

# Malta - Foundations

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## Introduction

Foundations in Malta have previously been regulated by customary law as no legislation on foundations existed until on 1 April 2008, the Second Schedule to the Civil Code was enacted which dedicates an entire sub-title to foundations. Based on comparable Italian and French legislation, the law on foundations allows the founder to set up a 'private' or a 'purpose' foundation.

## Foundations Law: Private vs Public Foundations and setup procedure

The Second Schedule to the Civil Code defines a foundation as:

*An organisation consisting of a universality of things constituted in writing, including by means of a will, by a founder or founders whereby assets are destined either (a) for the fulfilment of a specified purpose or (b) for the benefit of a named person or class of persons, and are entrusted to the administration of a designated person or persons. The patrimony, namely assets and liabilities, of the foundation is kept distinct from that of its founder, administrators or any beneficiaries.*

A private foundation is set up by the founder for the private benefit of one or more persons, or a defined class of persons in which the beneficiaries must be identified. Unlike a charitable foundation, a private foundation does not solicit funds from the public. On the other hand, a public foundation may be set up for a particular lawful purpose.

Our law provides that a foundation must be constituted in writing, via a public deed inter vivos or a public or secret will. The deed of the foundation must also be registered with the Office of the Registrar of Legal Persons, which is an office set up for the specific purpose of undertaking the registration of legal persons in general. The deed of the foundation must include detailed provisions containing the powers, form of resolutions and the signing authority of the foundation. In the case of a private foundation **a minimum of €1,164.69** in money or property must be transferred to the foundation in order for it to be validly created. In practice although a foundation needs to be registered, very little information in relation to a private foundation is available to the public therefore retaining the confidentiality which is a crucial element when such vehicles are created for the benefit of private individuals.

Once the foundation is established and registered with the Registrar of Legal Persons, **a new legal person is created** and thus the foundation itself becomes the owner of the foundation property. This is one variation from the trust concept whereby in a trust, no separate legal person is created. As a result, with foundations, there is no need to be concerned about the segregation of foundation property from property belonging to the administrators of the foundations.

The general rule is that the term of a Foundation's life cannot exceed 100 years and where no term is specified, a Foundation shall last for 100 years from its establishment. Exceptions exist in certain cases.

### *Board of Administrators of a Foundation*

The foundation board of administrators has powers of administration and representation and is accountable for the management of the foundation. However, the founder may have a considerable amount of discretion in the administration of its foundation, since the law allows for it to be an administrator itself.

While the administrator/s can be a non-resident, a person resident in Malta needs to be appointed to act as the local representative of the foundation in Malta. The name and address of this Maltese resident must be included in the instrument establishing the foundation. **The administrator/s may be either natural or juridical persons.** In the latter case there must be at least 3 directors within that particular company. The administrators of a private and of purpose foundations which are not charitable are required to be authorized to act as such by the Malta Financial Services Authority.

### *Founder and beneficiaries of a Foundation*

The foundation envisages a founder which sets up the foundation with administrators who manage the foundation with **the possibility of setting up a supervisory council to monitor the acts of the administrators.** Likewise, on setting up a trust, the settlor entrusts the trust property to a trustee, whose actions may be monitored by a protector. Unlike foundations, in the case of trusts, the settlor plays no part in the day-to-day administration of the trust assets.



The beneficiaries to a foundation have enforcement rights against the administrators of the same foundation. The benefit under a foundation is personal to the beneficiary as in the case of a trust. The founder of a foundation is also allowed to be a beneficiary.


Maltese law allows for more than one founder to exist for a single foundation. Rules are also in place as to the decision making process in such cases.

### *Segregated Cells*

Maltese law also provides for the creation of segregated cells within a foundation. Segregated cells allow assets and liabilities of an organization to be separated from other assets and liabilities of the same organization. Though segregated cells are not vested with legal personality and do not constitute distinct persons at law, **each segregated cell constitutes a distinct patrimony** from all assets and liabilities of the organization or any other cells which may be established.

### **Taxation of Foundations**

Further to the enactment of LN 312 of 2010, a foundation, shall be treated in the same manner as a company that is ordinarily resident and domiciled in Malta and any rules pertaining to the taxation of income applicable to companies shall equally apply to foundations. Tax shall be payable on the profits of a foundation at the rate of 35% and it shall be payable in the same manner applicable to companies.



Furthermore, distributable profits shall be allocated in the same manner applicable to companies. For this purpose distributable profits of a foundation shall mean the total profits which are available for distribution to the beneficiaries resulting from the income of such foundation.

The administrator of a foundation shall be answerable for doing all matters and things required to be done under the Income Tax Acts for the purposes of the determination, assessment and payment of tax in connection with the income of the foundation. Where two or more persons act in the capacity of administrators of the same foundation, they shall be jointly and severally so answerable. In particular, the administrator of a foundation shall keep all records, submit all returns and documents and pay tax to the Commissioner as is required in the case of companies.

Distributions of profits to beneficiaries of a foundation shall be treated as if they were dividends distributed to shareholders of a company and any transfer of a beneficial interest in the foundation by such beneficiaries shall be deemed to be a transfer of a security for all the purposes of the Income Tax Acts.

#### *Election for a foundation to be taxed as a trust*

The administrators of a foundation may by notice in writing to the Commissioner irrevocably elect that a foundation shall be taxed under the provisions of the Act applicable to trusts.

When an election as aforesaid has been made, the provisions of the Income Tax Acts and any regulations applicable to trusts, shall be applied to the founder, the foundation and the beneficiaries. For this purpose, the law also specifies that:

- a. reference to the settlor of a trust in the Act shall be construed as reference to the founder of a foundation;
- b. references to the patrimony of the trust or the trust fund or property shall be treated as reference to the foundation;
- c. reference to the trustees of the trust shall be treated as references to the administrators of the foundation;
- d. references to the beneficiaries shall be treated to be references to beneficiaries of a foundation, or in case of a purpose foundation to those persons who personally benefit: Provided that where the Income Tax Acts refer to a duty relative to the trust, it shall be treated as a duty of the administrator or of the foundation as the case may be.

When a foundation is established with segregated cells as aforementioned, each cell of the said foundation shall be deemed to be a separate foundation and for income tax purposes, what is applicable to the foundation will be applicable to each separate cell.

#### *Conclusion*

The Maltese foundation provides a lot of flexibility with the possibility of adapting to changing circumstances and the Civil Code also provides for the **conversion of foundations into trusts and vice versa**.

Despite being prohibited to trade, foundations can be used in the following commercial activities:

- a. a foundation may be endowed with commercial property or a shareholding in a profit making enterprise, a franchise, a trade mark or other asset which gives rise to income, as well as a ship as long as the organisation is only the passive owner of such assets;
- b. subject to such authorisations as may be necessary under applicable laws, be used as a collective investment vehicle, and issue units to investors therein, for the passive holding of a common pool of assets, the management of which is delegated to a third party, including a pension or employee benefit arrangements; and
- c. as a vehicle for the purpose of a securitisation transaction, borrow monies against the issue of bonds and do all relative and ancillary acts.

The possibility of retaining some form of control by the founder as well as the separate legal personality that a foundation enjoys are further examples of the effectiveness of such a vehicle. Depending on the requirements of each case the Maltese foundation is thus likely to be a very flexible vehicle for structuring one's affairs.

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