

Italy: why charitable trusts, just as foundations, should become a part of the Italian non-profit sector

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Abstract

Since the Trust has been legitimated in Italy, minor attention has been focused on the cohesive development of its potential benefits. The author retains that the tax advantages of non-profit organizations (ONLUS, NPOs) can also be applied to the Trust, if it respects the same statutory prerequisites as foundations. If the qualification of Italian ONLUS were applied to the trust, this might facilitate the use of charitable trusts, as an alternative to private foundations.

Key points

- If a trust could obtain the tax status of an NPO, it would consequently be possible to extend the tax advantages for Foundation-NPOs also to Trust-NPOs.
- In order to obtain the tax status of an NPO, the internal structure of Italian charitable trusts would need to be in line with the provision of Article 10 of Legislative Decree no. 460/1997.
- In Italy, the Agenzia per le ONLUS could—with a view to charitable trusts—fulfill a similar role as the Charity Commission under British law.

Introduction

As the author has already set out in his previous article,¹ under Italian law, the pursuit of social, political, cultural, charitable, scientific research or artistic purposes, or assistance to the needy has traditionally been achieved by either legal entities with direct state involvement through public bodies or by non-profit organizations (NPOs) such as private foundations.

Such organizations constitute the so-called ‘Third Sector’.

Since charitable trusts fulfil very similar purposes they must also be included in the Third Sector, alongside private foundations. In fact, Italian lawmakers, under the 2007 Finance Bill,² in homogenizing trusts and private foundations which do not undertake commercial activities (lett. c, Article 73 of Presidential Decree no. 917/1986, Italian Income

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1. Bancone, ‘Italy: Charitable Trusts and Private Foundations’, (2009) 15 T&T.

2. Law no. 296 of 27 December 2006 ‘Provisions governing the formation of the annual and long-term budget of the State (2007 Finance Bill)’ (2006) 299 Italian Official Journal.

Tax Consolidated Text, known as the 'TUIR') have *de facto* restated what had already been broadly confirmed in terms of Italian civil law; that is to say that trusts, although they are not autonomous 'foundation style' legal entities, enjoying a separate legal personality, may be destined to the pursuit of a public, ie charitable role.

The advantage of trusts with a charitable function, compared to Italian private foundations, lies in greater management flexibility and the presence of additional organs, such as the 'guardian', whose role is to guarantee the fulfilment of this charitable function.

However, despite the above advantages, the number and frequency of the use of charitable trusts in Italy is still far from satisfactory.

Against this background, it can be argued that trusts which are created for the general pursuit of idealistic, cultural or altruistic aims, taxation-wise should be recognized as an Italian *ONLUS*³ (NPO) and that hence the tax benefits related thereto should apply and facilitate the use of trusts with a public function, as an alternative to private foundations.

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Such a consequence does not seem unreasonable at all compared to the favourable tax status granted to charities and, in this respect, it is worth bearing in mind that an application of tax law benefits to trusts that Italian tax law on non-commercial bodies (and specifically that on NPOs, including 'Foundation-NPOs') is broadly inspired by the Anglo-Saxon regulation of charities.

Hence, as charitable trusts fulfil the same role as private foundations to which the tax status of an NPO is applied, this status should consequently be extended also to charitable trusts.

Tax advantages for NPOs and their extension to charitable trusts

Legal Basis

Legislative Decree no. 460/1997 stipulates that Italian private foundations, in the same way as other non-commercial entities such as associations and social cooperatives (which are structured on the basis of precise statutory restrictions as envisaged by Article 10 of the aforementioned Legislative Decree no. 460/1997)⁵, may be considered worthy of being

3. *Organizzazione non lucrativa di utilità sociale.*

4. *Ibid.*

5. This envisages expressly that non-profit organizations include private foundations and other private entities, with or without legal status, whose bylaws or memoranda of association, prepared in the form of a public act or as an authenticated or registered private agreement, expressly include, among other things:

- i. the undertaking of work in one or more of the following sectors:
 - a. social and socio-healthcare assistance;
 - b. healthcare assistance;
 - c. charitable work;
 - d. education;
 - e. training;
 - f. amateur sport;
 - g. protection, promotion and enhancement of artistic and historical assets;
 - h. protection and improvement of nature and the environment;
 - i. promotion of culture and the arts;
 - j. protection of civil rights; and
 - k. scientific research of social interest carried out directly by foundations or entrusted by them to universities, research bodies and other foundations which directly carry out such research.
- ii. the exclusive pursuit of charitable aims;
- iii. a ban on distributing, also indirectly, profits and operating surpluses as well as provisions, reserves or capital during the life of the NPO;
- iv. the obligation to devolve the assets of the NPO to other NPOs should it be wound up;
- v. the obligation to prepare an annual financial report or statements;
- vi. the use, in the name and in any trademark or communication for the public, of the term '*organizzazione non lucrativa di utilità sociale*' (non-profit organization) or of the acronym '*ONLUS*' (NPO).

treated as NPOs and, thus enjoying the related favourable tax regimes.

