Italy

Brexit: Deal or No Deal? Regulatory and Tax Implications for the Banking and Financial Services Industry – Part II

Vittorio Salvadori di Wiesenhoff[*]

Issue: Derivatives & Financial Instruments, 2019 (Volume 20), No. 6
Published online: 7 October 2019

This is the second piece of a two-part article dealing with certain regulatory and tax implications of Brexit (with or without a deal) for the banking and financial services industry. In the first part, the author considered the consequences of the loss of passporting rights in the event of a no-deal Brexit and examined the transitional provisions in both the European Union-United Kingdom Withdrawal Agreement and the emergency Brexit Decree enacted by the Italian government. In this second part, the author more specifically addresses the Italian tax consequences of Brexit for different banking and financial transactions.

1. Introduction

The United Kingdom will be leaving the European Union without a deal on 31 October 2019 unless it ratifies the Withdrawal Agreement, requests a third extension of the article 50(3) period (to which the European Council must agree by unanimity) or revokes its article 50 notification.[1]

In a no-deal Brexit (also referred to as a "hard" Brexit) scenario, all EU primary and secondary law will cease to apply to the United Kingdom as from 1 November 2019, 00:00 (CET). The United Kingdom would then become a third country (i.e. a country not a Member State of the European Union) for the purposes of the EU legal framework without an agreement to ensure an orderly withdrawal, meaning that it would be leaving the European single market and would no longer benefit from rights under EU law or be subject to its obligations. In these circumstances, the no-deal emergency measures enacted by the European Union and by several Member States (including Italy)[2]would start to apply, thus resulting in a patchwork of different solutions and applicable regimes.[3]

Conversely, if Brexit takes place with a deal (a so-called "soft" Brexit), the United Kingdom would leave the European Union on the first day of the month following the ratification of the Withdrawal Agreement by both parties,[4]but EU law would continue to apply to and in the United Kingdom during the transition period, as provided for by Part Four of the Withdrawal Agreement.[5]In this scenario, the United Kingdom and then-EU 27's[6]access to one another's markets would continue on the current terms throughout the transition period.

2. Lending

2.1. Direct lending by UK credit institutions

2.1.1. Regulatory overview

Performing lending activities on a professional basis vis-à-vis the public is a restricted activity in Italy, reserved for banks and certain other financial intermediaries.[7]The EU passporting regime under CRD IV[8]allows EEA credit institutions to carry out banking services in

*. Tax partner, K&L Gates LLP, Milan. The author can be contacted at vittorio.salvadori@klgates.com .
1. The first part of this article is V. Salvadori di Wiesenhoff, *Brexit: Deal or No Deal? Regulatory and Tax Implications for the Banking and Financial Services Industry – Part I* , 21 Derivs. & Fin. Instrums. 4 (2019), Journal Articles & Papers IBFD [hereinafter Part I].
2. Considering the UK government's failure to secure the required ratification of the Withdrawal Agreement by Parliament and the increasing likelihood that the United Kingdom could have left the European Union on 29 March 2019 without an agreed withdrawal deal or implementation period, on 25 March 2019, the Italian government enacted the Brexit Decree (IT: Decree Law No. 22, 25 Mar. 2019, converted into law by IT: Law No. 41, 20 May 2019) to mitigate the cliff-edge effect of a no-deal Brexit on UK and Italian financial institutions with existing passporting permissions, which would have lost the right to conduct business freely in one another's markets by virtue of EU law. *See* Part I, sec 4.2.
3. Against this background, the European Central Bank (ECB) published a newsletter on 14 August 2019 (available at https://www.bankingsupervision.europa.eu/press/publications/newsletter/2019/html/ssm.nl190814.en.html), calling on banks to step up their Brexit preparations. Acknowledging that "a no-deal Brexit is still a very real possibility, and could materialise on 1 November 2019 … the ECB expects banks to continue preparing for all possible contingencies [and] to speed up the implementation of their plans". In particular, "where contingency plans for a no-deal scenario are not yet fully implemented, banks should step up their preparations to minimise execution risk".
4. On 1 November 2019 at the latest (in the case that the ratification procedures are completed in October).
5. *See* Part I, sec 4.1.
6. The reference to the EU 27 should be read as also including Iceland, Liechtenstein and Norway, which are members of the European Economic Area.
7. In recent years, the Italian lawmaker has enacted measures that have widened the range of authorized lenders.

© Copyright 2019 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Exported / Printed on 8 Oct. 2019 by IBFD.

other EEA member countries, either through a branch or on a cross-border services basis.[9]Lending is one of the services that can be passported. As a consequence, a credit institution that has been authorized by the Prudential Regulation Authority in the United Kingdom has the right to establish a branch or provide services on a cross-border basis in any other EEA member country without the requirement for further authorization or licensing.

Should the United Kingdom leave the European Union with a ratified Withdrawal Agreement in place, during the transition period, "the UK would continue to participate in the Single Market. Banks located in the UK would have access to the Single Market for financial services through the use of passporting rights … They could establish branches or provide financial services across the EU without the need for further authorisation".[10]

Conversely, when the United Kingdom leaves the Single Market,[11]existing passports enabling UK-based firms to engage in regulated activity in the EU 27 (and vice versa) will cease.

2.1.2. Income taxes

2.1.2.1. Italian income taxation of non-resident persons

Under Italian rules, non-residents are subject to Italian income taxes only on their income from sources within Italy. Different sourcing rules apply for different types of income. These sourcing rules are contained in article 23 of Decree 917/86[12]and cover, among others, interest, dividends, derivative income and gains from the disposal of securities (altogether referred to as "financial income").

Unless domestic or treaty-based relief is available, Italian income taxes, generally levied by way of a flat withholding or substitute tax, apply in respect of financial income that is deemed to be sourced from Italy based on article 23 of Decree 917/86.[13]

2.1.2.2. The sourcing rule and the taxation criteria

Interest income earned by UK credit institutions on loans to Italian-resident borrowers[14]is Italian-source income[15]and is generally subject to a 26% withholding tax,[16]'[17]unless tax relief applies.

2.1.2.3. The banking tax relief

Italian-source interest income is tax-exempt in Italy when paid by an Italian bank or an Italian permanent establishment of a non-resident bank to a non-resident bank or a foreign permanent establishment of an Italian bank.[18]'[19]

The banking tax relief does not require the recipient of the Italian-source interest income to be resident or established in an EU Member State/EEA member country. As a consequence, Italian-source interest income on loans granted by a UK bank to an Italian bank should remain eligible for the banking tax relief on the same terms that currently apply. However, in the event of a no-deal Brexit, as from exit day, UK banks with a passport will have to enter the temporary permission regime (TPR)[20]in order to be able to continue to lend in Italy. If they do not do so, they will be subject to the temporary run-off regime (TROR)[21]and, accordingly, will not be able to grant new loans.

2.1.2.4. The article 26(5-bis) tax relief for medium-to-long-term loans granted to Italian entrepreneurs

Article 26(5-bis) of Decree 600/73[22]provides a withholding tax exemption for interest and other proceeds derived from medium-to-long-term loans[23]granted to Italian enterprises[24]by certain qualifying lenders (not acting through an Italian permanent

---

8. Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176/338 [hereinafter CRD IV].
9. The "passporting regime" under CRD IV does not cover unregulated lenders or alternative investment funds that wish to undertake lending activities in Italy on a cross-border basis.
10. *See* ECB, *Brexit: impact of a potential transitional period* (16 May 2018), available at https://www.bankingsupervision.europa.eu/press/publications/newsletter/2018/html/ssm.nl180516.en.html (accessed 7 Oct. 2019).
11. On exit day, in the event of a no-deal Brexit (in which case, UK credit institutions may rely on the Brexit Decree to continue to be able to lend in Italy during the temporary permission regime (TPR) period based on the provisions of the Brexit Decree), or at the end of the transition period, subject to any different arrangements that may be put in place in the context of the (yet to be negotiated) new UK-EU partnership.
12. IT: Presidential Decree 917 of 22 December 1986 [hereinafter Decree 917/86].
13. Different rules apply in the case that the relevant financial instruments are held through a permanent establishment in Italy.
14. Including Italian permanent establishments of foreign entities.
15. Art. 23(1)(b) Decree 917/86.
16. It is assumed that the borrower is a company/entity that qualifies as a withholding tax agent under Italian law.
17. IT: Presidential Decree 600 of 29 September 1973, art. 26(5) [hereinafter Decree 600/73].
18. Art. 26(2)(a) Decree 600/73.
19. According to the prevailing interpretation, this banking tax relief should also apply in respect of Italian-source interest income on loans.
20. The TPR set out by the Brexit Decree allows UK credit institutions to continue carrying out their current passported activities in Italy for a limited period after exit day. *See* Part I, sec. 4.2.2.2.
21. The temporary run-off regime (TROR) does not allow the granting of new loans as from exit day (or from the end of the short TPR period, in the event that UK credit institutions enter the TPR but do not file the required application within 6 months as from exit day). *See* Part I, sec. 4.2.2.3.
22. The rule was enacted in 2014 and subsequently amended in 2015 and 2016.
23. Art. 26(5-bis) of Decree 600/73 does not include any definition of "medium-to-long-term loans". The Italian tax authorities recently clarified (*see* IT: Ruling 76/E of 12 August 2019) that, analogous to what is required for the purposes of the substitute tax regime under art. 15 of Decree 601/73 (*infra* n. 41) (*see* sec. 2.1.3.), medium-to-long-term loans are those with contractual maturity in excess of 18 months.

© Copyright 2019 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Exported / Printed on 8 Oct. 2019 by IBFD.

establishment).[25]'[26]Qualifying lenders include credit institutions established in EU Member States.[27]'[28]This relief applies if and to the extent that the granting of the loan complies with the Italian Banking Code[29]provisions (i.e. the lender must be allowed to lend in Italy, based on applicable rules).[30]

If the United Kingdom leaves the European Union with a ratified Withdrawal Agreement in place, UK credit institutions should remain allowed to lend in Italy on a cross-border basis throughout the transition period and should continue to be eligible for the article 26(5-bis) relief, on the same terms that currently apply, in respect of both medium-to-long-term loans outstanding as of exit day and new loans granted thereafter.[31]Similarly, in the event of a no-deal Brexit, cross-border lending in Italy should remain a permitted activity throughout the TPR period for UK credit institutions that enter the TPR.[32]Based on the transitional tax regime (TTR) rules,[33]the article 26(5-bis) relief should remain available in this scenario as well, on the same terms that currently apply, for both existing and new medium-to-long-term loans.[34]

At the end of the transition period[35]or, as the case may be, at the end of the TPR period, UK credit institutions should no longer be licensed to lend in Italy unless they apply for authorization from the Bank of Italy.

2.1.2.5. Interest and Royalties Directive tax relief

Italian-source interest income on loans is exempt from withholding tax when paid to an EU-resident company by an Italian "associated company" and all of the application requirements for the Interest and Royalties Directive [36]tax relief are satisfied.[37]

The relief should remain available, on the same terms that currently apply, in respect of Italian-source interest paid to UK-resident associated companies during the transition period (if the United Kingdom leaves the European Union with a ratified Withdrawal Agreement in place) or during the TTR period (in the event of a no-deal Brexit). At the end of the transition period or the TTR period (as the case may be), the tax relief will cease to apply.[38]

UK credit institutions lending to Italian borrowers are, however, generally unable to rely on this tax relief, as it is only available in respect of loans between "associated companies", as defined in article 26-quarter of Decree 600/73.

