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In this article, the author discusses Italy's proposed beneficial ownership register, which would apply to business entities, noncommercial entities, and trusts.

On December 23, 2019, the Italian Ministry of Economy and Finance published on its website a draft ministerial decree setting forth provisions for the establishment and operation of a register of beneficial owners of business entities, noncommercial entities, and trusts.

The establishment of the register is required by article 21 of Legislative Decree No. 231 of November 21, 2007, which contains domestic legislation transposing the EU anti-money-laundering directives into Italian law.¹

The draft decree is open to public discussion. Comments and observations can be submitted through the ministry's website until February 28. The final decree will be published and enter into force by July 3. For entities organized before the decree's entry into force, the filing of required beneficial owners information must take place by March 15, 2021. For entities organized after the entry into force, the filing of required beneficial owners information must happen within 30 days of the entity's organization date.

The Scope of Mandatory Filing

Filing their information in the register of beneficial owners is mandatory for individuals who qualify as beneficial owners of the following:

- commercial enterprises with legal personality, which include business entities organized in the form of a limited liability company, limited partnerships with capital divided by shares, joint stock companies, and cooperatives as defined and governed under the company law provisions of Italy's Civil Code;
- nonbusiness entities classified as private juridical persons, which include associations, foundations, and other entities that acquired legal personality through registration of juridical persons as instituted and governed by Presidential Decree No. 361 of February 10, 2000; and
- trusts and similar arrangements having relevant fiscal effects in Italy.

Italy does not have domestic legislation governing the establishment and administration of trusts. However, it is party to the Convention on the Law Applicable to Trusts and on Their Recognition, concluded in The Hague on July 1, 1985. Italy enacted and ratified the convention October 16, 1989, via Law No. 364, which recognizes and gives legal effect to trusts established under, and in compliance with, trust laws of a foreign country.

Regarding trusts, the December 2019 draft decree provides that mandatory filing applies to express trusts recognized and effective in Italy under Law 364 that:

- are tax residents of, or established within, Italy; or
- if nonresident and established outside Italy, derive taxable income from Italian sources.

Trusts that are resident in Italy for tax purposes are subject to tax on their worldwide income at the corporate rate of 24 percent and are required to file an Italian corporate income tax return.

¹Legislative Decree No. 231 of 2007 was enacted to implement the provisions of Directive 2005/60/EC (the third EU anti-money-laundering directive), and has been subsequently amended by Legislative Decree No. 90 of May 25, 2017, implementing the provisions of Directive 2015/849/EU (the fourth anti-money-laundering directive), and Legislative Decree No. 125 of October 4, 2019, implementing the provisions of Directive 2018/843/EU (the fifth anti-money-laundering directive).

The tax residence of trusts is determined under Italian tax laws, with reference to three alternative criteria:

- legal seat;
- place of administration; and
- principal object.

The legal seat of the trust is the official address of the trust as set forth in the trust agreement. The place of administration is the place where the trust is effectively managed, which is presumed to be the place where the trustee is resident or domiciled. The principal object is akin to the domicile of the trust and is intended to designate the place in which the principal activities, investments, or assets of the trust are located.

Nonresident trusts with Italian-source taxable income are also subject to filing in the register of beneficial owners. Italian-source income is determined under the source rules of article 23 of the Italian income tax code. Income such as dividends, interest, rents and royalties, and capital gains from portfolio investments (passive income) is generally taxed on a gross basis by way of a withholding tax at source. Income deriving from an active business is generally subject to net income taxation and requires the filing of an income tax return.

It is not clear from the draft decree whether the filing is triggered whenever a trust holds assets in Italy that are capable of generating Italian-source taxable income, regardless of whether any item of income is actually recognized by the trust, or solely when, in a specific tax year, the trust actually derived Italian-source income that was taxed in Italy. Also, it should be considered whether, as a matter of convenience or fairness, occasional Italian-source income recognized in connection with an isolated investment in an Italian-income producing asset should be enough to trigger the duty to file in the register.

Presumably, a “trust established in Italy” is a trust created in Italy under an agreement entered into and executed there, either by way of a private agreement or a public deed signed in front of a public notary. The place of establishment criteria seems to be disconnected from the tax criteria of residence and sources of income. It should be clarified whether a trust established in Italy, which is nonresident and does not have any

Italian-source taxable income, would still fall within the scope of the filing rules.

