

Italy's New Disclosure Rules for Trusts

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PRACTITIONERS' CORNER

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This article focuses on a recent Italian bill that would transpose into domestic law the disclosure requirements for trusts in the EU anti-money-laundering directive (2015/849).

Under new rules proposed in Italy, trustees must collect, retain, and disclose information on beneficial ownership of trusts connected to Italy that are given legal effect in that country. Trustees will be required to report this information in a special trusts section of the Italian Business Register (Registro delle Imprese).¹ The new rules are contained in a bill² to adopt the fourth EU anti-money-laundering directive (2015/849) in Italy's domestic law.

The new disclosure obligations will apply on top of international tax reporting rules requiring fiscally non-

transparent trusts, which are treated as resident trusts under Italian tax law, or resident beneficiaries of fiscally transparent trusts (resident or nonresident) to report foreign financial accounts and other assets owned by or through the trust, and capable of generating foreign-source income taxable in Italy (to the trust or its beneficiaries).

The directive requires trustees of express trusts governed by the laws of a member state to obtain and hold information on the trust's beneficial ownership, including the identities of the settlor, trustee, protector (if any), beneficiaries, and any other natural person holding authority or exercising any kind of authority or effective control over the trust. Any legal or tax consequences generated by trusts in a member state must be reported in a central register in that country.³

The Italian bill to implement the directive imposes these duties on trustees of express trusts that are governed in accordance with Law 364 of October 16, 1989,⁴ the federal legislation by which Italy ratified the 1985 Hague Convention on the Law Applicable to Trusts and on Their Recognition.⁵ Although Italy does not have a body of national statutory provisions on trusts, the implementation of the 1985 Hague Convention on Trusts into Italian domestic law through Law 364 of 1989 has the effect that foreign trusts created and governed under foreign law can be legally recognized and enforced in Italy. Accordingly, foreign trusts

¹The Italian Business Register is a public register held by the local chambers of commerce that contains the registration of all business entities.

²The bill (Legge Delega Europea 2015) under discussion in the Italian Parliament delegates to the Italian government the power to adopt eight EU directives (including the anti-money-laundering directive) in national law and to implement six EU regulations. Article 14 of the bill adopts Directive 2015/849 and is available at <http://www.affariregionali.it/media/169790/schema-ddl-recepimento-direttive-europee.pdf>.

³Article 31(4), EU Directive 2015/849; article 14(d), Italian bill.

⁴Article 14(2)(d)(3), Italian bill. The text of Law 364 of 1989 is available at http://www.tuttocamere.it/files/dirsoc/1989_364.pdf.

⁵The text of the convention is available at <http://www.hcch.net/upload/conventions/txt30en.pdf>.

that produce legal and tax effects in Italy are considered to be governed in accordance with Law 364 of 1989, thereby following under the scope of the new provisions on trust disclosure and registration laid out in the directive as well as the obligation to register in a special trusts section of the Italian Business Register.

The directive sets a deadline of June 26, 2017, for implementation in EU member states' domestic laws. Once enacted, the Italian bill would require the government to adopt legislative decrees with enforcement provisions under the legislative authority granted therein.

Scope

Trustees of foreign trusts that have legal or tax effects in Italy would automatically be subject to the new disclosure obligations, including the requirement to register the trusts in the Italian Business Register.⁶ Trustees of foreign trusts should carefully monitor the implementation of the directive into Italian law, and be ready to proceed with the collection of information about the trusts they administer and with the disclosure and registration of the trusts on the Italian Business Register as soon as the new rules are in effect.

A foreign trust would be treated as having legal or tax effect in Italy, thereby falling under the new disclosure and reporting rules, in a variety of situations. For example:

- the settlor may wish to use the trust to separate herself from the trust assets and income, and claim that she bears no tax obligations regarding the assets and income of that trust (those obligations falling on the trust or its beneficiaries);
- an Italian or foreign resident individual who is a beneficiary of the trust may wish to use the trust to claim the distribution of income or principal from the trust;
- a foreign trust with foreign settlor, beneficiaries, and trustees owns Italian assets and needs to be used and enforced in Italy as the legal arrangement through which the Italian assets are transferred and disposed of in accordance with the terms of the trust.

In each of these scenarios, the trust bars some connections with Italy and is used to produce legal or tax effects there, with the result that the new reporting and registration rules would apply.

Beneficial Ownership

Trustees of foreign trusts affected by the new rules must obtain, hold, and make available to Italian tax agencies, if required, accurate and up-to-date information on the beneficial ownership of the trusts or other similar fiduciary arrangements, as well as register this

⁶Article 14(d)(4), Italian bill; article 31(4), EU directive.

information in the trusts section of the Business Register.⁷ Trustees would also have to adopt customer due diligence procedures.

The beneficial owners of a trust are defined as the settlor, trustee, protector (if any), beneficiaries, and any other individual exercising ultimate control over the trust by means of direct or indirect ownership or otherwise.⁸ The disclosure requirement therefore applies to the identities of these parties and other related information.

This definition of beneficial ownership differs from that applicable to corporate entities, under which a beneficial owner is the natural person who ultimately owns or controls a legal entity by direct or indirect ownership of shares, voting rights, or ownership interest in that entity.⁹ A shareholding of 25 percent plus one share or an ownership interest of more than 25 percent held by a natural person would indicate direct ownership in this case.