---

24. Art. 26(5-bis) of Decree 600/73 limits the withholding tax exemption to loans granted to Italian enterprises, and, accordingly, it is debatable whether the same benefit may also be applicable when the borrowers are Italian real estate funds, investment funds, pension funds or other entities that do not carry on business activities. In this respect, the Italian tax authorities recently clarified (*see* IT: Ruling 98/E of 5 April 2019 and IT: Ruling 76/E of 12 August 2019) that, in their view, Italian undertakings for collective investments (UCIs) are not eligible borrowers for the purposes of the withholding tax relief, since they do not qualify as enterprises for tax purposes, and are, accordingly, required, in any event, to withhold when paying interest on loans granted to them by non-resident lenders (including when these are qualifying lenders under art. 26(5-bis) of Decree 600/73 and the loan has maturity in excess of 18 months).
25. As clarified by the tax authorities in IT: Ruling 84/E of 29 September 2016, the withholding tax exemption is intended to remove the risk of juridical double taxation of Italian-source interest, which is usually recharged to the borrower, in order to promote cost-competitive access for Italian enterprises to foreign sources of funding. In the same ruling, the tax authorities clarified that, by way of derogation to the rules in article 23(1)(b) of Decree 917/86, the Italian-source interest payments that are eligible for the withholding tax exemption will not be liable to any income tax in Italy.
26. The withholding tax exemption applies in respect of both loans originated by any of the qualifying lenders and, as clarified in a private ruling, loan receivables purchased by a qualifying lender on the secondary market.
27. The term "establishment" suggests, in the absence of any official guidance, that the exemption should be granted to both EU-resident banks (provided that they are not acting though a non-EU permanent establishment to which the disbursement of the loan is effectively connected) and non-EU-resident banks acting through an EU permanent establishment (to which the disbursement of the loan is effectively connected).
28. Other qualifying lenders are:
– entities under arts. 2(5)(4)-2(5)(23) of CRD IV: these are development promotion institutions established in different EU Member States;
– insurance companies incorporated and authorized under provisions enacted by EU Member States: differently from what is stated in respect of credit institutions, in the case of insurance companies, there is no reference to the state of establishment; and
– foreign institutional investors under art. 6(1)(b) of Decree 239/96 (*infra* n. 63), even if not liable to tax, that are subject to forms of supervision in their state of formation (*see* sec. 2.2.2.).
29. IT: Legislative Decree No. 385 of 1 September 1993 [hereinafter Italian Banking Code].
30. Indeed, IT: Decree 18 of 14 February 2016 slightly amended the wording of art. 26(5-bis) of Decree 600/73, stating that the withholding tax exemption applies without prejudice to the rules in the Italian Banking Code concerning lending to the public as a restricted activity. This issue was specifically addressed by the Italian tax authorities in a private ruling issued in 2016 and in a recent public ruling (*see infra* n. 64).
31. The Withdrawal Agreement provides that during the transition period, the United Kingdom will no longer be a member of the European Union, but will be treated as such under EU law (with the exception of participation in the EU institutions and governance structures). Save for a few exceptions, the entire EU *acquis* (i.e. the existing rules under EU law) will continue to apply to and within the United Kingdom as if it were a Member State, and references to Member States in EU law will be understood as including the United Kingdom. As a consequence, in the author's opinion, UK credit institutions should be treated (including for the purposes of the article 26(5-bis) tax relief) as if they were still EU credit institutions. This conclusion is also supported by the argument that the art. 26(5-bis) tax relief should remain available in the event of a hard Brexit as well, based on the provisions of the Brexit Decree and subject to the requirements set out therein.
32. Conversely, credit institutions established in the United Kingdom that are subject to the TROR (either because they do not enter the TPR or because, having entered the TPR, they fail to submit the required application by the end of the short TPR period) will lose their ability to grant new loans in Italy (from, respectively, exit day or the end of the short TPR period). *See* Part I, sec. 4.2.2.3.
33. The Brexit Decree establishes a transitional tax regime (TTR), lasting 18 months from actual exit day (*see* Part I, sec. 4.2.5). During that period, Italian tax rules that rely on the UK membership of the European Union (including, therefore, the art. 26(5-bis) tax relief) shall continue to apply. This conclusion should, however, be revised once the TTR implementing regulations have been issued.
34. Any new medium-to-long-term loans granted during the transition period (in the case of Brexit with a deal) or the TPR period (in the case of a no-deal Brexit) should remain eligible for the optional 0.25% substitute tax regime (which replaces all transfer taxes otherwise applicable to the facility agreement and the security package).
35. Unless differently agreed in the context of the (yet to be negotiated) new UK-EU partnership arrangements.
36. Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, OJ L 168 (2003), Primary Sources IBFD
37. Art. 26-quater Decree 600/73.
38. Unless differently agreed in the context of the (yet to be negotiated) new UK-EU partnership arrangements.

© Copyright 2019 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Exported / Printed on 8 Oct. 2019 by IBFD.

2.1.2.6. The Italy-UK Income Tax Treaty (1988) relief

According to the Italy-UK Income Tax Treaty (1988),[39]the rate of withholding tax on Italian-source interest income on loans shall not exceed 10% when the income is derived by a UK beneficial owner entitled to benefit from the provisions of the treaty.[40]

Brexit will not affect the Italy-UK Income Tax Treaty (1988). As a consequence, Italian-source interest income on loans should remain eligible for the Italy-UK Income Tax Treaty (1988) relief, on the same terms that currently apply, when derived by UK-resident credit institutions entitled to benefit from the provisions of the treaty.

UK credit institutions would need to rely on the provisions of the treaty in circumstances in which the article 26(5-bis) tax relief is not available (e.g. because the loan is not medium-to-long-term or because the borrower is an Italian undertaking for collective investments, or UCI).

2.1.3. The substitute tax regime for medium-to-long-term loans

Facility agreements executed in Italy by certain qualifying lenders with maturity in excess of 18 months are eligible for the optional 0.25% substitute tax regime under article 15 of Decree 601/73.[41]If this regime is opted for, the facility itself and the related security package will be exempt from the registration, stamp, mortgage and cadastral taxes otherwise due.

Article 15 of Decree 601/73 applies to:

> [...] medium-to-long-term financing transactions and all acts, contracts, deeds and formalities relating to such transactions, their execution, amendment and termination, any guarantees of whatsoever nature granted by anyone at any time in respect thereof, as well as any subrogation, substitution, postponement, division and cancellation, also partial, including any assignment of receivables executed in relation to such financing transactions and any subsequent disposal of the relevant agreements or receivables and the transfers of the guarantees relating thereto.[42]

A medium-to-long-term facility falls under the scope of article 15 of Decree 601/73 if the following conditions are satisfied:

- the facility has contractual maturity in excess of 18 months (i.e. equal to at least 18 months and 1 day);[43]'[44]
- the facility is granted by certain qualifying lenders (article 15 qualifying lenders);[45]
- the facility agreement is properly executed in Italy;
- the facility implies cash financing (*finanziamento*) with new liquidity being provided to the borrower, as opposed to facilities that do not include a cash advance (e.g. letters of credit, bonds or bank guarantees); and
- a specific election for the substitute tax regime is made in the facility agreement.[46]'[47]

---

39. *Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Italian Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* art. 11(2) (21 Oct. 1988), Treaties & Models IBFD [hereinafter Italy-UK Income Tax Treaty (1988)].
40. Art. 11(2) Italy-UK Income Tax Treaty (1988).
41. IT: Presidential Decree 601 of 29 September 1973 [hereinafter Decree 601/73].
42. Unofficial translation.
43. Art. 15(3) Decree 601/73.
44. Under the guidelines of the Italian tax authorities and the judgments of the Italian Supreme Court, this requirement is not fulfilled – and thus, the substitute tax regime is not available – when the lender has a full discretionary right to call in the facility before the expiration of the minimum required maturity. On the other hand, the application of the art. 15 regime is not prevented in the case of contractual provisions that entitle the lender to terminate the facility early or request a prepayment on the basis of circumstances that are either contemplated by the applicable law (e.g. under art. 1186 of the Italian Civil Code, whereby "even though the term is set in favour of the borrower, the lender may immediately claim the money back if the borrower is in default or has willfully decreased the guarantees provided or has not delivered the guarantees it had undertaken to provide" [unofficial translation]) or specifically identified in the agreement and connected to the lender's ability to preserve its credit. In this regard, however, in IT: Supreme Court, 6 Feb. 2015, Decision 2188, the Supreme Court stated that financing agreements allowing the lender early termination of the loan for valid reasons (*giustificati motivi*) would not satisfy the minimum duration requirement, and thus would not be eligible for the substitute tax regime. The decision is synthetic and does not describe the "valid reasons" considered in the relevant financing agreement in detail. In particular, it does not appear evident from the decision whether the agreement clearly specified the cases and circumstances in which the lender was allowed to request early termination or repayment; rather, it simply made reference to generic valid reasons, with no further specifications.
45. The substitute tax regime under art. 15 of Decree 601/73 was originally available only to medium-to-long-term facilities granted by Italian banks, EU banks or non-EU banks acting through a permanent establishment located in Italy. IT: Decree Law 91 of 24 June 2014 [hereinafter, Decree 91/2014] amended the tax provisions, extending the optional 0.25% substitute tax regime to new categories of lenders, such as Italian securitization vehicles operating under Law 130 of 30 April 1999, insurance companies incorporated and authorized under provisions enacted by EU Member States and UCIs formed in the European Union/European Economic Area.
46. Art. 17(1) Decree 601/73.
47. Prior to changes enacted in December 2013, the substitute tax regime automatically applied when the conditions stated in art. 15 of Decree 601/73 were fulfilled (i.e. when a medium-to-long-term facility was executed in Italy by an art. 15 qualifying lender), regardless of whether the facility had a security package and irrespective of whether the substitute tax cost was higher than the taxes otherwise due on the facility and its security package. IT: Decree Law 145 of 23 December 2013 rendered the substitute tax regime optional, amending art. 17(1) of Decree 601/73, which now provides as follows: "The entity carrying out the transactions referred to in articles 15 and 16, following a specific option, may pay a substitute tax in lieu of registration tax, stamp tax, mortgage tax, cadastral taxes and taxes on government concession. The option shall be exercised in writing in the credit facility agreement." [Unofficial translation] As a consequence, the substitute tax regime under art. 15 of Decree 601/73 now applies only if a specific election is made in writing in the facility agreement, thus leaving the parties full discretion as to whether they wish to take advantage of the regime.

© Copyright 2019 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Exported / Printed on 8 Oct. 2019 by IBFD.

If the substitute tax regime applies, any document related to the facility and all of the procedures, deeds, agreements and formalities connected with the execution, amendment or redemption of the relevant agreements, as well as the security documents relating thereto, will be exempt from registration tax, stamp duty tax, mortgage tax, cadastral tax and any other government concession tax otherwise applicable.[48] In particular, the execution of the security package will be exempt from these taxes, provided that the secured obligations under the security package are those arising from the relevant facility only (and chargeable with the substitute tax). The application of this regime is crucial when the security package granted in connection with the financing is one that would trigger a material cost in terms of Italian registration tax and mortgage tax (e.g. mortgage loans). In such circumstances, the 0.25% substitute tax is levied in lieu of the aforementioned taxes and significantly reduces the tax cost that would have been otherwise triggered by the security package.

If the United Kingdom leaves the European Union with a ratified Withdrawal Agreement in place, UK credit institutions should still be allowed to rely on their existing passport to lend in Italy on a cross-border basis throughout the transition period. As a consequence, any new loans granted by UK credit institutions during that period should remain eligible for the substitute tax regime under article 15 of Decree 601/73, on the same terms that currently apply.[49] Similarly, in the event of a no-deal Brexit, cross-border lending in Italy should remain a permitted activity throughout the TPR period for UK credit institutions that enter the TPR. Based on the TTR rules, the substitute tax regime should remain available in this scenario as well, on the same terms that currently apply, for new medium-to-long-term loans that are entered into during the TPR period.[50]

As already mentioned in section 2.1.2.4. , at the end of the transition period[51] or, as the case may be, at the end of the TPR period, UK credit institutions will have to apply for authorization from the Bank of Italy to remain licensed to lend in Italy.

2.2. Direct lending by UK alternative investment funds

2.2.1. Regulatory overview

Under article 46-ter of the Italian Finance Code,[52] EU alternative investment funds (AIFs)[53] can lend directly to Italian borrowers (other than consumers), subject to the following conditions:

- they are authorized by their home country authority to carry out direct lending transactions in the jurisdiction where they are established;
- they are established in the form of closed-ended funds and are subject to functioning rules, in particular as regards the modalities of participation by their investors, equivalent to those applicable to Italian credit AIFs;
- they are subject in their home country to limitations on risk mitigation and diversification and financial leverage that are at least equivalent (i.e. equal or stricter) to those set out under Italian law for Italian credit AIFs;[54] and
- a 60-day notice is sent to the Bank of Italy prior to commencing the lending activity in Italy.