The mandatory filing in the register of beneficial owners does not apply to trusts established (created) outside Italy that are not residents of Italy and do not derive Italian-source taxable income. These trusts are effectively administered in a foreign country by a trustee or trustees domiciled or resident outside Italy, and they hold the majority of their investments, or conduct the majority of their activities, outside Italy.

The determination of the tax residence of the trust under Italian tax law will be very important in determining whether there is a duty to file. The tax classification and status of the trust under foreign tax law should not play any role.

The draft decree does not include any provisions on the duty to file for foreign business entities that do not qualify as trusts or similar fiduciary arrangements, incorporated or organized in a legal form similar to that of domestic entities required to file. I refer to the case of a permanent establishment in Italy, engaged in a trade or business in Italy deriving Italian-source business income, or foreign funds that hold portfolio investments in Italian companies from which they derive Italian-source portfolio income. It also does not refer to foreign entities treated as Italian resident taxable entities under Italy’s place of effective management test.

For Italian company law purposes, a foreign entity’s PE is treated as an Italian company and, as such, it is required to file in the general register of enterprises, obtain a VAT number, maintain Italian accounting books, and file an annual financial statement and corporate income tax return. Similarly, a foreign incorporated entity that is effectively managed in Italy is treated as an Italian company, under the place of administration and subject to the same filing requirements for Italian company and tax law purposes.

Persons Liable for Filing

The duty of filing with the register of beneficial owners falls upon — and constitutes the personal liability of — the directors or managers of commercial enterprises with legal personality; founders, administrators, and managers of

private juridical persons; and trustees or fiduciaries of trusts and similar arrangements.

Failure to faithfully and fully report information about beneficial owners carries significant penalties under the anti-money-laundering statute.

Definition of Beneficial Owners

Individuals classified as beneficial owners, and whose personal information must be filed in the register, are identified based on the following criteria.

For business enterprises with legal personality, beneficial owners are individuals who:

- directly or indirectly own more than 25 percent of the capital of, or hold more than 25 percent equity interest in, the enterprise (the ownership test);
- control the enterprise by virtue of holding the majority of the votes that can be cast in the ordinary meeting of shareholders of the enterprise, or a sufficient number of votes as required to exercise a material influence in the ordinary meeting of the enterprise, or are otherwise able to exercise a material influence on the enterprise under special contractual covenants or other arrangements (the control test); or
- in the event that no beneficial owner can be identified in accordance with any of the preceding criteria, have the statutory authority to act on behalf of the enterprise in its dealings with third parties, or the authority to administer, manage, or direct the enterprise, in accordance with the enterprise's bylaws, operating agreement, or other relevant organizational documents (the management or administration test).

In the case of a chain of companies, the ownership test based on indirect ownership would reach up to the entity's ultimate individual owners who may not own any directed interest in the Italian entity falling within the scope of the filing. The decree does not contain any specific provisions on the way in which indirect ownership should be tested for purposes of the ownership test (such as rules attributing ownership held through other entities, family members, or related parties).

Similarly, whenever the beneficial owner is identified through the control test, the duty to file may involve individuals who do not hold any actual voting power or formal authority within the entity. The draft decree does not include attribution rules, but the material influence through the other arrangements prong of the control test should be able to catch situations involving joint control exercised by family members or other persons acting in concert.

In any event, the final decree should set forth more detailed provisions about the way in which the ownership or control test should apply to make sure neither overreaches and makes filing too extensive in scope and too difficult to manage in practice.

For private juridical persons, beneficial owners include the founder or founders, beneficiary or beneficiaries (if identified or identifiable with sufficient certainty), and those who hold the power to legally represent, manage, and direct the entity under the entity's organizational documents and applicable law.

For trusts and other similar fiduciary arrangements, beneficial owners include the settlor or settlors, trustee or trustees, guardian or guardians, beneficiaries or classes of beneficiaries, and any other person or persons who exercise control over the trust or over the assets of the trust through their direct or indirect ownership or other arrangements.

The definition of beneficial owner for trusts is very wide in scope and requires an extensive review of the trust's governing documents, as well as the facts concerning the actual administration of the trust and the management and beneficial use of its assets. For example, the use of a trust's assets for personal benefit may be sufficient to classify that person as the beneficial owner of the trust and therefore require that person to file and disclose personal information.

Scope, Method, and Filing Deadline

The filing includes all personal information about the beneficial owner, such as name, date of birth, place of residence, and domicile. The individual liable for the filing is required to collect, verify, and keep the relevant beneficial owners information and the relevant information about the entity to which it relates, including the

date of organization, registered address, Italian tax code number, place of administration, and place of business.