The tax benefits granted to NPOs under Italian Law

Direct Taxes

The tax benefits envisaged for NPOs, including also foundation-NPOs, are very wide. The most important benefit lies in the fact that, for the purposes of direct taxes (Article 150 of the TUIR as introduced by Article 12 of Legislative Decree no. 460/1997):

- for NPOs the undertaking of institutional activities in the pursuit of purely charitable purposes does not constitute commercial activity;
- income from carrying out directly related activities does not count towards the formation of taxable income.

It should be remembered that institutional activities, which benefit from tax exemptions, only include those statutory activities which are undertaken in sectors typical of NPOs, while the following are defined as related activities: healthcare, education, training, amateur sport, promotion of culture and the arts, even if they are not related to charity, as well as the other activities which supplement the institutional activities.

Indirect taxes

As for indirect taxes, and in particular Value Added Tax (VAT), NPOs are tax exempt pursuant to Article 10 of Presidential Decree no. 633/1972 if the NPOs undertake the following activities:

- transport of the sick and injured in specifically equipped vehicles;
- patient recovery and care, including the administration of medicine;
- child education and education services generally, also for training, refresher courses and professional retraining, including board and lodging and the supply of books and teaching materials; and

- socio-healthcare services, home help and out-patient services for the elderly, drug addicts and the mentally and physically disabled.

Deductions

The tax qualification of NPOs is also important in an indirect way. Just consider the possibility that anyone making a donation to an NPO is able to deduct the donated funds from his own taxable income. In particular:

- individuals can deduct 19 per cent of the cash sum they have donated to NPOs from their income taxes up to a limit of €2065.83 (in other words the maximum deduct is €392.51);
- sole proprietorships and partnerships can, on the other hand, deduct up to €2065.83 or 2 per cent of their taxable income from their income thus reducing the amount of their taxable income;
- companies and self-employed persons can deduct the cost of permanently engaged staff who have been seconded free of charge to NPOs, up to a limit of 0.5 per cent of total pay.

In addition, in application of the provisions set out in paragraph 1, Article 14 of the Legislative Decree no. 35/2005, donations in cash or in kind made by individuals or tax-paying divisions of companies to NPOs can be deducted from the overall income of the taxpayer to an amount of up to 10 per cent of their declared overall income and, in any case, up to a maximum of €70,000.00 per annum (the so-called 'the more you give, the less you pay' rule).

Tax qualification of a Trust

In light of the above and as stated in the introduction, the question becomes imminent whether a trust with a public purpose can acquire the same tax classification as a foundation-NPO with all the tax advantages deriving from it.

In this regard, it is worth remembering that the aforementioned Legislative Decree no. 460/1997

does not place any subjective limits on the allocation of NPO tax status.

Consequently, we may add ‘*other private bodies with or without legal personality*’ to those which are rightly denominated private foundations and to which the Legislative Decree no. 460/1997 mainly refers.

This means with a view to the conferral of the NPO status that, regardless of the legal form of the entity, its bylaws must compulsorily include the statutory restrictions envisaged by Article 10 of the aforementioned Legislative Decree no. 460/1997 which direct the work of the entity to particular sectors and regulate its management.

Concluding, the criteria which characterize an entity as an NPO therefore are the sector in which it operates and hence the ultimate purpose of the entity, which is determined upon the examination of its statutory documents rather than by its legal form.

Since the legal provisions do not contain rigid restrictions from a subjective tax viewpoint, it would be sufficient for a trust to have its deed in line with the requirements envisaged by Article 10 of Legislative Decree no. 460/1997 in order for it to be recognized as having NPO tax status in the same way as a private foundation.

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Structuring a Trust deed to meet the NPO criteria

The trust deed must be drafted—as in the case of foundations—in the form of a public act or an

authenticated private agreement⁶ and must contain specific clauses to limit the scope and direction of the trust’s activities.

In addition, the trust deed must contain, just as with foundation-NPOs, provisions to prevent the trustee distributing income, operating surpluses or the trust fund during the whole period during which the trust exists, and include the obligation to use the income from the fund or the assets held in trust for the exclusive realization of the institutional activities to which the trust itself has been destined.