In the event of a no-deal Brexit, UK AIFs will no longer qualify as EU AIFs. They will not be allowed to enter the TPR and will automatically fall under the TROR. This means that even when a UK AIF was authorized by the Bank of Italy to directly lend in Italy, that authorization should no longer be in place as from exit day. The TROR does not allow a UK AIF to grant new loans in Italy.

Conversely, if Brexit takes place with a deal, the United Kingdom would leave the European Union from exit day, but EU law would continue to apply to and within the United Kingdom during the transition period, as provided for by Part Four of the Withdrawal Agreement. As a consequence, UK AIFs should arguably continue to qualify as EU AIFs, being allowed to directly lend in Italy if so authorized by the Bank of Italy.

2.2.2. Income taxes

Interest income earned by UK AIFs on loans to Italian-resident borrowers[55] is Italian-source income[56] and is generally subject to a 26% withholding tax,[57] unless the article 26(5-bis) tax relief is available.[58]'[59]

---

48. Under art. 15(2) of Decree 601/73, the substitute tax does not replace the taxes that may be due in connection with legal proceedings concerning the relevant transaction documents (i.e. the facility agreement and the connected security package). Therefore, registration tax may be payable on any act issued by an Italian court in relation to legal actions brought in respect of any of the transaction documents. Such registration tax currently applies at a rate varying from EUR 200 up to 3% of the amount mentioned in the decision.
49. Based on the provisions of the Withdrawal Agreement, in the author's opinion, UK credit institutions should be treated (including for the purposes of the substitute tax regime) as if they still were EU credit institutions.
50. This conclusion should, however, be revised once the TTR implementing regulations have been issued.
51. Unless differently agreed in the context of the (yet to be negotiated) new UK-EU partnership arrangements.
52. IT: Legislative Decree No. 58 of 24 February 1998 [hereinafter Italian Finance Code].
53. According to art. 1(1)(m-quinquies) of the Italian Finance Code, EU alternative investment funds (AIFs) are defined as "the UCIs falling within the scope of application of Directive 2011/61/EU [i.e. the Alternative Investment Fund Managers Directive] and formed in an EU State different from Italy" [unofficial translation].
54. Equivalence can also be assessed by making only reference to the constitutional documents of the AIFs (i.e. their management rules or bylaws that expressly contain those limitations), provided that the home country authority ensures compliance by the EU credit AIFs with their constitutional documents (including those limitations).
55. Including Italian permanent establishments of foreign entities.
56. Art. 23(1)(b) Decree 917/86.
57. Art. 26(5) Decree 600/73. It is assumed that the borrower is a company/entity that qualifies as a withholding tax agent under Italian law.
58. *See* sec. 2.1.2.4.

© Copyright 2019 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

As already discussed,[60]the article 26(5-bis) tax relief applies to interest and other proceeds derived from medium-to-long-term loans[61]granted to Italian enterprises[62]by certain qualifying lenders, which should include EU AIFs,[63]subject to the requirement that the granting of the loans complies with the Italian Banking Code provisions (i.e. the lender must be allowed to lend in Italy, based on applicable rules).[64]

If the United Kingdom leaves the European Union with a ratified Withdrawal Agreement in place, UK AIFs should arguably remain allowed to directly lend in Italy (if so authorized by the Bank of Italy), also being eligible for the article 26(5-bis) tax relief in respect of both outstanding loan facilities and new loan agreements executed during the transition period, on the same terms that currently apply.[65]

Conversely, in the event of a hard Brexit, UK AIFs should lose their status of EU AIFs and, consequently, their ability to lend into Italy.

3. Investing in Italian Decree 239 Securities

3.1. Income taxes

3.1.1. The sourcing rule

Interest income paid by the Italian state, Italian-resident persons or Italian permanent establishments of foreign persons is Italian-source income.[66]This means that interest income earned by non-resident persons on Italian Treasury bonds or debt securities issued by Italian-resident companies is sourced from Italy and, therefore, subject to withholding or substitute tax unless tax relief applies.

3.1.2. The Decree 239 regime

3.1.2.1. Securities falling under the Decree 239 regime

Based on Decree 239/96, a special tax regime (the Decree 239 regime) applies to, inter alia, the following securities (Decree 239 securities):

(1) Italian Treasury bonds;

(2) bonds issued by Italian-resident banks or companies with shares traded on EU/EEA regulated markets/multilateral trading facilities (MTFs);[67]'[68]

(3) bonds issued by Italian-resident companies other than those in (2) above, on the condition that the securities are traded on an EU/EEA regulated market/MTF (category (3) bonds);[69],[70]

---

59. UK AIFs that cannot rely on the art. 26(5-bis) tax relief should assess whether they can take advantage of the provisions of the Italy-UK Income Tax Treaty (1988).
60. *See* sec. 2.1.2.4.
61. *See* the sources cited in *supra* n. 23 .
62. *See* the sources cited in *supra* n. 24 .
63. The list of qualifying lenders for the purposes of the art. 26(5-bis) relief includes foreign institutional investors under art. 6(1)(b) of IT: Legislative Decree No. 239 of 1 April 1996 [hereinafter Decree 239/96], even if not liable to tax, that are subject to forms of supervision in their state of formation. Art. 6 of Decree 239/96 governs the tax relief that is available to certain non-Italian investors in respect of interest accruing on bonds and similar securities issued by the Italian Treasury and by certain other qualifying issuers. Under art. 6(1)(b) of Decree 239/96, such relief is available to foreign institutional investors, even if not subject to tax, that are formed in states with adequate exchange of information with Italy. The notion of "institutional investors" (*infra* n. 77) clearly includes UCIs. However, differently from art. 6 of Decree 239/96, the provisions of art. 26(5-bis) of Decree 600/73 limits the exemption to foreign institutional investors in art. 6(1)(b) of Decree 239/96 that are subject to forms of supervision in their home state (including, therefore, EU AIFs).
64. The compliance with the Italian Banking Code provisions was specifically considered in a private ruling issued by the Italian tax authorities in 2016, dealing with a French *fond commun de titrisation* (French securitization fund, or FCT) that had purchased a medium-to-long-term loan receivable from a French bank. In the private ruling, the Italian tax authorities confirmed the availability of the withholding tax relief in respect of the interest payments collected by the FCT, taking into consideration that, on the one hand, the loan was originally granted by the Italian permanent establishment of a French bank (which is an entity allowed to lend based on the Italian Banking Code), and, on the other hand, that the loan receivable was then purchased by an eligible institution (the FCT), the management company of which is subject to supervision in France by the competent regulator, the *Autorité des Marchés Financiers*). In a recent public ruling (IT: Ruling 76/E of 12 August 2019), the Italian tax authorities addressed the availability of the art. 26(5-bis) tax relief in respect of medium-to-long-term loans granted by UK investment funds, managed by a management company authorized and supervised by the Guernsey Financial Services Commission (GFSC), to an Italian holding company 100% indirectly owned by them. In that specific case, the UK funds were not performing lending activities vis-à-vis the public, since the loans were granted to an indirectly fully owned subsidiary. Consequently, the tax authorities concluded that compliance with the provisions of the Italian Banking Code dealing with direct lending into Italy by EU AIFs was not a requirement for the purposes of the withholding tax relief.
65. Based on the provisions of the Withdrawal Agreement, in the author's opinion, UK AIFs should be treated (including for the purposes of the art. 26(5-bis) tax relief) as if they still were EU AIFs.
66. Art. 23(1)(b) Decree 917/86.
67. Based on art. 1(1) of Decree 239/96, the Decree 239 regime applies to, amongst others, (i) bonds issued by Italian companies with shares traded on regulated markets/multilateral trading facilities (MTFs) established in EU Member States or EEA member countries that are included in the list referred to in the Ministerial Decree issued in accordance with art. 168-bis of the Decree 917/86; and (ii) bonds that are issued by unlisted Italian companies and traded on regulated markets/MTFs established in EU Member States or EEA member countries that are included in the same list referred to in (i) above. As the Ministerial Decree under art. 168-bis of the Decree 917/86 has not been issued, reference should be made to the whitelisted states included in IT: Ministerial Decree of 4 September 1996 (as subsequently amended and restated). The list includes, amongst others, all EU Member States and EEA member countries.
68. As clarified by the Italian tax authorities (IT: Circular 306/E of 23 December 1996), the shares of the issuer must be traded on an EU/EEA regulated market or MTF as of the issue date of the bonds, and the Decree 239 regime remains available even when the shares are subsequently delisted.
69. *See* the sources cited in *supra* n. 67 .
70. The Italian tax authorities have clarified in the past (IT: Circular 4/E of 6 March 2013) that the listing requirement has to be satisfied on the issue date. On that basis, category (3) bonds issued before exit day and traded only on a UK regulated market/MTF on the issue date qualify as Decree 239 securities since, at the time of

© Copyright 2019 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Exported / Printed on 8 Oct. 2019 by IBFD.

(4) bonds issued by Italian-resident companies other than those in (2) and (3) above, on the condition that the securities are exclusively held by one or more qualified investors (*investitori qualificati*);

(5) notes issued by Italian-resident securitization companies; and

(6) hybrid financial instruments (different from shares and securities comparable to shares) issued, for capital adequacy purposes in compliance with EU and domestic regulations, by intermediaries subject to the Bank of Italy's supervision or by undertakings subject to IVASS[71]supervision.[72]

3.1.2.2. The full tax relief for non-resident investors in Decree 239 securities

Italian-source interest income paid to non-resident persons on Decree 239 securities is generally subject to a 26% substitute tax (12.5% in the case of Italian Treasury bonds), unless relief applies.[73]'[74]

Italian-source interest income on Decree 239 securities is tax-exempt in Italy when the securities are beneficially owned by any of the following non-resident investors:[75]

- investors tax resident in a whitelisted state, i.e. a state or territory allowing for adequate exchange of information with Italy as listed in the Ministerial Decree of 4 September 1996;[76]
- international bodies or entities set up in accordance with international agreements that have entered into force in Italy;
- central banks and entities that manage, inter alia, the official reserves of a foreign state; or
- "institutional investors" (e.g. UCIs), regardless of whether they are subject to tax, formed in a whitelisted state.[77]

The Decree 239 tax relief does not require the investors to be resident or formed in an EU Member State/ EEA member country. What matters is that the state of residence or formation is included in the list of states having adequate exchange of information with Italy. As a consequence, Italian-source interest income on Decree 239 securities should remain eligible for the Decree 239 tax relief, on the same terms as now, when derived by UK-resident investors or UK institutional investors.

---

issuance, the United Kingdom was an EU Member State. In a soft Brexit scenario, category (3) bonds issued during the transition period and traded only and a UK regulated market/MTF should also be eligible for the Decree 239 regime; indeed, based on the provisions of the Withdrawal Agreement, in the author's opinion, UK venues should be treated (including for the purposes of the Decree 239 regime) as if they still were EU venues, In the event of a no-deal Brexit, category (3) bonds issued during the TTR period should also reasonably still qualify, based on the TTR rules, as Decree 239 securities, even when they are only traded on a UK regulated market/MTF (this conclusion should, however, be revised once the TTR implementing regulations have been issued).

