Financial Transaction Tax

(Shares and other financial instruments subject to the tax)

Unless otherwise specified, legal references are made to the Decree of the Minister of Economy and Finance of 21 February 2013.

ARTICLE 1 - Definitions

1) Does the definition of "shares" referred to in Article 1(2)(c) also include the shares of consortia as joint venture companies for the purpose of Article 2615-ter of the Civil Code, where the consortium is constituted as *società per azioni* or *società in accomandita per azioni*?

Pursuant to Article 2615-ter of the Italian Civil Code, the definition of consortia may include *società per azioni*, *società in accomandita per azioni*, *società a responsabilità limitata*, *società in accomandita semplice* and *società in nome collettivo* having the consortium activities as their business purpose. Only consortia having the legal form of *società per azioni* and *società in accomandita per azioni* may issue shares covered by the definition in Article 1(2)(c) of the Decree, with the consequence that they are subject to tax in case of transfer of ownership.

2) For the purposes of the definition of "regulated markets and multilateral trading facilities" referred to in Article 1(2)(f) for markets established in Countries which are not covered by Directive 2004/39/EC (MiFID Directive) is an application for prior authorization from CONSOB required for the platform to be regarded as "regulated"?

No prior authorization is required from Consob since the Decree clarifies that for Member States not covered by the MiFID Directive, if included in the list referred to in the Ministerial Decree issued pursuant to Article 168-bis of TUIR ("Consolidated Act on Income Taxes"), regulated markets and multilateral trading facilities mean those systems that function regularly and are authorized by a national public authority (namely of the State concerned) and subject to public supervision, including those authorized by Consob pursuant to Article 67(2) of TUF ("Consolidated Law on Financial Intermediation"). According to this provision, Consob - subject to prior agreements with the relevant authorities - may authorize markets in financial instruments, other than those recognized under EU law, for the (specific) purpose of extending its operations to the territory of the Italian Republic and not, therefore, in order to define them as "regulated".

ARTICLE 2 - Objective scope

3) **Is the transfer of equity securities from one securities account to another with a different holder relevant for the application of the financial transaction tax? If so, does it also cover the transfer of bearer shares?**

The transfer of shares between securities account with different holders is a pre-requisite for the application of the tax if resulting from the transfer of ownership. The same holds true for bearer shares.

4) **Pursuant to Article 2 of Decree Law No 143 of 16 September 2008, converted with amendments into Law No 181 of 13 November 2008, the securities seized in the course of criminal proceedings or for the application of the preventive measures referred to in Law No 575 of 1965, as well as other securities subject to other preventive measures prescribed by law, are headed for the Fund referred to in Article 61(23) of Decree Law No 112 of 25 June 2008, converted with amendments by Law No 133 of 6 August 2008, called *Fondo unico giustizia* ("Single Fund Justice"), managed by Equitalia Giustizia S.p.A.**
Pursuant to the provisions of Article 10 of subsequent Decree Law No 98 of 6 July 2011, converted with amendments into Law No 111 of 15 July 2011, the above securities may be sold in accordance with certain principles laid down by the relevant legislation. What treatment should be reserved for the purposes of the financial transaction tax to the equity securities held for the *Fondo unico giustizia*?

According to the principle of continuity of taxation in the case of property subject to seizure, which is stated - albeit for direct taxation purposes – in Article 51 of Legislative Decree No 159 of 6 September 2011, according to which the taxation applicable to goods seized is to be regarded as provisional until the time of final confiscation, it is considered that the mere condition of being headed for the FUG is not a relevant event for the purposes of the financial transaction tax, bearing in mind that it will be applicable in the case when equity securities seized and headed for the FUG are sold pursuant to the procedures established by the above Decree Law No 98 of 2011, as well as in the event that these securities are permanently subjected to confiscation.