Moreover, upon expiry of the trust, in regard to the destination of the fund held in trust, the deed must set out that the trustee is obliged to direct whatever is left of the fund to other NPOs.

The trust then would be recognized in tax terms as having NPO status, enjoy the above-mentioned tax benefits but as such hence also be subject to the reporting obligations envisaged for foundations-NPOs⁷.

The role of the Agenzia per le ONLUS (NPO Agency) regarding trusts with a public function

If we permit a trust with a public function to have the status of an NPO in the same way as a private foundation, it follows as a natural consequence that the trust would be subject to control by the Agenzia per le ONLUS (NPO Agency) which was set up by a Prime Ministerial Decree of 26 September 2000.

This control must not be seen as a restriction on the activity of trusts since in relation to the essential prerequisite for the validity of every purpose trust, ie the need for there to be (in the absence of beneficiaries) a subject who has legal authority to take action against the trustee for fulfilment of the trust’s purpose, it seems reasonable to hypothesize that in Italy such an activity, once the NPO status for trusts has been

6. This is fully in line with the Italian practice regarding Italian trusts, which has been developed—in compliance with Article 3 of the Hague Convention—in the sense that the trust deed takes the form of a public act or an authenticated private agreement.

7. The law establishes that in relation to the overall work undertaken (ie including non-tax work) chronological accounting records must be kept in which all operations are exactly reproduced. This information then flows into the financial statements which must be prepared within 4 months of the closure of the financial year; these financial statements must express the equity, income and financial situation of the organization, thereby distinguishing the directly related activities from the institutional ones.

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In fact, the function of the Charity Commissioners (appointed for the first time by the Charitable Trusts Act of 1853, while the Acts of 1993 and 2006 have ensured their continued presence) is to promote:

the effective use of charitable resources by encouraging the development of better methods of administration, by giving the charity trustees information or advice on any matter affecting the charity, and by investigating and checking abuses.

In addition, their general task is

to act in the case of any charity (unless it is a matter of altering its purposes) as best to promote and make effective the work of the charity in meeting the needs designated by its trusts.

The Charity Commissioners can also appoint, remove or revoke the trustees of a charity and transfer its assets to another charity, but only at the request of the Attorney-General. On occasion, they may establish investigations into charities or a particular charity which has general or specific aims.

It is also worth remembering that the aforementioned *Agenzia per le ONLUS*, among other things, is vested with the widest possible powers of direction, promotion and inspection for due compliance with the legislative and regulatory taxation provisions for the Third Sector. Among these powers, it can adopt provisions to pronounce specific penalties for non-

commercial NPOs (those envisaged by Article 28 of Legislative Decree no. 460/1997).

In particular, the *Agenzia per le ONLUS* inter alia enjoys the competence to:

- call on representatives of NPOs (therefore also including foundation-NPOs) to provide information and data;
- send representatives of NPOs questionnaires relating to specific information and data, inviting them to return them completed and signed;
- ask Public Administrations, public entities, companies and businesspeople (ie VAT-registered entities) to communicate information and data or to provide acts and documents relating to NPOs; and
- ask for a copy or extracts of acts and documents regarding NPOs filed with notaries, local public offices and other public officials.

Besides the above, the *Agenzia per le ONLUS* is authorized among others to:

- ask the competent bodies of the finance authorities to carry out specific controls in order to verify the subjective and objective prerequisites for the application of tax benefits already used or claimed by the individual NPOs, also on the basis of the information which is in its possession; and
- inform the competent bodies of violations and anomalies found while undertaking its control work, in order to apply sanctions.

These powers clearly portray the essential role which the *Agenzia per le ONLUS* could play in regard to trusts with a public function and which could be recognized as having NPO status; indeed this role is very similar to the activities which the Charity Commissioners undertake in regard to British charities.

Just consider the power of intervention of the Charity Commissioners which—as already highlighted—is empowered:

- to order any person to provide reports or written depositions on issues regarding an investigation

- (issues on which that person possesses or may reasonably obtain information), provide copies of documents in their safekeeping or under their control, give evidence and produce documents; and
- to apply to the Court at the end of the preliminary investigation to take the necessary measures against the trustees of a charity.

Conclusion

In light of the above and in opinion of the author it is indeed possible to state that no material limit can be

invoked regarding the possibility that a trust with a public function, whose deed complies with the restrictions imposed by Legislative Decree no. 460/1997, can obtain, in the same way as an Italian private foundation, the tax status of an NPO; with the consequence that it is also possible to extend the tax advantages for foundation-NPOs also to trust-NPOs.

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