71. IVASS is the Italian Insurance Supervisory Authority.
72. The extension of the Decree 239 regime to these financial instruments is established by art. 2(22) of IT: Law Decree No. 138 of 13 August 2011, converted into law by IT: Law No. 148 of 14 September 2011.
73. Art. 26(1) Decree 600/73; and art. 2 Decree 239/96.
74. The Decree 239 substitute tax applies on an accrual basis (i.e. *pro rata temporis*). Therefore, (i) the coupons payable on the securities are attributed to the legal owners, pro rata to the holding period of the securities; and (ii) the substitute tax may or may not be levied on the coupons in (i), depending on the tax status of the relevant investor and the satisfaction of the Decree 239 tax relief formalities.
75. Art. 6 Decree 239/96. These are the same non-Italian investors entitled to the capital gains tax relief and the derivative income tax relief under art. 5(5) of Decree 461/97 (*see* sec. 4.2.2.2. and sec. 4.2.3.2.).
76. The list was significantly broadened by IT: Ministerial Decree of 9 August 2016, which added 50 jurisdictions and granted the Italian authorities the right to remove from the list countries that repeatedly do not comply with their exchange-of-information obligations. The United Kingdom's current inclusion in the list should not be affected by Brexit. IT: Ministerial Decree of 23 March 2017, art. 1(1) amended the list, excluding a few jurisdictions therefrom.
77. The notion of "institutional investors" is not defined in Decree 239/96. The Italian tax authorities have provided some guidance, as follows. First, the definition of "institutional investor" is contained in para. 4 of the instructions on the self-declaration form that must be filed for purposes of the Decree 239 tax relief (as confirmed by the Italian tax authorities in IT: Circular 23/E of 1 March 2002; and IT: Circular 20/E of 27 March 2003): "[F]or the purposes of the above-mentioned exemption, the term 'institutional investors' refers to those entities which, regardless of their legal or tax status in their country of residence, have, as their principal activity, managing investments on their own account or on behalf of third parties, such as insurance companies, investment companies, investment funds, SICAV (open-end investment companies) and pension funds." [Unofficial translation] Second, Circular 23/E points out that art. 6 of Decree 239/96 includes both taxable entities and entities that are not taxable in their state of formation amongst the institutional investors. In this regard, Circular 23/E clarifies that, for the sole purposes of art. 6 of Decree 239/96, the fact that entities are not taxable in their home country may be due to different circumstances, such as exemptions granted under domestic law, tax transparency regimes whereby taxes are charged on the participants or exclusions from taxation. Third, the Italian tax authorities clarified, in Circular 23/E and Circular 20/E, that classification as an institutional investor applies to both entities that are subject to regulatory supervision (*vigilanza*) in their country of formation (regulated institutional investors) and entities that are not subject to any regulatory supervision (*vigilanza*) in their country of establishment (unregulated institutional investors). However, unregulated institutional investors must satisfy additional conditions, as they are required to possess specific skills and expertise in transactions on financial instruments and may not have been created to manage investments made by a limited number of investors resident in either Italy or a privileged tax jurisdiction with the aim of unduly benefiting from the exemption that would otherwise not be allowed. The supervision requirement, for the purposes of identifying regulated institutional investors, should be deemed to be satisfied when either the entity itself or the management company is subject to supervision by the competent foreign regulator, such that the commencement of the activity is subject to prior authorization and the entity's activities are subject to ongoing mandatory controls, on the basis of the laws in force in the foreign home state.

© Copyright 2019 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Exported / Printed on 8 Oct. 2019 by IBFD.

4. Cash Equity and Equity Derivative Transactions

4.1. Regulatory implications

4.1.1. General

UK market operators/investment firms operating a trading venue or execution venue will no longer benefit from the Markets in Financial Instruments Directive (MiFID II)[78]authorization/licence.[79]UK-based regulated markets, MTFs or systematic internalizers (SIs) will thus cease to be eligible venues for trading shares subject to the Markets in Financial Instruments Regulation (MiFIR)[80]share-trading obligation (STO).[81]EU counterparts will no longer be able to undertake trades in shares subject to the trading obligation on such platforms and would need to reassess their trading arrangements to ensure continued compliance with their obligations under the MiFIR.

4.1.2. The STO

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 sets out a trading obligation for shares admitted to trading on a regulated market or traded on an EU trading venue (TOTV shares). That STO requires EEA investment firms and credit institutions (dealing on their own account or executing client orders) to undertake transactions in TOTV shares exclusively on (i) regulated markets; (ii) MTFs; (iii) systematic internalizers; or (iv) equivalent third-country trading venues[82].

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 to transactions in shares that are traded in the European Union on a "non-systematic, ad-hoc, irregular and infrequent basis". 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), are also exempt from the STO.

The STO applies in respect of shares that are "admitted to trading on a regulated market or traded on a trading venue" (TOTV shares), therefore including shares that are traded or admitted to trading on 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.

On 13 November 2017, the European Securities and Market Authority (ESMA) published its guidance on the application of the trading obligation for shares when there is a chain of transmission of orders,[83]stating that whenever an EU investment firm is part of the transmission of an order (either initiating the order or acting as broker) in a share subject to the STO, it should ensure that the ultimate execution of that order complies with the requirement under article 23 of the MiFIR.[84]In that same context, ESMA also clarified, in coordination with the European Commission:

---

78. 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].
79. Under arts. 5 and 44 of MiFID II.
80. 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 173/84 (2014).
81. *See* sec. 4.1.2.
82. With regard to granting equivalence to third-country venues for the purposes of the STO, art. 23 of the MiFIR refers to art. 25(4) of MiFID II. According to this latter provision, the national competent authority 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. 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 to the requirements applicable to EU regulated markets under the Market Abuse Regulation (Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse), title III of MiFID II, title II of the MiFIR and the Transparency Directive (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); and (ii) those requirements are subject to effective supervision and enforcement in that third country. In accordance with art. 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.
83. On 13 November 2017, the European Securities and Market Authority (ESMA) updated its Question and Answers (Q&A) regarding the implementation of MiFID II to clarify the application of the trading obligation for shares to trade certain instruments on-venue (*see* https://www.esma.europa.eu/press-news/esma-news/esma-clarifies-trading-obligation-shares-under-mifid-ii (accessed 7 Oct. 2019)).
84. "As an example, where an EU investment firm transmits an order for a share admitted to trading on a regulated market or traded on a trading venue to an EU investment firm that subsequently passes it on to a non-EEA firm, the EU investment firms should ensure the trade is undertaken in accordance with the requirements set out in Article 23 of MiFIR, i.e. on a regulated market, MTF, systematic internaliser or equivalent third country venue."

© Copyright 2019 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Exported / Printed on 8 Oct. 2019 by IBFD.

> [W]hile the Commission is preparing equivalence decisions for the non-EU jurisdictions whose shares are traded systematically and frequently in the EU,[85] the absence of an equivalence decision taken with respect to a particular third country's trading venue 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.

That guidance, however, did not take into account the implications of a no-deal Brexit. On 19 March 2019, ESMA published a statement[86] addressing the STO implications of a no-deal Brexit, in the absence of an equivalence decision in respect of the UK by the Commission, with the intention of clarifying the position for EEA investment firms and banks.[87] In that statement, ESMA provided some additional general guidance on the STO in response to some queries by stakeholders.[88]

With specific reference to Brexit's impact on the STO, ESMA, making reference to its November 2017 guidance, pointed out that, at the time of publication, that guidance did not consider the possible complications in the case of a no-deal Brexit. According to ESMA, "the strong ties and interconnections between the UK and the EU27 financial markets" imply that:

> [...] it cannot reasonably be assumed that all shares admitted to trading on a UK regulated market are traded on a non-systematic, ad-hoc, irregular and infrequent basis in the EU27 and are therefore out of the scope of the trading obligation. Such assumption could only be made if all those shares would be subject to a lack of liquidity in the EU27. On the contrary, ESMA's data indicates that a number of shares admitted to trading in the UK qualify as liquid under MiFID II based on trading in the EU27 only.

Against this background, ESMA believed that it was necessary to provide clarity on the exact scope of the trading obligation, focusing on the concept of "non-systematic, ad-hoc, irregular and infrequent" trading, with respect to shares admitted to trading or traded on EU as well as UK markets in a no-deal Brexit scenario and in the absence of an equivalence decision in respect of the United Kingdom by the Commission. In this respect, ESMA clarified that, in the event of a no-deal Brexit occurring on exit day, the STO would have to be applied based on the following criteria:

- all EU 27 shares (i.e. International Securities Identification Numbers (ISINs) starting with a country code corresponding to an EU 27 Member State and shares with an ISIN from an EEA member country)[89] are within the scope of the trading obligation (even if there is *de minimis* or no liquidity on EU venues in those ISINs);
- UK shares (i.e. ISINs starting with the prefix "GB") are traded on a "non-systematic, ad-hoc, irregular and infrequent" basis in the EU 27, unless those shares qualify as liquid in the EU 27 (GB ISINs that are deemed to be "liquid" on EU 27 venues are subject to the STO, even though the overwhelming majority of liquidity in many of those cases is available on UK markets); and
- the application of the trading obligation to shares with a different ISIN should continue to be determined taking into account the previous ESMA guidance published on 13 November 2017 and, when applicable, on the basis of equivalence decisions adopted by the European Commission.

The above approach, developed by ESMA in close coordination with the Commission, "seeks to limit potential market disruption while also ensuring Article 23 MiFIR is adequately and consistently applied across the EU", and is grounded on the following arguments and considerations:

- the STO applies to all shares traded on a venue in the European Union unless the trading is non-systematic;
- EU 27 shares are deemed to have their main pool of liquidity in the EU 27 and are therefore traded in a systematic, deliberate, regular and frequent way in the EU 27;
- GB shares are deemed to have their main pool of liquidity in the United Kingdom and are therefore traded in a non-systematic, ad-hoc, irregular and infrequent way in the EU 27 (therefore being potentially exempt from the STO), except for UK shares that qualify

---

85. In December 2017, the European Commission adopted a series of equivalence decisions regarding the share-trading obligation (STO). These decisions relate to trading venues in Australia, Hong Kong, Switzerland and the United States 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 art. 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.
86. *See* ESMA's application of the trading obligation for shares following a no-deal Brexit, available at https://www.esma.europa.eu/sites/default/files/library/esma70-155-7329_public_statement_trading_obligation_shares.pdf (accessed 7 Oct. 2019).
87. The reasons for publishing that statement are clearly indicated by ESMA, which "is aware that the application of the trading obligation for shares in a no-deal Brexit scenario is creating uncertainty among many market participants and may lead to disruptive effects. Therefore, ESMA is informing stakeholders about its approach to the application of the trading obligation for shares after the no-deal Brexit date, and subject to the above-mentioned conditions".
88. In particular, ESMA clarified the following:
    – the trading obligation is not limited to shares admitted to trading on EU regulated markets. Indeed, when a share is delisted from a regulated market but continues to be traded on any other EU trading venue, the trading obligation remains applicable;
    – the trading obligation is directly addressed to EU investment firms and branches of third-country firms to which MiFID II applies, and not to the trading venues on which they trade; and
    – a chain of transmission of orders does not include general clearing members, the role of which concerns the post-trade processing of transactions.
89. Iceland, Liechtenstein and Norway.

© Copyright 2019 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Exported / Printed on 8 Oct. 2019 by IBFD.

> as liquid based on trading in the EU 27 only.[90] These latter shares cannot be considered to be traded in a non-systematic, ad-hoc, irregular and infrequent way in the EU 27 and are subject to the STO.

ESMA also published, together with its statement, a list of ISINs that, following the above approach, would be subject to the trading obligation for shares.[91]'[92]

ESMA, however, acknowledged that its approach regarding the application of the STO in a no-deal Brexit scenario may lead "to an overlap of trading obligations for a number of shares and potentially a greater level of fragmentation of trading should the UK apply an identical approach". In this respect, on 19 March 2019, the Financial Conduct Authority (FCA) issued a statement in response to ESMA,[93] highlighting the risk of an uncoordinated approach and of potentially conflicting requirements between the STOs under the MiFIR (EU 27 STO) and UK legislation (UK STO)[94] and stating its readiness to engage constructively with ESMA and other European authorities.

After further considering the matter and taking into account the concerns expressed by some stakeholders about the guidance published on 19 March 2019,[95] on 29 May 2019, ESMA published a statement revising its position on the STO in a hard Brexit scenario.[96] ESMA changed the scope and criteria for determining which shares are included in the EU 27 STO:

> [...] to further mitigate potential adverse effects of the application of the STO, within the constraints of the extraordinary circumstances of a no-deal Brexit and taking into account the concerns expressed by some stakeholders about the guidance published on 19 March 2019. ESMA has also given additional attention to the risk of disruption that conflicting EU27 and UK STOs may potentially create, in particular for UK branches of EU27 investment firms and for EU27 branches of UK investment firms.

According to ESMA, "an approach to the STO based only on the ISIN of the share would be more likely to minimise any such risk of disruption in the interest of orderly markets."