ARTICLE 3 - Transfer of ownership

5) **Article 3(1) provides that the person responsible for the payment, subject to prior consent of the taxpayer, can take the settlement date stipulated in the contract in alternative to the date of registration of transfers at the end of settlement as the transaction date. Can that consent from the taxpayer be acquired by means of a communication to the customer, with the application of the "silence means consent" rule? If so, is it possible to make only one communication applying to all transactions conducted in future by a single customer (and not for each transaction)?**

Communications can be made only once for multiple operations for each taxpayer with notice to the customer that it would be valid until revoked. It should also be noted that the rule does not only provide for the "silence means consent" rule; the customer may also explicitly express his/her intention.

6) Is it possible to use both the trading date and either the actual settlement date or the date contractually provided as the date of purchase? How should the intermediary choose the market exchange rate?

As provided for by Article 3(1), the date of purchase shall mean the settlement date or, as an alternative, the settlement date contractually provided for. Therefore, the trading date is irrelevant. As for the choice of the exchange rate, the provisions of Article 3(1) are of interest.

7) The cases of refund or exchange of bonds with securities (ADR) representing equity investment are not listed among the operations in the first sentence of Article 3(3), according to which also the exchange or refund of bonds by means of shares or other participating financial instruments. Is the provision also applicable to the latter?

For the sake of systematic coherence, it is believed that ADRs should be included among the securities to which Article 3(3) applies, and that the date of transfer of ownership is that provided for in the second sentence of that paragraph.

ARTICLE 4 - Value of the transaction

8) For the purposes of netting, is it possible to consider transactions carried out on different trading dates?

It is possible to consider also transactions carried out on different trading dates if they are settled on the same date.

9) The tax shall be paid on the net purchases determined by settlement date; moreover, netting can be conducted also between purchases and sales made on different markets, only where the settlement date is the same (*e.g.* a purchase made on the Italian Stock Exchange at t=0, settled at *Monte Titoli* at t +3, can be offset against sales made at t=1 on markets with settlement date at t+2). In this respect, please clarify whether it is possible to choose between the actual settlement date and the date stipulated in the contract.

As already explained, netting between different transactions is conducted according to the settlement date; therefore, it is possible to compensate also for transactions taking place on different trading dates provided they are settled on the same day. The choice between the actual settlement date and settlement date stipulated in the contract is reserved, pursuant to provisions in the third sentence of Article 3(1), to the cases where the person in charge of the payment is different from the taxpayer; in the other cases, the settlement date is always that referred to in the second sentence of that paragraph, namely that "made at the end of settlement of the relevant transaction."

10) In the case of market purchases, is the exchange value paid for acquiring the securities to be considered also taking account of additional charges?

The purchase price is not considered as including additional charges.

11) In case of earn out clauses how is the financial transaction tax applied? For instance, if the closing price amounts to 100 and an earn out clause envisages a variable price (upward or downward) integration of 20, on certain conditions, how is the tax applied?

In case of acquisition of shareholdings, due to perspective contract clauses, the closing price can be upward or downward revised according to the attainment of certain future economic-property and/or financial goals (profits, EBITDA, turnover, etc.). This is due to the so-called earn-out clauses according to which the payment of a part of the price is conditioned and/or dependent on a certain result or situation of the company purchased in a moment or period of time after the transfer.
The financial transaction tax is to be applied also on the variable part of the price, deriving from the above-mentioned clauses, which is an integration of the closing price. The tax is due on the date on which the payment of the price integration is contractually due. In case of downward price revision, the taxpayer is entitled to be refunded of the overpaid tax.

12) Please clarify if for the purposes of price determination in the case of endorsement authentication, the intermediary involved in the endorsement has to make reference to the provision referred to in Article 4(2)(d) (value stipulated in the contract).

In such a case the intermediary involved in the endorsement (usually the seller's one), responsible for the application of the tax, considers as purchase price the value paid for the purchase of the security which cannot be lower than the value stipulated in the contract if the endorsement determines a market purchase. Article 4(2)(d) refers to the value stipulated in the contract (or, failing that, the normal value determined under Article 9(4) of TUIR) and applies to all cases other than market purchase.

