other financial instruments does not fulfil its obligations).

The conditions in the second paragraph of articles 6(1) and 11(1) are basically identical to those required by article 15(2)(a), except for the fact that, for the purposes of the reduced IFTT rate/charges, the interposed intermediary must be buying the financial instruments on a regulated market or MTF, while this is not required for the purposes of the IFTT exclusion in article 15(2)(a) of the Treasury Decree.

Based on the limited guidance provided by the tax authorities,[76]these rules address the case of a financial intermediary that stands between two counterparties or between a regulated market/MTF and a counterparty acting in a riskless (principal) capacity. The interposed financial intermediary referred to in article 15(2)(a) "is excluded from the tax, just like the intermediary that is interposed without buying and then reselling the securities". As a consequence, the same IFTT regime applies "both when the intermediary acts on a riskless basis and when it is interposed without buying the securities".[77]The tax authorities seem to be making the argument that the exclusion in article 15(2)(a) is aimed at avoiding any differential IFTT charges that only arise as a consequence of different capacities in which intermediaries may be acting, provided that the substance of the transaction flows are identical. The same argument should be made, in the author's opinion, for the purposes of the reduced IFTT rate/charges in the second paragraph of articles 6(1) and 11(1) of the Treasury Decree.

The provisions do not require the interposed intermediary to act in any specific trading capacity. Therefore, the reduced IFTT rate/charges and the IFTT exclusion in article 15(2)(a) may be available both in the case that an investment firm is acting on a matched principal basis under article 4(1)(38) of MiFID II and in the case that it is dealing on own account under article 4(1)(6) of MiFID II to fill orders that it receives from a client. What matters for IFTT purposes is that the interposed investment firm purchases chargeable equities/derivatives (on exchange, in the event of the second paragraph of articles 6(1) and 11(1)) and sells them on to a client or counterparty on identical terms regarding price,[78]total quantity[79]of securities and settlement dates.

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74. Art. 16 Treasury Decree sets out exemptions from the application of IFTT equity and IFTT derivatives. One of these exemptions is available to market-makers. Indeed, based on art. 16(3)(a), first para. of the Treasury Decree, transactions in chargeable equities and chargeable derivatives executed in the exercise of market-making activities, as defined in art. 2(1)(k) Short Selling Regulation and in the ESMA, *Guidelines: Exemption for market making activities and primary market operations under Regulation (EU) 236/2012 of the European Parliament and the Council on short selling and certain aspects of Credit Default Swaps* (2 Apr. 2013), available at https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-74.pdf , are exempt from IFTT. For a detailed overview of this exemption, *see* V. Salvadori di Wiesenhoff, *Italian Financial Transaction Tax Implications of the Evolving Regulatory Landscape: The Exemption for Market Makers* , 20 Derivs. & Fin. Instrums. 1 (2018), Journals IBFD.
75. Art. 15 Treasury Decree lists the transactions that are outside the scope of IFTT equity and IFTT derivatives.
76. *See* the Q&A concerning IFTT equity, available at http://www.agenziaentrate.gov.it/wps/file/Nsilib/Nsi/Schede/Pagamenti/Imposta+sulle+transazioni+finanziarie/Normativa+e+prassi+Imposta+transazioni+finanziarie/Financial+Transaction/FAQ_azioni_FTT_8_8_2013_EN.pdf .
77. *See* id., at question 27.
78. As clarified by the tax authorities in the Q&A, *supra* n. 76 , at question 22, the coincidence of prices needs to be assessed without considering the fees due to the intermediary. However, "where the coincidence of price, total quantity and settlement date is referred to groups of customers", in the tax authorities' view, the provision cannot be relied upon. This specific guidance relates to the exclusion in art. 15(2)(a) of the Treasury Decree. In the author's opinion, however, it should be extended to the second para. of art. 6(1) and art. 11(1) as well.
79. The tax authorities have also clarified in the Q&A, *supra* n. 76 , at question 27, that the notion of "total quantity" in art. 6(1) Treasury Decree "is meant to refer to the entire customer order". Even though this specific guidance concerns the availability of the reduced IFTT rate under the second para. of art. 6(1), in the author's opinion,

it should be extended to the second para. of art. 11(1) and to art. 15(2)(a) as well. Based on this approach, therefore, satisfaction of the art. 6 and art. 11 conditions (for the purpose of the reduced IFTT rate/charges) and the art. 15 conditions (for the purposes of the IFTT exclusion) would need to be assessed by reference to the entire order placed by a customer. If the client's order is filled partially on exchange and partially OTC, the reduction of the IFTT rate/charge reduction "shall be applicable only to the part of the order executed on regulated markets and multilateral trading facilities".