Under the revised approach, all EU 27 shares[97] and shares with an ISIN from Iceland, Liechtenstein and Norway[98] (all EEA ISINs) are within the scope of the EU STO. Conversely, GB ISINs are outside the scope of the EU STO, regardless of the level of liquidity available on European venues. Consequently, EU firms will be able to trade on these shares on any venue (subject to other regulatory obligations, such as best execution).[99] According to ESMA, this new approach:

---

90. On the basis of 2018 trading volumes, excluding UK data.
91. The list is available at https://www.esma.europa.eu/files/stolistofisinsxlsx (accessed 7 Oct. 2019). The list, which was compiled based on data from the calendar year 2018, is only meant to clarify the application of the trading obligation for shares with an EU 27 Member State/EEA member country or GB ISIN.
92. As clarified by the Deutsche Bank (*see* https://autobahn.db.com/microSite/docs/DB_GlobalMarketStructure_Brexit_ShareTradingObligation.pdf (accessed 7 Oct. 2019)):
– ESMA identified 14 GB ISINs that they consider to be liquid in the EU 27 based on 2018 trading volumes in the EU 27. This list of 14 names includes nine names in the FTSE 100 Index (the stock index comprising the 100 most highly capitalized blue chip companies listed on London Stock Exchange), one in the FTSE 250 Index (the stock index comprising mid-capitalized companies not covered by the FTSE 100) and one in the All-Share Index (the stock index representing 98-99% of UK market capitalization). The remaining three names are mostly traded on EU 27 venues. Unless an equivalence decision is adopted by the Commission, EU 27 firms will no longer be permitted to trade these shares on UK venues (i.e. they will only be permitted to trade them on trading venues or with systematic internalizers located within the EU 27);
– similarly, EU 27 investment firms' access to UK-based liquidity in a number of the EU 27 ISINs that are also traded on the London Stock Exchange would be subject to the same restrictions.
93. The Financial Conduct Authority (FCA) statement is available at https://www.fca.org.uk/news/statements/fca-statement-share-trading-obligations (accessed 7 Oct. 2019): "The EU MiFID II and onshored UK MiFID regimes both have share trading obligations (STOs) which mandate investment firms to trade certain shares on regulated markets, multilateral trading facilities, systematic internalisers or third-country trading venues assessed as equivalent by the EU and UK respectively … The statement from ESMA has made clear that the EU's STO will apply to all shares traded on EU27 trading venues that are shares of firms incorporated in the EU (EU ISINs), and of companies incorporated in the UK (GB ISINs) where these companies' shares are 'liquid' in the EU. This means EU banks, funds and asset managers will not be able to trade these GB or EU ISIN shares in the UK, even where the UK is the home listing of the British or EU company … Whilst the FCA acknowledges that clarifying the application of the STO in the event of a no-deal Brexit will help to provide certainty, we believe that only a comprehensive and coordinated approach can provide the necessary certainty to market actors. Without this approach, it will not be possible to address the issues of conflicting obligations applying to the same instruments. Where this is the case, firms may be limited to trading certain shares only in either the UK or the EU or in some cases be caught by overlapping obligations. The onshoring of EU legislation in preparation for Brexit means that the UK will, as well as the EU, have an STO. Applying the same approach as ESMA to the scope of the UK STO would, based on current trading data, mean there would be a large degree of overlap between the UK and EU obligations. This has the potential to cause disruption to market participants and issuers of shares based in both the UK and the EU, in terms of access to liquidity and could result in detriment for client best execution. We therefore urge further dialogue on this issue in order to minimise risks of disruption in the interests of orderly markets. The FCA stands ready to engage constructively with ESMA and other European authorities to achieve this."
94. As part of the its on-shoring of EU legislation in preparation for Brexit, the United Kingdom will have its own STO that mirrors the requirements under art. 23 of the MiFIR.
95. Indeed, market participants highlighted that many shares falling within the scope of the STO have their primary pool of liquidity on a UK venue (such as the London Stock Exchange) rather than a European venue and that, consequently, EU firms would be required to execute on an EU venue even when a better price could be obtained on a UK venue, thus preventing them from obtaining the best execution for their clients and putting them at a disadvantage in comparison with non-European fund managers.
96. *See* https://www.esma.europa.eu/sites/default/files/library/esma70-154-1204_revised_public_statement_trading_obligation_shares.pdf (accessed 7 Oct. 2019). As pointed out by ESMA, the revised statement "is only meant to clarify the application of the EU27 STO to shares with an EEA ISIN [AT, BE, BG, CY, CZ, DE, DK, EE, ES, FI, FR, GR, HR, HU, IE, IS, IT, LI, LT, LU, LV, MT, NL, NO, PL, PT, RO, SE, SI, SK]. The application of the STO to shares with a different ISIN should continue to be determined taking into account the previous ESMA guidance, published on 13 November 2017 … ESMA remains mindful of the impact of a no-deal Brexit on EU market structures and will consider, in light of possible market developments, whether to review its approach at the latest 12 months after the no-deal Brexit date. There is still a high level of uncertainty as to the final timing and conditions of Brexit. Should these change or should there be developments on the application of the STO in the UK, ESMA will assess whether its approach needs to be adjusted and will inform the public accordingly".
97. I.e. ISINs starting with a country code corresponding to an EU 27 Member State.
98. AT, BE, BG, CY, CZ, DE, DK, EE, ES, FI, FR, GR, HR, HU, IE, IS, IT, LI, LT, LU, LV, MT, NL, NO, PL, PT, RO, SE, SI, SK.
99. As noted by ESMA, its 19 March 2019 guidance on the STO "has significantly reduced the scope of the STO under no-deal Brexit circumstances: while there are currently around 23,000 shares that are admitted to trading or traded on a trading venue in the EU, ESMA's guidance limited the application of the STO to 6,243 shares,

© Copyright 2019 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Exported / Printed on 8 Oct. 2019 by IBFD.

> [...] based only on the ISIN of the share will effectively avoid … overlaps if the UK adopts an approach that does not include EEA ISINs under the UK STO. It would provide a balanced, objective and easily identifiable dividing line between EEA and UK shares. Should EEA ISINs be included in the scope of the UK STO, this would introduce overlapping obligations and the potentially damaging consequences for market participants that ESMA is seeking to address through its revised approach today.[100]

In response to ESMA's revised approach, on 29 May 2019, the FCA published an update on the STOs,[101]pointing out that the application of the EU 27 STO "to all shares issued by firms incorporated in the EU (EU ISINs) would still cause disruption to investors, some issuers and other market participants" and that "that reciprocal equivalence … remains the best way of dealing with overlapping share trading obligations".

4.2. Income taxes

4.2.1. Dividends

4.2.1.1. The sourcing rule and the taxing criteria

Dividends paid by Italian-resident companies to non-residents are Italian-source income,[102]which is generally subject to a 26% final withholding/substitute tax,[103]unless tax relief applies.

4.2.1.2 The pension funds partial relief (11%)

The rate of withholding/substitute tax is reduced to 11% when Italian-source dividends are paid to pension funds established in one of the EU Member States/EEA member countries.[104]These pension funds may be exempt from the 11% withholding/substitute tax in the case that they hold qualifying investments (including shares issued by Italian companies) for at least 5 years and comply with certain other conditions.[105]

Italian-source dividends should remain eligible for both the above tax reliefs[106](on the same terms as now) when paid to UK pension funds during the transition period (if the United Kingdom leaves the European Union with a ratified Withdrawal Agreement in place) or during the TTR period (in the event of a no-deal Brexit).[107]Conversely, the tax reliefs may no longer be available at the end of the transition period[108]or the TTR period (as the case may be).

4.2.1.3 The EU/EEA partial relief (1.2%)

The rate of withholding/substitute tax is reduced to 1.2% when Italian-source dividends are paid to companies and entities that are resident in one of the EU Member States/EEA member countries and are subject to corporation tax in their home country.[109]

---

among them 14 shares with a GB ISIN". As a consequence of the revised guidance published on 29 May 2019, "the EU27 STO would not be applied to the 14 GB ISINs included in its previous guidance". In addition, "ESMA no longer considers it necessary to publish a list of ISINs that, following the approach described above, would be subject to the EU27 STO".

100. The Association for Financial Markets in Europe (AFME), while welcoming ESMA's revised approach to the scope of the STO, highlighted its concern that "EU investors may still not be able to access major pools of liquidity for a number of EU27 shares (e.g. a number of Irish and dual-listed shares) and therefore may not be able to execute trades at the best available price". In addition, AFME also suggested that "equivalence granted by the EU and UK would be the best solution" for addressing the prospect of overlapping STOs with the UK STO. "However, in the event that equivalence decisions are not available in time for a no-deal Brexit scenario, clarifying the scope of trading obligations to shares based on an ISIN and currency principle could reduce the number of shares where access to major pools of liquidity could be challenging." *See* AFME, *Brexit: Remaining no-deal risks in financial services* (16 July 2019), available at https://www.afme.eu/Portals/0/globalassets/downloads/publications/Annex%201%20-%2020190710%20Brexit%20Remaining%20no-deal%20risks%20in%20financial%20services.pdf?ver=2019-09-11-143809-510 (accessed 7 Oct. 2019).
101. The FCA statement is available at https://www.fca.org.uk/news/statements/fca-update-share-trading-obligations (accessed 7 Oct. 2019): "The FCA is encouraged that ESMA has taken steps to reduce the disruption that would be caused by the previously announced scope of the EU STO. According to ESMA, the revised approach proposed today would mean that EU banks and investment firms will be able to trade all UK shares in the UK, where for most the primary centre of liquidity exists. However, applying the EU STO to all shares issued by firms incorporated in the EU (EU ISINs) would still cause disruption to investors, some issuers and other market participants, leading to fragmentation of markets and liquidity in both the EU and UK. A number of shares with EU-27 ISINs have both a listing, as well as their main or only significant centre of market liquidity, on UK markets. In our view, the ISIN that a share carries does not and should not determine the scope of the STO. Some shares have their main or only centre of market liquidity outside the country in which the issuer is incorporated. This approach would place restrictions on a company's access to investors and freedom to choose where they seek a listing on a public stock market. We consider that the risk of disruption from potentially conflicting EU27 and UK STOs is not mitigated by the revised ESMA approach given that article 23 of the onshored MIFIR implies overlapping obligations for firms. Consistent with our objectives and the principle of best execution, we would want to ensure that markets in these shares currently available to both UK and EU investors in London would not be damaged. The FCA believes in open markets and competition between trading venues and that reciprocal equivalence - which reflects the reality - remains the best way of dealing with overlapping share trading obligations. The UK has onshored the same regime, making us one of the most equivalent countries in the world. In the absence of reciprocal equivalence, applying both UK and EU STOs in a way that maintains the status quo for a limited period of time after exit remains an alternative way of mitigating disruption whilst longer term solutions are found. The FCA stands ready to use the extra time available due to the delay to the UK's withdrawal to engage constructively with ESMA and other European authorities to achieve either of these outcomes."
102. Art. 23(1)(b) Decree 917/86.
103. Art. 27(1) and art. 27-ter Decree 600/73.
104. Art. 27(3), second sentence and art. 27-ter Decree 600/73.
105. IT: Law no. 232 of 11 December 2016, art. 1(95) [hereinafter Law 232/2016].
106. The 11% withholding/substitute tax rate and the full exemption under art. 1(95) of Law 232/2016.
107. These dividend withholding tax reliefs, being available to UK pension funds if and to the extent that the United Kingdom is a Member State of the European Union, should fall within the scope of the TTR. This conclusion should, however, be revised once the TTR implementing regulations have been issued.
108. Unless differently agreed in the context of the (yet to be negotiated) new UK-EU partnership arrangements.
109. Art. 27(3-ter) and art. 27-ter Decree 600/73.

© Copyright 2019 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Italian-source dividends should remain eligible for this tax relief (on the same terms as now) when paid to UK-resident corporations and entities during the transition period (if the United Kingdom leaves the European Union with a ratified Withdrawal Agreement in place) or during the TTR period (in the event of a no-deal Brexit).[110]Conversely, the tax relief may no longer be available at the end of the transition period[111]or the TTR period (as the case may be).

4.2.1.4 The Parent-Subsidiary Directive full tax relief

Italian-source dividends are exempt from withholding/substitute tax when paid to EU-resident parent companies that own shares representing at least 10% of the capital of the paying company and fulfill the requirements for the Parent-Subsidiary Directive[112]tax relief.[113]

Italian-source dividends should remain eligible for the Parent-Subsidiary Directive tax relief if paid to UK-resident parent companies during the Italian transition period (if the United Kingdom leaves the European Union with a ratified Withdrawal Agreement in place) or during the TTR period (in the event of a no-deal Brexit).[114]The Parent-Subsidiary tax relief should no longer be available for dividends paid after the end of the transition period[115]or, as the case may be, after the end of the TTR period.