ARTICLE 5 – Persons liable to tax

13) In the case of an exchange of shares for shares, is the tax paid by both parties?

In this case the taxable event takes place for both parties unless the shares exchanged are, in one or both cases, newly issued.

ARTICLE 6 – Tax rate

14) In the case of share ownership transfer following the use of a derivative financial instrument between 1 March 2013 and 1 September 2013, is the tax referred to in Article 1(491) of Law No 228 of 24 December 2012 applied? Are the shares so purchased to be considered to determine the daily net balance?

Article 6(5) explicitly sets forth that "a 0.2 percent tax rate shall apply to the purchase of shares, participating financial instruments and securities representing equity investment

resulting from the settlement of the financial instruments referred to in paragraph 492". Such a rate is the one envisaged by Article 1(491) of Law No 228 of 2012, for the transfers not taking place in regulated markets and multilateral trading facilities. Therefore, if a share ownership transfer takes place after 1 March, it is still subject to the tax referred to in paragraph 491 even if following the exercise of derivative contracts; such purchases are considered when calculating the daily net balance.

ARTICLE 15 - Exclusions from the tax

15) **Please clarify if the purchase of own shares is always outside the scope of the tax or it is so only in the case in which the shares are purchased and cancelled. In this respect, if the cancellation is decided after the purchase of own shares, should this be anyhow excluded from the FTT application?**

The purchase of own shares is not excluded from taxation if aimed at the cancellation of the shares. If the cancellation is decided after the purchase of own shares, the purchase is subject to tax because when it was performed it was not aimed at the cancellation of shares.

16) **Article 3(3) in conjunction with Article 15(1)(d) could lead to think that the exclusion envisaged by the latter provision for primary market issues operates only for "conversions of bonds" in newly issued shares and not also for the "exchanges" of bonds with shares or other newly issued participating instruments, which are not explicitly mentioned in Article 15. Although the ratio legis of the provision leads to think that the tax always and only applies to already circulating shares with exemption of newly issued ones, please confirm such interpretation.**

Even if Article 15(1)(d) mentions only the conversion of bonds in shares, due to the ratio legis to exclude newly issued shares in order to favour the raising of capital, it is deemed that the exclusion from the tax refers also to the exchange and refund of bonds with newly issued shares. Therefore, the exclusion refers to all cases of issues of new shares, in line with the directive on the raising of capital.

17) **Please clarify the procedures for applying the tax in case of units of ETF. In particular, in the case of purchase of shares in order to contribute them in the ETF**

As specified in the explanatory memorandum to the decree, in the case of ETF *creation in kind*, the tax is due by the subject (*creation agent*) purchasing the shares (or participating instruments) in order to contribute them in the ETF. In case of *creation in cash*, the tax is due by ETF at the time of the share purchase (or participating instruments or securities representing equity investment). In case of *redemption in kind*, the same procedure as creation in kind applies: only the sale of shares on the market by the *creation agent* is subject to tax.

18) **The explanatory memorandum to the decree identifies as an exclusion from the tax transactions such as the allocation of newly issued shares against distribution of**

profits or reserves and the allocation of newly issued shares against stock option schemes not explicitly laid down by Article 15 of the decree.
Please confirm the cases falling in those to be reported.

The allocation of newly issued shares is covered by the concept of transaction on the primary market; therefore it is excluded from tax in any case.
As far as the transactions on capital (so-called corporate actions) are concerned the explanatory memorandum specifically indicates that the distribution of profits or reserves through the allocation of shares, even if not newly issued ones (e.g. own shares in portfolio by the issuer) is anyhow excluded from tax. This is due to the fact that the choice as to the collection method of profits and/or reserves is not left to the discretion of the subject becoming owner (and who should therefore pay the tax).
The measure of 18 July 2013 issued by the Director of the *Agenzia delle Entrate* gave indications on excluded (and exempt) transactions that are to be recorded by the intermediaries in the summary and condensed statements.

19) Please clarify the rules for the determination of the tax base in the case of temporary transfer of securities ending with a final transfer (paragraph 1, letter e)).