Furthermore, for commercial enterprises (business entities) with legal personality, the filing must include:

- the ownership percentage of the entity's capital or equity, when the beneficial owner is identified through the ownership test;
- the source and nature of the power to control the enterprise, when the beneficial owner is identified through the control test; and
- the source and nature of the authority to legally represent and bind the entity or the power of administration or management of the entity, when the beneficial owner is identified through the power of the administration or management test.

For private juridical persons, the filing must include the entity's name, registered address, place of administration or principal place of business, Italian tax code number, and Italian legal certified email address.

For trusts and similar arrangements, the filing must include the trust's name, registered address, place of administration, place of establishment, and basic information about the essential elements of the trust.

The filing must also include a statement according to which an individual identified as beneficial owner claims the status of individual with a legitimate interest against access to the beneficial ownership information set forth in the register. This prevents general public access to that information. A legitimate interest against disclosure exists whenever the disclosure of the information on the register would expose a beneficial owner to a disproportionate risk of fraud, kidnapping, ransom, extortion, violence, harassment, or threat.

The filing is done electronically and requires registration of the entity with the Ministry of Economic Development's electronic database. In the event of any change of the facts and information that were submitted with the initial filing that change the status of the entity and identity of its beneficial owners, an amended filing must be carried out within 30 days of the change.

All information and statements due with the filing shall be submitted under penalty of perjury, and any incomplete or false submissions would be treated as a failure to file and subject to penalty.

Register Access

Tax authorities, anti-money-laundering officials, and finance police have unlimited and unconditional authority to inspect the register and retrieve the information on beneficial owners.

Similarly, any member of the public at large has access to the register to retrieve information on beneficial owners of commercial enterprises (business entities) and private juridical persons (nonbusiness entities with legal personality). The disclosure is limited to a beneficial owner's first and last name, month and year of birth, place of residence, citizenship, and grounds for beneficial ownership status. The access, however, is not permitted in respect of beneficial owners with a legitimate interest against disclosure.

In the case of trusts and similar fiduciary arrangements, access to the register is limited to those members of the public who have legal standing — namely, those who can show a legitimate interest in accessing the information, as a result of holding a legal right or claim that is:

- relevant and specific (such as to ground, integrate, and reinforce; or interfere with, injure, or diminish that legal right or claim); or
- direct, real, and present (relevant for the purpose of instituting or prosecuting the claim through judicial proceedings and producing direct effect on that specific legal right).

For that purpose, a person seeking to access the register must file an application and provide all relevant information and documentation showing eligibility based on the above criteria. The Ministry of Economy and Finance will rule on the application within 30 days of filing and can extend the deadline for the ruling once for a maximum of 10 days if the information or documentation supporting the application is deemed insufficient or incomplete. In the case of trusts, too, access will not be permitted regarding beneficial owners with a legitimate interest against disclosure.

Concluding Remarks

The register of beneficial owners will impose significant and cumbersome duties upon directors, managers, administrators, fiduciaries, and trustees of business entities, nonbusiness entities, and trusts. It will require the collection, maintenance, and disclosure of personal information on a vast number of individuals who can qualify as beneficial owners based on extremely flexible criteria that will significantly depend on the specific facts and circumstances of particular cases.

Access to the information on the register can be obtained by any private individual who can show a sufficiently specific legal right or claim giving standing, and that enforcement of the right or claim is met by accessing the information in any meaningful way.

Careful planning will be required to minimize the impact of the new filing rules.

For private individuals with interests in trusts, the fact that nonresident trusts without Italian-source income will fall outside the scope of the filing will deserve special consideration when reviewing trust planning structures. Individuals must ensure they will not face a more extensive

information disclosure duty relating to the trust, potentially affecting other related or unrelated individuals with interests in the same trust.

In a cross-border context, foreign trusts that are established outside Italy by nonresident individuals and that — either at the time of the creation of the trust or later — have connections with Italy must carefully assess the potential impact of the new filing and disclosure requirements and avoid any inadvertent failure to file on the part of their trustee. The failure would carry severe criminal and civil penalties. Connections with Italy could be established if the settlor or one or more beneficiaries or trustees moves to, or starts traveling more frequently to, Italy or if the trust purchases property located in Italy.

Conversely, trusts established in Italy by Italian resident settlors will have to be reconsidered because, as Italian resident trusts, they fall within the scope of the new filing and disclosure requirement.

Presumably, the draft decree will undergo further changes and adjustments before being approved in its final form. ■