4.2.1.5 The Italy-UK Income Tax Treaty (1988) partial tax relief (5%-15%)

According to the Italy-UK Income Tax Treaty (1988), the rate of withholding/substitute tax on Italian-source dividends paid to UK-resident persons shall not exceed:

- 5% if the beneficial owner is a company that controls, directly or indirectly, at least 10% of the voting power in the company paying the dividends; or
- 15% in all other cases.

Brexit will not affect the Italy-UK Income Tax Treaty (1988). As a consequence, Italian-source dividends should remain eligible for the DTT tax relief, on the same terms as now, when paid to UK-resident persons entitled to benefit from the provisions of the DTT.

4.2.2. Capital gains

4.2.2.1. The sourcing rule and the taxation criteria

Capital gains income derived by non-resident persons from the disposal of shares issued by Italian-resident companies is Italian-source income, irrespective of where the shares are held,[116]and is generally subject to a 26% substitute tax[117](unless tax relief applies).

By way of exception, however, capital gains income derived by non-resident persons from the disposal of a non-substantial shareholding[118]is not Italian-source income (and, accordingly, is not taxable in Italy) when the shares are listed on regulated markets (even when the transaction takes place over the counter (OTC)).[119]'[120]This sourcing exception applies to all non-resident investors, irrespective of their state of residence. Therefore, UK investors should remain eligible for it, on the same terms as now, irrespective of how Brexit unfolds.

4.2.2.2. The article 5(5) full tax relief

Italian-source capital gains income[121]from the disposal of a non-substantial shareholding is tax-exempt in Italy[122](article 5(5) tax relief) when derived by the following non-resident investors:[123]

- investors tax-resident in a whitelisted state;

---

110. This dividend withholding tax relief, being available to UK-resident corporations and entities if and to the extent that the United Kingdom is a Member State of the European Union, should fall within the scope of the TTR. This conclusion should, however, be revised once the TTR implementing regulations have been issued.
111. Unless differently agreed in the context of the (yet to be negotiated) new UK-EU partnership arrangements.
112. Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 345/8 (2011), Primary Sources IBFD, available at https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:32011L0096 (accessed 7 Oct. 2019).
113. Art. 27-bis Decree 600/73.
114. The Parent-Subsidiary Directive full tax relief, being available to UK parent companies if and to the extent that the United Kingdom is a Member State of the European Union, should fall within the scope of the TTR (which specifically references Italian tax rules stemming from EU directives).
115. Unless differently agreed in the context of the (yet to be negotiated) new UK-EU partnership arrangements.
116. Art. 23(1)(f) Decree 917/86.
117. IT: Legislative Decree 461, 21 Nov. 1997, art. 5(2) [hereinafter Decree 461//97].
118. The term “non-substantial shareholding” means the holding of shares in a listed company representing, in aggregate, no more than 2% of the voting rights or 5% of the capital of the relevant issuer. In the case of unlisted companies, the qualifying holding thresholds are increased to, respectively, 20% of voting rights and 25% of the capital.
119. Art. 23(1)(f)(1) Decree 917/86.
120. As clarified by the Italian tax authorities (IT: Circular 165/E of 24 June 1998 and IT: Circular 207/E of 26 October 1999), for the purposes of this provision, the term “regulated markets” also includes regulated venues in OECD member countries that are organized and governed by regulations adopted or approved by the competent authorities on the basis of the laws in force in the state in which these venues are established.
121. Excluding, therefore, capital gains income falling under the sourcing exception governed by art. 23(1)(f)(1) of Decree 917/86 (*see* sec. 4.2.2.1.).
122. Art. 5(5) Decree 461/97.
123. These are the same non-Italian investors entitled to the full tax relief in respect of interest accruing on Decree 239 securities based on art. 6 of Decree 239/96 (*see* sec. 2.1.2.2.).

© Copyright 2019 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

- international bodies or entities set up in accordance with international agreements that have entered into force in Italy;
- central banks and entities that manage, inter alia, the official reserves of a foreign state; or
- "institutional investors" (e.g. UCIs), regardless of whether they are subject to tax, formed in a whitelisted state.[124]

This tax relief, which typically applies in respect of the sale of shares in an unlisted company, does not require the investors to be resident or formed in an EU Member State/EEA member country. What matters is that the state of residence or formation is included in the list of states having adequate exchange of information with Italy.[125]Therefore, Italian-source capital gains income from the disposal of a non-substantial shareholding should continue to be tax-exempt in Italy, on the same terms as now, when derived by UK-resident investors or UK institutional investors.

4.2.2.3. The Italy-UK Income Tax Treaty (1988) full tax relief

Italian-source capital gains income from the disposal of shares derived by UK-resident persons entitled to benefit from the provisions of the DTT is taxable in the United Kingdom only;[126]'[127]therefore, Italy is not allowed to charge any income tax.

Brexit will not affect the Italy-UK Income Tax Treaty (1988). As a consequence, Italian-source capital gains income should remain eligible for the Italy-UK Income Tax Treaty (1988) tax relief, on the same terms as now, when derived by UK-resident persons entitled to benefit from the provisions of the treaty.

4.2.3. Derivative transactions

4.2.3.1. The sourcing rule and the taxing criteria

Income derived by non-resident persons from derivative transactions with an Italian-resident counterparty is Italian-source income[128]and is generally subject to a 26% substitute tax[129](unless tax relief applies).

By way of exception, income derived by non-resident persons from derivative transactions executed on regulated markets[130]is not Italian-source income (and, accordingly, is not taxable in Italy).[131]This sourcing exception applies to all non-resident investors, irrespective of their state of residence. Therefore, UK investors should remain eligible for it, on the same terms as now, irrespective of how Brexit unfolds.

4.2.3.2. The article 5(5) full tax relief

Italian-source derivative income[132]derived by certain non-resident derivative counterparties may be eligible for the article 5(5) tax relief.[133]This exemption typically applies in respect of OTC derivative transactions. Non-resident derivative counterparties that can benefit from the relief include investors tax-resident in a whitelisted state and institutional investors, regardless of whether they are subject to tax, formed in a whitelisted state.[134]

The article 5(5) tax relief does not require the investors to be resident or formed in an EU Member State/EEA member country. What matters is that the state of residence or formation is included in the list of states having adequate exchange of information with Italy.[135]Therefore, Italian-source derivative income should continue to be tax-exempt in Italy, on the same terms as now, when derived by UK-resident investors or UK institutional investors regardless of how Brexit unfolds.

4.3. Italian financial transaction tax

4.3.1. Introduction

The Italian financial transaction tax (IFTT) was enacted by article 1, paragraphs 491-500 of the 2013 Stability Bill.[136]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.[137]'[138]The

---

124. *See* the sources cited in *supra* n. 77 .
125. The United Kingdom's current inclusion amongst the whitelisted states should not be affected by Brexit.
126. Art. 13(4) Italy-UK Income Tax Treaty (1988).
127. By way of exception, art. 13(5) of the Italy-UK Income Tax Treaty (1988) states that the provisions of art. 13(4) shall not affect Italy's right to tax gains derived by an individual who (i) is a resident of the United Kingdom; (ii) has been a resident of Italy at any time during the 5 years immediately preceding the alienation of the shares; and (iii) is not subject to tax on those gains in the United Kingdom.
128. Art. 23(1)(f) Decree 917/86; and IT: Circular 207/E of 26 October 1999.
129. Art. 5(2) Decree 461/97.
130. *See* the sources cited in *supra* n. 120 .
131. Art. 23(1)(f)(3) Decree 917/86.
132. Excluding, therefore, derivative income falling under the sourcing exception governed by art. 23(1)(f)(3) of Decree 917/86 (*see* sec. 4.2.3.1.).
133. *See* sec. 4.2.2.2.
134. *See* the sources cited in *supra* n. 78 .
135. The United Kingdom's current inclusion amongst the whitelisted states should not be affected by Brexit.
136. IT: Law 228 of 24 December 2012 [*Legge di Stabilità* 2013], Official Gazette 302 (29 Dec. 2012) [hereinafter 2013 Stability Bill].
137. IT: Decree of 21 February 2013 [hereinafter Treasury Decree], enacted by the Ministry of Economy and Finance, as subsequently amended and restated. The Treasury Decree was slightly amended on 18 March 2013. Further significant amendments were introduced by way of a decree enacted on 16 September 2013 by the Ministry of Economy and Finance.
138. 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 Post-MiFID II Financial Market Ecosystem* , 20 Derivs. & Fin. Instrums. 6 (2018), Journal Articles & Papers IBFD; V. Salvadori

© Copyright 2019 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

IFTT applies to (i) the transfer of ownership of certain equity securities (IFTT equity);[139](ii) certain transactions in equity derivatives (IFTT derivatives);[140]and (iii) certain high-frequency transactions executed on Italian regulated markets and MTFs (IFTT high-frequency transactions).

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, the Short Selling Regulation (SSR),[141]MiFID I[142]and the MiFID I Implementing Regulation.[143]MiFID I and the MiFID I Implementing Regulation, however, are no longer in force, having been replaced by MiFID II and the MiFIR (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.

4.3.2 The reduced rates for equity and equity derivative trades executed on regulated markets and MTFs

4.3.2.1 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";[144]
- when the transactions satisfy the conditions of 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";[145]and
- when transactions in chargeable equities qualify as "negotiated transactions" under article 19 of the MiFID I Implementing Regulation.[146]'[147]

---

di Wiesenhoff, *Italian Financial Transaction Tax Implications of the Evolving Regulatory Landscape: The Exemption for Market Makers* , 20 Derivs. & Fin. Instrums. 1 (2018), Journal Articles & Papers IBFD; R.-A. Papotti & M. Gusmeroli, *Italian FTT in Practice: Issues and Solutions* , 19 Derivs. & Fin. Instrums. 4 (2017), Journal Articles & Papers IBFD; V. Salvadori di Wiesenhoff, *Update on Financial Transaction Tax* , 15 Derivs. & Fin. Instrums. 6 (2013), Journal Articles & Papers IBFD; and V. Salvadori di Wiesenhoff & R. Egori, *2013 Italian Financial Transaction Tax* , 15 Derivs. & Fin. Instrums. 2 (2013), Journal Articles & Papers IBFD.

139. The IFTT equity is due in respect of the transfer of ownership of the equity instruments listed 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 November of the previous year of more than EUR 500 million. Art. 15(1)(f) of the 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 November 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 of the Treasury Decree, the Ministry of Economy and Finance must draft and publish on its website, by 20 December 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) of the Italian Civil Code (IT: Royal Decree 262 of 16 March 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, global depositary receipts and European depositary receipts. Art. 15(1)(i) of the 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 November 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.
140. Based on art. 7(1) of the Treasury Decree, the IFTT derivative is due in respect of transactions in the following derivative instruments (chargeable derivatives):
– art. 7(1)(a): non-securitized financial derivatives (futures, options, swaps, forwards or contracts for difference), as referred to in art. 1(3) of the 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 MTFs 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 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) of the 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 not include shares issued by low-capitalized Italian-resident companies, as included in the list published under art. 17 of the Treasury Decree. As a consequence, the tax authorities have clarified that the IFTT derivatives do not apply to derivative instruments having those same shares as their underlying (or reference) asset(s).
141. 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 (2012) [hereinafter SSR], available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012R0236 (accessed 7 Oct. 2019).
142. 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 (2004) [hereinafter MiFID I].
143. 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 (2004) [hereinafter MiFID I Implementing Regulation].
144. Art. 6(1), first paragraph Treasury Decree.
145. Art. 6(1), second paragraph Treasury Decree.
146. Reference, however, should now be made to art. 4(1)(b) of the MiFIR.
147. Art. 6(4) Treasury Decree.

© Copyright 2019 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Exported / Printed on 8 Oct. 2019 by IBFD.