In the cases outlined the tax is to be calculated according to the provision of Article 4(2). In particular, the following clarifications are given distinguishing the tax base as envisaged by Article 15(1)(e) for the cases of enforcement of the collateral taking place through the sale or appropriation of the securities, set-off of the collateral against the relevant financial obligations or application of the collateral in discharge of the relevant financial obligations.
In the case of sale of securities the tax base is given by the value paid. In the case of appropriation of securities or set-.off against the relevant financial obligation the tax base coincides with the value attributed in the financing contract to the securities given as collateral or, failing that, their normal value.

20) Does the exclusion set forth for intra-group transactions apply also to transactions between companies indirectly controlled by the same company?

The Decree clarifies that the exclusion from tax referred to in Article 1(491) and (492) of Law No 228 of 2012 refers also to transfers and transaction performed between companies controlled by the same company. Without any specific provision explicitly laying down that the control of the two or more companies between which the transfer takes place must be direct or indirect by the only controlling company, it is deemed that the control over the sister companies by the controlling company can be both direct and indirect.

21) Please clarify whether the notion of relationship of control referred to in Article 15(1)(g) also applies when companies are resident in different States.

The notion of relationship of control mentioned for the purposes of the exclusion of certain transactions from the scope of the tax refers to Article 2359(1) numbers 1) and 2) of the Civil Code as well as to the case of companies controlled by the same company. The rule in question does not preclude the application of this notion to non-resident companies. It is therefore considered that the exclusion also applies in cases of transfer of ownership between non-residents in the same State.

22) For the purposes of the exclusion from tax stipulated in Article 15(2)(a) (for purchases and transactions entered into by a financial intermediary interposed between two parties acting as a counterparty to both sides), should the requirement set by the rule whereby for both operations the price must coincide, be understood in the sense that the fees for the intermediaries are not considered to this end? Can the above requirement be considered as met also where the coincidence of price/total quantity and date is referred to groups of customers?

In relation to the first question, the interpretation that the price should not take into account the fees for the intermediaries can be agreed with. As far as the exclusion is concerned, this does not apply in the case of groups of customers.

23) The exclusion provided for the systems of clearing and collateral (Article 15(2)(b)) requires that they be authorized under Regulation (EU) No 648/2012 (EMIR). Given that the authorization will not be granted by an explicit Regulation provision before 2014, is it still possible at this stage to consider the *Cassa di Compensazione e Garanzia SpA* (CCG) as excluded, along with the persons performing similar roles in regulated markets in white-list States?

The EMIR stipulates in its transitional provisions (Article 89) that "until a decision is made under this Regulation on the authorisation or recognition of a CCP, the respective national rules on authorisation and recognition of CCPs shall continue to apply and the CCP shall continue to be supervised by the competent authority of its Member State of establishment or recognition." The CCG and other persons who perform similar roles in regulated markets in white-list Member States are, therefore, excluded from the financial transaction tax, provided that they are authorized and recognized under domestic rules that continue to apply until the decision of authorization/recognition is made, pursuant to the EMIR Regulation.

24) Please clarify how the capitalisation threshold should be verified in the case of transfer, from abroad to Italy, during the year of the registered office of a company listed in the Stock Exchange.

In such cases, a rule similar to that in last sentence of Article 17(2) concerning the first admission to trading, can be applied: for the year (or two years) for which it is not possible to communicate by 10 December the average market capitalisation for the preceding month of November, a market capitalization of less than 500 million is assumed.

25) Please clarify whether the exclusion provided for in Article 15(1)(g) may also apply to transactions between unit trusts between which there exists a relationship of control similar to that provided for by Article 2359 of the Civil Code.

For the sake of systematic coherence, it is believed that Article 15(1)(g) also applies to unit trusts that are not in corporate form, also with a view to avoid discrimination between *fondi costituiti come patrimonio autonomo* (funds with equities raised independently) and SICAVs (investment companies with variable capital).