Disclosure and Registration Obligations

Trustees are required to disclose information to tax and government agencies under the new rules within certain strict deadlines.¹⁰ The information must also be reported in the Italian Business Register, which makes it available without restriction to the tax and government agencies.¹¹

While information on the beneficial ownership of trusts must be made available only to competent authorities and obliged entities, information on the beneficial ownership of other legal entities must be registered in a section of the Business Register that can be accessed by any person or entity demonstrating a legitimate interest. Limitations on access apply to protect public order and privacy¹²; information would not be made available if it related to minors or incompetent individuals, or if disclosure would place the beneficial owner's safety at risk.¹³

Penalties

Article 58 of the EU directive requires member states to impose criminal and administrative sanctions for breaches of its provisions. Member states must ensure that sanctions can be applied to entities that engage in serious, repeated, or systematic breaches of

⁷Recital 17, EU directive; article 31, EU directive; article 14(d)(3)-(4), Italian bill.

⁸Article 3(6)(b), EU directive; article 14(d)(3.2), Italian bill.

⁹Article 3(6)(a)(i), EU directive.

¹⁰Article 14(d)(3.3), Italian bill; article 31(3), EU directive.

¹¹Article 14(d)(4), Italian bill; article 31(4), EU directive.

¹²Article 14(d)(2), Italian bill.

¹³Article 14(d)(2.1)-(2.4), Italian bill; article 30(5)(c), EU directive on beneficial ownership in general.

their obligations regarding customer due diligence, suspicious transaction reporting, or recordkeeping.¹⁴ Available sanctions must include public statements identifying the responsible person and nature of the breach; cease-and-desist orders; withdrawal or suspension of authorizations; temporary bans from exercising managerial functions in obliged entities; and pecuniary sanctions.¹⁵

Under the Italian bill, criminal sanctions can be applied only for fraud or forgery in conducting customer due diligence and recordkeeping.¹⁶ Penalties cannot exceed three years of imprisonment and a €30,000 fine.¹⁷ Administrative sanctions and other penalties apply for breaches of requirements concerning customer due diligence, suspicious transaction reporting, record keeping, and internal controls, as instructed by the directive. Administrative fees range from a minimum of €2,000 to a maximum of twice the amount gained from the violation, if determinable, or no less than €1 million.¹⁸ If the violation was committed by an entity, the sanctions would be applied to the responsible managing individuals.¹⁹

The fees for repeated and serious violations by financial institutions range from €30,000 to 10 percent of the entity's turnover and from €10,000 to €5 million for the individuals.²⁰

Other penalties may apply for lesser offenses, depending on the nature of the responsible party, the gravity of the damage, the amount of profit, and the degree of culpability. These include public disclosure of the responsible party's identity, an order to refrain from unlawful conduct, revocation of licenses or authorizations, and administrative fees, in line with the directive.²¹

¹⁴Article 59(1), EU directive.

¹⁵Article 59(2), EU directive.

¹⁶Article 14(h)(1), Italian bill.

¹⁷*Id.*

¹⁸Article 14(h)(4.5), Italian bill.

¹⁹Article 14(h)(3), Italian bill.

²⁰Article 14(h)(4), Italian bill; article 50(3), EU directive.

²¹Article 14(h)(6), Italian bill; article 59, EU directive.

Conclusion

The new disclosure rules introduced by the directive create significant challenges to the traditional benefits of trusts, including privacy protection. Although member states have until June 26, 2017, to bring their domestic laws into conformity with the directive, the Italian bill is likely to become law by the end of 2016, given the strict annual terms imposed on the Italian government to enforce European directives. Under the new Italian law, beneficiaries of trusts that are recognized and given effect in Italy could have reporting obligations,²² while trustees, regardless of nationality, would have to disclose information regarding the parties to the trust.

Since the directive is addressed to all EU member states, the new rules will not only affect trusts connected to Italy, but apply to those connected with any member state. It will be interesting to observe how other member states adopt the directive in domestic law. The requirement that trusts be included in a central domestic register may be particularly cumbersome for foreign trustees who are not familiar with the administrative procedures and rules applicable in the host country in which their trusts may have connections and legal effect. Further, interesting questions arise over how the directive will be implemented by member states that have not ratified the Hague Convention on Trusts²³ and that do not have internal rules on trusts. In that case, the directive's reference to trusts governed under the law of a member state may have the effect of preventing the application of the new disclosure rules in all of those states that do not recognize trusts.

Although the effects of the new rules on trusts (particularly the registration requirements) should be further examined once the directive is enforced in all states, they initially appear pervasive and discouraging. Trustees of trusts that are potentially affected by the new rules need to become familiar with the European directive and the new legislation in force in all member states to make sure they are ready to comply with the new reporting requirements. ◆

²²Italian beneficiaries might, for instance, have duties to report foreign investments by filing a RW form to the Italian IRS.

²³For example, Spain. The only member states to have signed the convention are Italy, France, Luxembourg, the Netherlands, the United Kingdom, Malta, and Cyprus.