

The commercial basis and the family exception

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The same criteria of commercial activity apply to trustees as to portfolio managers: gross revenue of more than CHF 50,000 a year, more than twenty contracting parties, or power of disposal over trust assets exceeding CHF 5 million at any time. The exclusive management of assets of persons with family ties is not counted.¹ The family exception matters for private trust companies, which act as trustee only for the trusts of a single family and are often set up in Switzerland by families who want control over the trustee's board. Whether a private trust company falls under FinIA depends on whether its activity can be attributed to the family. The Financial Institutions Ordinance defines family ties broadly, covering relatives in the direct line, collateral relatives up to the fourth degree, spouses, registered partners and life partners as well as co-heirs until the division of the estate. It also deems such ties to exist where a trustee manages assets for persons linked to one another by family ties and is itself directly or indirectly controlled by a member of that family or by a trust, foundation or similar construct set up by such a person.² Protectors, who supervise the trustee and may hold powers of consent or removal, fall outside the statutory definition as long as they neither manage nor hold the trust fund themselves, because FinIA defines a trustee as a person who on a commercial basis manages or holds a separate fund for the benefit of the beneficiaries or for a specified purpose (Art. 17 para. 2 FinIA).³

1 Italian clients and their trusts

For Lugano the trustee business is closely linked to the Italian market. Italy recognized the trust through Law No. 364 of 16 October 1989 ratifying the Hague Convention, and Italian practice developed the *trust interno*, a trust governed by a foreign law but with Italian settlor, beneficiaries and assets.⁴ Italian families have used trusts administered from Lugano to hold participations in family companies, to plan succession around the Italian forced heirship rules and to separate assets from the risks of business. The

Italian tax treatment of these trusts has changed several times, most recently with the guidance of the Revenue Agency in Circular 34/E of 20 October 2022, and Chapter E.V explains how Italian residents are taxed on trusts and their distributions. A Lugano trustee who administers a trust with Italian beneficiaries must therefore understand both the Swiss supervisory rules and the Italian tax consequences of each distribution and each change in the trust's assets.

The end of banking secrecy, described in Chapter E.II, also changed the trustee business. Under the automatic exchange of information a Swiss trustee that qualifies as a financial institution must report the settlor, beneficiaries and protector of the trusts it administers, or the bank that holds the trust's account must report them if the trust is a passive non-financial entity. Italian beneficiaries of Lugano trusts are therefore known to the Italian Revenue Agency. The trustee's work has accordingly shifted from discretion to documentation of the trust's compliance in Italy.⁵

Essentials. Switzerland has applied the Hague Trust Convention since 1 July 2007 (Italy since 1 January 1992) but has no domestic trust, and on 15 September 2023 the Federal Council abandoned the project of a Swiss trust for lack of political consensus. Since 2020 a trustee who administers a trust within the meaning of the Hague Convention on a commercial basis needs a FINMA licence under Article 17 paragraph 2 FinIA, on the same conditions as a portfolio manager, with qualified managers experienced in trust administration. The trustee must act in the best interests of the beneficiaries and prevent conflicts of interest (Art. 24 para. 4 FinIO). Private trust companies of a single family may fall under the family exception. Trusts with Italian beneficiaries require attention to the Italian tax rules described in Chapter E.V.

2 Notes

1. FINMA, "Trustees" (above). ↩
2. FinIA (above), Art. 2 para. 2 let. a, <https://www.droit-bilingue.ch/en-it/9/95/954.1-2-5.html>; Ordinance of 6 November 2019 on Financial Institutions (FinIO), SR 954.11, Art. 4 (family ties) and Art. 19 para. 2, <https://www.droit-bilingue.ch/en-it/9/95/954.11-4-7.html> and <https://www.droit-bilingue.ch/en-it/9/95/954.11-19-22.html>. ↩
3. FinIA (above), Art. 17 para. 2, <https://www.droit-bilingue.ch/en-it/9/95/954.1-17-20.html>. ↩
4. Legge 16 ottobre 1989, n. 364, ratifying the Hague Convention of 1 July 1985; Hague Conference, Status table (above), for Italy's ratification

on 21 February 1990 and entry into force on 1 January 1992; on the law of ratification and the definition of the trust interno as a trust whose only foreign element is its governing law, Wikipedia (Italian), "Trust", <https://it.wikipedia.org/wiki/Trust> (used as a last resort); see also Chapter E.V. ↩

5. Federal Act of 18 December 2015 on the International Automatic Exchange of Information in Tax Matters (AEOIA), SR 653.1, title and date as shown at <https://www.droit-bilingue.ch/en-it/6/65/653.1-index.html>; on Italy see Chapter E.II and Chapter G.IV. ↩

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