26) In relation to the common market practice for the negotiation of Depositary Receipts (DRs) - which provide several stages between the purchase order placed by the customer and the delivery of the securities to him – please clarify at which stage the tax should be applied, since the different stages are part of the same transaction, and also the rate to be applied.

Transactions relating to the negotiation of DRs should be treated in the same way as the transfer of the shares represented by those securities. This means that all the steps required to get to the delivery of the DRs to the person requesting their purchase are taxed only once. More specifically, the financial transaction tax applies on the transfer of DRs to the purchaser. The person liable to the payment of the tax is the intermediary receiving the request by the purchaser to purchase the DRs. In other words, the purchase of the shares on the market, the subsequent transfer of the shares to the custodian bank and the issuing of DRs by the custodian bank are not taxed.
The rate to be applied to the first placement for the underlying securities that are not newly-issued depends on the place where such placement takes place (OTC/market). The application of the reduced rate for DRs is envisaged where transactions take place on regulated markets and multilateral trading facilities.

27) With regard to the transactions referred to in Article 15(2)(a) (so-called "riskless principal trading"), for the purposes of calculating the tax base and the tax rate please clarify how the transactions where the intermediary purchases the securities partly on the markets and partly OTC should be treated.

The intermediary adopting this mode of operation is excluded from the tax, just like the intermediary that is interposed without buying and then reselling the securities. Since the activities are considered, in substance, as equivalent, the same treatment shall result for the purchaser, whether the intermediary is acting in a riskless mode, or is interposed without buying the securities. For the purpose of calculating the tax base (Article 4(1)) and for the purpose of determining the tax rate (Article 6(3)), the transactions are considered to be executed on regulated markets and multilateral trading facilities or OTC according to the actual conditions of purchase followed by the intermediary. More specifically, with reference to Article 6(1), "total quantity" is meant to refer to the entire customer order, but if such order is executed with purchases both on the regulated market and OTC, the rate reduction provided for in Article 6(1) shall be applicable only to the part of the order executed on regulated markets and multilateral trading facilities.

ARTICLE 16 - Exemptions

28) Can sovereign wealth funds be exempted from the application of financial transaction tax under Article 16(1)(a)(3) of the Decree?

Sovereign wealth funds are exempt from the tax, according to Article 16(1)(a)(3), where they invest the official reserves of the State.

29) **Please clarify the treatment for FTT purposes of the purchases of shares or of derivative transactions made by ethical investment funds or as part of portfolio management described as ethical or socially responsible.**

The purchases of shares or of derivative transactions made by ethical investment funds or as part of portfolio management described as ethical or socially responsible are subject to FTT as no exemptions has been envisaged in these cases.

30) **Last sentence of Article 16(5) provides for the exemption from tax for persons and entities receiving solely pension funds. Please clarify whether the exemption can be applied to these persons regardless of their State of establishment.**

The exemption in question applies to all persons and bodies receiving pension funds, provided that the pension funds have the features required by the Decree for exemption. The residence of such persons and bodies shall not be relevant for these purposes.

31) **Last sentence of Article 16(5) provides for the exemption from tax for persons and bodies receiving solely pension funds. Please clarify whether the exemption can be applied also to persons and bodies of the same kind receiving other forms of supplementary pension schemes.**

In view of the aim of the provision, it is believed that also persons and bodies of the same kind receiving other forms of supplementary pension schemes are entitled to the exemption.

ARTICLE 21 - Tax implementation in 2013

32) **Paragraph 5 provides that for 2013 the tax on the transfers of the ownership of shares and other participating financial instruments be set at the rate of 0.22%, reduced to 0.12 per cent for the transfers taking place on regulated markets and in multilateral trading facilities. Please clarify whether in the case of transfer of the ownership of shares as a result of settlement of a derivative contract made in 2013, the applicable rate shall be that of 0.22 per cent.**

If the transfer of shares as a result of the settlement takes place in 2013, the 0.22 per cent tax rate applies, while if the same happens in 2014 the rate will be of 0.20 per cent.