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 chargeable derivative trades take place on regulated markets or MTFs;[148]
- 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";[149]and
- when transactions in chargeable derivatives qualify as "negotiated transactions" under article 19 of the MiFID I Implementing Regulation.[150]'[151]

4.3.2.2. Equity and equity derivative trades executed on EU/EEA regulated markets and MTFs

Regulated markets and MTFs are defined as follows in the Treasury Decree:[152]

> [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 [Decree 917/86].[153]

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 portal);[154]and (ii) are established within the European Union or in an EEA member country.[155]'[156]

4.3.2.3 Equity and equity derivative trades executed on third-country trading venues

The reduced IFTT rate/charges under articles 6(1) and 11(1) of the Treasury Decree, however, may also apply in respect of equity and equity derivative trades executed on non-EU/EEA trading venues. Indeed, the definition of regulated markets and MTFs also includes equivalent third-country trading venues that satisfy certain requirements, as follows:[157]

> [I]n the case of the States to which the […] [MiFID I][158]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)][159]pursuant to article 67, paragraph 2 of the Italian Finance Code,[160]provided that they are established in States and territories included in the list referred to in the above Ministerial Decree.

Therefore, the reduced IFTT rate/charges are also available in respect of equity and equity derivative trades executed on third-country (multilateral) trading venues that are established in a whitelisted state[161]and are (i) in regular operation and authorized by a national public authority with state supervision; or (ii) recognized by Consob based on article 70(1) of the Italian Finance Code.

---

148. Art. 11(1), first paragraph Treasury Decree.
149. Art. 11(1), second paragraph Treasury Decree.
150. Reference, however, should now be made to art. 4(1)(b) of the MiFIR.
151. Art. 11(1), third paragraph Treasury Decree.
152. Art. 1(2)(f), first paragraph Treasury Decree.
153. 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.
154. The ESMA portal is currently available at https://registers.esma.europa.eu/publication/ (accessed 25 Sept. 2019). 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 (accessed 7 Oct. 2019). The portal provides investors with a one-stop shop register, including for MiFID II trading venues.
155. As the Ministerial Decree referred to in art. 168-bis of the Decree 917/86 has not been issued, for IFTT purposes as well, reference should be made to the whitelisted states included in IT: Ministerial Decree of 4 September 1996 (as subsequently amended and restated). The list includes, amongst others, all EU Member States and EEA member countries.
156. The introduction of "organized trading facilities" (OTFs) as a new category of trading venues under MiFID II has no impact on the reduced IFTT rate under art. 6(1) of the Treasury Decree, since equity instruments may not be traded on an OTF.
157. Art. 1(2)(f), second paragraph Treasury Decree
158. Reference is now to the MiFID II provisions.
159. The *Commissione Nazionale per le Società e la Borsa* (Consob) is the supervisory authority responsible for regulating the Italian financial markets.
160. Reference is now made to art. 70(1) of the Italian Finance Code.
161. Whitelisted states are those included in IT: Ministerial Decree of 4 September 1996. The list was significantly broadened by IT: Ministerial Decree of 9 August 2016, which added 50 jurisdictions (including Hong Kong and Switzerland) and grants the Italian authorities the right to remove countries that repeatedly do not comply with their exchange-of-information obligations from the list.

© Copyright 2019 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Exported / Printed on 8 Oct. 2019 by IBFD.

According to article 70(1) of the Italian Finance Code, 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, 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).[162]These venues, therefore, are eligible for the reduced IFTT rate/charges (assuming, of course, that chargeable equities/ chargeable derivatives are traded thereon).

Based on the wording of article 1(2)(f), second paragraph of the Treasury Decree, however, the reduced IFTT rate/charges are not limited to trades executed on non-EU trading venues recognized by Consob. Rather, in the author's opinion, any third-country trading venue that meets all of the following objective criteria should be eligible for the reduced IFTT rate/charges for equity and equity derivative trades (regardless of any recognition by Consob):

- it is established in a whitelisted state;
- 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);[163]
- it is subject to authorization in accordance with the legal and supervisory framework of the third country;
- it is subject to supervision and enforcement by a competent authority on an ongoing basis 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.[164]In December 2017, the European Commission adopted a series of equivalence decisions for the STO relating to trading venues in Australia,[165]Hong Kong,[166]Switzerland[167]and the United States.[168]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 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 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.

4.3.2.4. Post-Brexit IFTT qualification of UK trading venues

If the United Kingdom leaves the European Union with a ratified Withdrawal Agreement, regulated markets and MTFs established in the United Kingdom should continue to be considered EU trading venues during the transition period and should, therefore, remain listed in the ESMA Portal, thus satisfying the requirements of article 1(2)(f), first paragraph of the Treasury Decree. As a consequence, equity

---

162. The list of non-EU trading venues recognized by Consob under art. 70(1) of the Italian Finance Code is available at http://www.consob.it/web/consob-and-its-activities/agreements-markets (accessed 7 Oct. 2019).
163. 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) of the 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".
164. *See* sec. 4.1.2.
165. 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 331/81 (2017), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017D2318&qid=1567627917367&from=EN (accessed 7 Oct. 2019).
166. Commission Implementing Decision (EU) 2017/2319 of 13 December 2017 on the equivalence of the legal and supervisory framework applicable to recognized 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 331/87 (2017), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017D2319&qid=1567628046705&from=EN (accessed 7 Oct. 2019).
167. 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 337/77, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018D2047&from=EN (accessed 7 Oct. 2019). According to art. 2 of said decision, the Swiss stock exchanges (SIX Swiss Exchange AG (SIX) and BX Swiss AG (BX)) were granted limited-period equivalence, which expired on 30 June 2019.
168. 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 331/94 (2017), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017D2320&qid=1567628148809&from=EN (accessed 7 Oct. 2019).

© Copyright 2019 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Exported / Printed on 8 Oct. 2019 by IBFD.

and equity derivative trades executed on those venues should remain eligible for the reduced IFTT rate/charges under articles 6(1) and 11(1) of the Treasury Decree.

Conversely, trading venues established in the United Kingdom will no longer be considered EU trading venues (and should, therefore, be removed from the ESMA Portal), either with effect from exit day (in the event of a hard Brexit) or from the end of the transition period under the Withdrawal Agreement (in the event of a soft Brexit). This implies that, from a MiFID II perspective, transactions concluded on UK trading venues would be considered OTC transactions and would be subject to the post-trade transparency requirements pursuant to articles 20 and 21 of the MiFIR. Nonetheless, in the author's opinion, equity and equity derivative transactions executed on UK regulated markets and MTFs (regardless of whether they are recognized by Consob under article 70(1) of the Italian Finance Code and whether the European Union adopts an STO-equivalent decision in respect of UK trading venues) should remain eligible for the reduced on-exchange IFTT rate/charges, since those venues would arguably satisfy the requirements in article 1(2)(f), second paragraph of the Treasury Decree.[169]'[170]

4.3.3. The IFTT exemption for UK-based market-makers[171]

4.3.3.1. Introduction

The SSR requires market participants to provide information on significant net short positions in shares and poses restrictions on uncovered (naked) short selling in shares.[172]Under article 17 of the SSR, however, the information requirements and the restrictions do not apply to transactions performed in the course of market-making activities, which are defined in article 2(1)(k) of the same regulation (the SSR exemption).[173]'[174]

Market-makers wishing to take advantage of the SSR exemption must notify the relevant competent authority[175]at least 30 calendar days before they first intend to use that exemption.[176]

According to article 16(3)(a), first paragraph of the Treasury Decree, transactions in chargeable equities and chargeable derivatives executed by entities performing market-making activities (as defined in article 2(1)(k) of the SSR and in the ESMA Guidelines)[177]are exempt from the application of the IFTT (the IFTT exemption).

In the author's opinion, the Italian tax authorities will follow, for the purposes of the IFTT exemption, the guidance on the scope of market-making activities contained in the ESMA Guidelines. Indeed:

- article 16(3)(a) of the Treasury Decree does not contain any independent tax definition of "market-making" and, for this purpose, specifically references the SSR and the ESMA Guidelines. The IFTT exemption is, therefore, linked to the definition of market-making activities in the SSR and to the interpretation adopted in the ESMA Guidelines on how the SSR exemption should be applied;

---

169. *See* sec. 4.3.2.3.
170. In addition, during the TTR period following a no-deal Brexit, UK trading venues could be equated with EU/EEA markets based on the TTR rules. In this respect, however, one would need to take into account the TTR implementing regulations that the Italian Minister of Economy and Finance is required to enact. According to the TTR rules, the Italian tax provisions relying on the United Kingdom's EU membership shall continue to apply throughout the TTR period as if the United Kingdom were still a Member State of the European Union). However, based on the definition in art. 2(1)(f), first paragraph of the Treasury Decree, regulated markets and MTFs are trading venues that are (i) established in an EU Member State/EEA member country; and (ii) listed in the ESMA portal. UK trading venues may be deemed to satisfy the requirement in (i) above on the basis of the TTR rules, while this may not be the case for the requirement in (ii) above.
171. For a comprehensive overview of the IFTT exemption for market-makers, *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), Journal Articles & Papers IBFD.
172. The SSR requires information on significant net short positions in shares to be notified to the competent authorities or disclosed to the market and imposes restrictions on naked short-selling in shares (similar requirements and restrictions also apply in respect of short sales of sovereign debt instruments). In particular, market participants, whether domiciled or established within the European Union or in a third country (art. 10 of the SSR), are required to privately report to the relevant competent authority or disclose to the public significant net short positions that they hold in relation to the issued share capital of a company of which the shares are admitted to trading or are traded on a trading venue (regulated market or MTF) in the European Economic Area (unless they are primarily traded on a third-country venue; *see* art. 16 of the SSR) when the position equals, exceeds or crosses downwards specified thresholds (*see* arts. 5-6 of the SSR). In addition, the SSR acknowledges that uncovered short-selling may increase the potential risk of settlement failure and volatility and, as a consequence, imposes restrictions in that respect to reduce such risks, stating that a short sale of a share can be entered into only when certain conditions have been met. Indeed, before conducting a short sale, the person needs to have either (i) borrowed the share; (ii) entered into an agreement to borrow the share or have another absolutely enforceable claim so that the settlement can be effected when due; or (iii) an arrangement with a third party that has confirmed that the share has been located and has taken measures so that the short-seller has a reasonable expectation that the settlement can be effected when due.
173. These activities play a crucial role in providing liquidity to financial markets within the European Union, and market-makers need to take short positions in performing their task. Imposing notification or disclosure formalities and restrictions in respect of short sales performed by market-makers could severely inhibit their ability to provide liquidity and have a significant adverse impact on the efficiency of EU financial markets (recital 26 of the SSR).
174. The SSR exemption allows market-makers to build net short positions without having to notify the relevant competent authorities and disclose to the public, as well as to enter into short sales without having coverage for them. The SSR exemption applies only to transactions that are essential for performing market-making activities as defined in art. 2(1)(k) of the SSR. All other trading activities conducted by a market-maker (and, in particular, proprietary trading) are subject, in their entirety, to the SSR prohibitions and transparency requirements.
175. As specified in art. 17(5) and (8) of the SSR.
176. The notification procedure is not an authorization or licensing process of the competent authority. The competent authorities can prohibit the use of the exemption at any time, either during the 30 calendar days from when they receive the notification or subsequently when there have been changes in the circumstances of the notifying person so that it no longer satisfies the conditions of the exemption. This may result from an own assessment by the competent authorities or from a subsequent notification received from the notifying person indicating a change affecting its ability to use the exemption.
177. 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 (accessed 30 Sept. 2019).

© Copyright 2019 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Exported / Printed on 8 Oct. 2019 by IBFD.

- unlike other national competent authorities, Consob and the Bank of Italy[178] notified ESMA that they intend to comply with the ESMA Guidelines,[179] and they are indeed doing so;
- the Italian tax authorities have informally stated that reference would be made to the ESMA Guidelines for the purposes of the IFTT exemption.[180]

4.3.3.2. The SSR exemption

Market-making activities are defined in article 2(1)(k) of the SSR as follows:

> [T]he activities of an investment firm, a credit institution, a third-country entity, or a firm as referred to in point (l) of Article 2(1) of Directive 2004/39/EC which is a member of a trading venue or of a market in a third country, the legal and supervisory framework of which has been declared equivalent by the Commission pursuant to Article 17(2) where it deals as principal in a financial instrument, whether traded on or outside a trading venue, in any of the following capacities:
>
> (i) by posting firm, simultaneous two-way quotes of comparable size and at competitive prices, with the result of providing liquidity on a regular and ongoing basis to the market;
>
> (ii) as part of its usual business, by fulfilling orders initiated by clients or in response to clients' requests to trade;
>
> (iii) by hedging positions arising from the fulfilment of tasks under points (i) and (ii).

The SSR exemption only applies to transactions of a market-maker carried out while performing the above-mentioned activities (liquidity provision, client facilitation and related hedging) and on the condition that all relevant requirements are satisfied.[181]

Market-making activities eligible for the SSR exemption are only those undertaken by the entities specifically listed in article 2(1)(k) of the SSR. These include, in addition to EEA investment firms and credit institutions, third-country entities that are members of either (i) a market in a third country of which the legal and supervisory framework has been declared equivalent by the Commission pursuant to article 17(2) of the SSR;[182]'[183] or (ii) a trading venue in the European Union. Any such entity is entitled to avail itself of the SSR exemption, provided that it is a member of a trading venue (or a market in a third country with a declared equivalent regime) and it performs, as principal, whether on or outside a trading venue, any of the quoting, client servicing and hedging activities listed in article 2(1)(k) in respect of the financial instruments for which it notifies the exemption.

4.3.3.3. The IFTT exemption: The general rule and the special rule

Under article 16(3)(a), first paragraph of the Treasury Decree (the general rule), the IFTT exemption applies provided that the person acting as market-maker has been granted the SSR exemption under article 17(1) of the SSR by the competent authority specified in article 17(5) and (8) of the SSR.[184] Unless the special rule referred to below applies, being entitled to the SSR exemption is, therefore, a requirement for the purposes of the IFTT exemption. Under the general rule, a market-maker can rely upon the IFTT exemption on the condition that (i) it has notified the competent authority in a timely manner that it intends to make use of the SSR exemption; (ii) the competent authority has not prohibited the use of such exemption; and (iii) the envisaged trades meet the SSR article 2(1)(k) definition and satisfy the conditions and requirements in the SSR and the ESMA Guidelines.

A specific procedure is contemplated for market-makers that are established in countries to which the SSR is not directly applicable and cannot make the SSR notification to the competent EU regulator under article 17(1) of the SSR. Indeed, article 16(3)(a), second paragraph of the Treasury Decree (the special rule) states that, in these instances:

---

178. Art. 4-ter(2) of the Italian Finance Code designates Consob as the national competent authority for receiving the notifications, implementing the measures and exercising the functions and powers provided for in the SSR in relation to shares and financial instruments other than sovereign debt and sovereign credit default swaps. Paragraph 3 of the same article designates the Bank of Italy and Consob as the competent authorities for exercising the ordinary functions and powers provided for in the SSR in relation to sovereign debt and sovereign credit default swaps.
179. *See* the joint communication published on 5 June 2013 by the Bank of Italy and Consob, available at https://www.bancaditalia.it/compiti/sispaga-mercati/short-selling/normativa/2013-06-Comunicazione-congiunta-BI-Consob.pdf (accessed 30 Sept. 2019) (the document is available in Italian only). *See also* the Guidelines Compliance table published by ESMA, available at https://www.esma.europa.eu/sites/default/files/library/esma70-21038340-46_compliance_table_-_guidelines_on_market_making_activities_under_ssr.pdf (as of the 1 Aug. 2019 update) (accessed 7 Oct. 2019).
180. References to the ESMA Guidelines are contained in a draft Q&A on the scope of the IFTT Exemption, which however, has never been finalized and published by the Italian authorities.
181. The SSR exemption does not cover the entire scope of activity of a market-maker; in particular, it does not apply to proprietary trading (recital 26 SSR).
182. Art. 17(2) SSR: "The Commission may … adopt decisions determining that the legal and supervisory framework of a third country ensures that a market authorised in that third country complies with legally binding requirements which are, for the purpose of the application of the exemption set out in paragraph 1, equivalent to the requirements under Title III of Directive 2004/39/EC [MiFID I], under Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) and under 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 which are subject to effective supervision and enforcement in that third country". Directive 2003/6/EC is no longer in force, having been replaced by Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse. MiFID I is also no longer in force, and reference shall now be made to the provisions of Title III of MiFID II concerning regulated markets.
183. So far, however, the EU Commission has not adopted any such equivalency decisions.
184. The wording of the Treasury Decree is not accurate, in the sense that, under the SSR, the competent authority in art. 17(5) and (8) will not be formally granting the SSR exemption. Rather, the SSR exemption is available to entities that have notified the competent authority in writing that that they intend to make use of it, on the condition that the competent authority has not prohibited the use of such exemption.

© Copyright 2019 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Exported / Printed on 8 Oct. 2019 by IBFD.

[...] the person acting in the course of market-making activities is entitled to the exemption, provided that such person has submitted a specific application to Consob according to the procedures that will be set out in a regulation to be issued by this public authority; the applicant shall in any case prove to comply with the same requirements and conditions provided for in the above [Short Selling] Regulation and [ESMA] Guidelines. Consob, on the basis of the information that it has received, confirms the satisfaction of the prescribed requisites [i.e. compliance with the requirements and conditions under the SSR and the ESMA Guidelines], within the deadline that will be set out in a forthcoming regulation issued by this same authority. Consob shall retain the right to request additional documentation; in this case, the statutory deadline period starts again from the reception of the above documentation.

In this respect, the Treasury Decree includes a specific tax rule on the equivalence of third-country venues, which addresses the fact the Commission has not yet adopted any equivalence decisions for the purposes of the SSR.[185]Indeed, the same article 16(3)(a), second paragraph of the Treasury Decree states that, pending the adoption by the European Commission of the above-mentioned equivalence decisions, for the purposes of the IFTT exemption under the special rule:

[Third-country] regulated markets and multilateral trading facilities are deemed to be equivalent, provided that they are:

- authorized and supervised by a national public authority with which Consob has concluded a bilateral cooperation agreement, as identified in the specific section of the Consob website;[186]or
- authorized and supervised by a national public authority with which Consob has concluded a multilateral cooperation agreement, as identified in the specific section of the International Organization of Securities Commission's website,[187]provided that they are established in states and territories with an adequate exchange of information with Italy;[188]or
- recognized by Consob under Art. 70(1) of the Italian Finance Code, based on the list published on the Consob website.[189]

Consob adopted the regulation referred to in article 16(3)(a), second paragraph of the Treasury Decree with the Resolution of 2 October 2013, n. 18663[190](the Consob Resolution), which replaced and superseded the previous Resolution of 13 March 2013, n. 18494.

The Consob Resolution governs the application that needs to be made by market-makers established in non-EU/EEA jurisdictions under the special rule for the purposes of the IFTT exemption and also includes the form to be filed with Consob for that purpose.[191]Consob shall reply to the applicant within 30 days from the receipt of the form.[192]In its response,[193]Consob will indicate whether, based on the information submitted by the applicant, the latter satisfies the requirements and is therefore eligible for the IFTT exemption.

It is clearly stated in the Consob Resolution that the application to Consob under the special rule is not deemed to be a notification for the purposes of the SSR exemption and cannot be made by firms that carry out market-making activities, as defined in the SSR, on an EU regulated market/MTF[194]or on a trading venue of a third-country of which the regulatory and supervisory framework has been declared equivalent by the European Commission based on article 17(2) of the SSR.[195]These firms fall within the scope of the general rule and, accordingly, can benefit from the IFTT exemption, provided that they have given valid notification to the competent rEegulator for the purposes of the SSR exemption and are entitled to that exemption.

A market-maker to which the special rule applies is entitled to the IFTT exemption on the condition that (i) it has, in a timely manner, filed the application with Consob to notify the Italian authorities that it intends to make use of the IFTT exemption; (ii) Consob has confirmed the utilization of such exemption; and (iii) the envisaged trades meet the article 2(1)(k) SSR market-making definition and satisfy the conditions and requirements of the SSR and the ESMA Guidelines.

4.3.3.4. Brexit's impact on the availability of the IFTT exemption for UK-based market-makers

If the United Kingdom leaves the European Union with a ratified Withdrawal Agreement in place, during the transition period, the SSR should continue to apply to the United Kingdom, and any short-selling notifications made to the FCA should remain valid. As a

---

185. *See* the sources cited in *supra* n. 182 and n. 183 .
186. *See* http://www.consob.it/web/area-pubblica/cooperazione-internazionale (accessed 30 Sept. 2019).
187. *See* https://www.iosco.org/about/?subSection=mmou&subSection1=signatories (accessed 30 Sept. 2019).
188. The jurisdictions that allow for adequate exchange of information with Italy for tax purposes are listed in the Ministerial Decree of 4 September 1996, as broadened by the Ministerial Decree of 9 August 2016 and subsequently amended by the Ministerial Decree of 23 March 2017.
189. *See* http://www.consob.it/web/area-pubblica/mercati-esteri/#accordi (accessed 30 Sept. 2019). The list only includes venues in Switzerland (SIX Swiss Exchange) and the United States (CBOT, CME-Globex, NYSE Liffe, ICE Futures U.S., NYMEX and COMEX). The Treasury Decree makes reference to art. 67(2) of the Italian Finance Code. Due to subsequent changes, the reference is now to art. 70(1) of the same code.
190. *See* http://www.consob.it/documents/46180/46181/d18663.pdf/d5002ad3-1325-4ccc-86fe-e30b3a1b5ab3 (accessed 30 Sept. 2019).
191. The form shall be sent, together with all the required annexes, either by registered email to consob@pec.consob.it or by registered letter to Consob, Markets Division, Post-Trading Office, Via G. B. Martini 3, 00198 Rome. The form and the annexes must be sent in advance by email to shortselling-service@consob.it .
192. In the event that Consob requires additional documentation, the 30-day period begins from the receipt of that documentation.
193. The response is also communicated to the Minister of Economy and Finance.
194. According to the SSR and the ESMA Guidelines, a third-country entity that is not authorized in the European Union and that is a member of EU trading venues shall make an SSR notification to the competent EU authority. In this respect, art. 17(8) of the SSR defines the relevant competent authority as that of the main trading venue in the European Union on which it trades. Therefore, when a third-country entity intends to make use of the SSR exemption for market-making activities for a specific financial instrument, it should notify the authority of the trading venue where it carries out most of its trading activities in Europe. Making that notification is also an essential requirement for the purposes of the IFTT exemption.
195. *See* the sources cited in *supra* n. 182 and n. 183 .

© Copyright 2019 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Exported / Printed on 8 Oct. 2019 by IBFD.

consequence, the IFTT market-making exemption should remain available to UK firms under the general rule, on the same terms that currently apply.

Conversely, in the event of a no-deal Brexit, the SSR should cease to apply to the United Kingdom as of exit day. The IFTT market-making exemption should continue to apply under the general rule to UK firms that keep on carrying out market-making activities over Italian shares on Italian[196]or other EU-27 trading venues. These UK firms, however, should be required to make a valid new short-selling notification to the competent EU-27 regulator (in replacement of their previous notification to the FCA, which should no longer be valid for these purposes).[197]Making that SSR notification is also a condition for the availability of the IFTT exemption under the general rule in respect of the Italian shares specifically identified in the notification.[198]

UK firms that only conduct their market-making activities over Italian shares on UK venues[199]will, on the contrary, fall within the scope of the special rule and will, therefore, have to file the application with Consob in order to remain eligible for the IFTT exemption.

---

196. Based on the provisions of the Brexit Decree, UK firms that were members of Italian regulated markets and MTFs as of exit day should be allowed to retain their membership for an 18-month period as from exit day (*see* Part. I, sec. 4.2.3.) and, accordingly, may continue to carry out their market-making activities over Italian shares on those venues.
197. According to art. 17(8) of the SSR, when a third-country entity intends to make use of the SSR exemption for a specific financial instrument that is admitted to trading or traded in the European Union, it should notify the authority of the trading venue where it carries out most of its trading activities in Europe. In this respect, the ESMA Guidelines clarify that "the third country entity should assess its activity in the course of the preceding year on the basis of the turnover … per trading venue when performing market making activities in financial instruments in Europe …, and, identify on which European trading venue (i.e. regulated market or MTF) it is the most active".
198. The SSR exemption is available on a per-instrument basis (as far as equity instruments are concerned). Therefore, the new SSR notification should include a list of all ISINs (including Italian ones) in respect of which the SSR exemption is sought.
199. UK trading venues that should be treated as equivalent to EU venues for IFTT purposes, based on the criteria set out in art. 16(3)(a), second paragraph of the Treasury Decree.

© Copyright 2019 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Exported / Printed on 8 Oct. 2019 by IBFD.