

The Maltese Foundation

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Introduction

The Maltese Foundation is legal entity with no shareholders or partners widely used for estate planning as well as to ensure the safe transition of assets to the intended beneficiaries.

Maltese law defines foundations as organisations consisting of a universality of things whereby the assets thereof 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.

Elements of a Malta Foundation**Foundation**

A foundation has a distinct juridical personality and as such it has a **legal personality** of its own as opposed to a Trust which does not constitute a separate legal entity. In similarity to a company, a foundation is the full and absolute owner of its assets, while in contrast to a company, it does not have shareholders owning the same and being able to liquidate it accordingly so as to realise the underlying value of their investment.

The Maltese regime recognises two types of foundations namely private and public foundations.

A private foundation is constituted by the founder for the exclusive private benefit of one or more persons or for the benefit of a defined class of persons being the beneficiaries of the foundation.

A public foundation may be established for a charitable or social purpose whether as a profit or non-profit organization.

Each of the above types of foundations must have a legitimate purpose in order for them to be construed as valid in accordance with the applicable Maltese legal regime.

A Maltese foundation may not be established for trading purposes or to carry on commercial activities; however, the foundation may be endowed with commercial property or the holding of shares in a profit making enterprise as long as it is the passive owner of such property. It may also be used as a collective investment vehicle or as a vehicle for the purpose of a securitisation transaction.

Specific requirements apply with respect to the donation of money or property upon the establishment of a Foundation.

Finally, the maximum statutory threshold concerning the validity and duration of a Foundation is set at 100 years from the date of the establishment of the Foundation.

Exceptions to this rule apply in case of purpose foundations, foundations used as collective investment vehicles or in a securitisation transaction where a Foundation can be established for an unlimited term.

Founder

This is the person or entity establishing the foundation. Unless deceased, a Founder retains a measure of control over the Foundation in that he may exercise supervision over the administration of the foundation and in certain cases also intervenes in the matter of appointment of administrators or in the disposal of the assets of the Foundation. Unless otherwise provided for in the Deed of Foundation, the Founder may also amend the Deed of Foundation and substitute, add or remove beneficiaries.

Board of Administrators

A Foundation is administered and controlled by the Administrators who are bound by fiduciary obligations and whose identity is publicly disclosed. They are responsible for management of the assets of the foundation, safeguarding such assets and ensuring compliance with the Deed of Foundation and the law in general.

Supervisory Council or Protector

The Founder may appoint a Supervisory Council or Protector to supervise the acts of the Board of Administrators. The Supervisory Council or Protector are appointed by the Founder but this need not be done in the Deed of Foundation itself provided that the Deed of Foundation gives the possibility of a subsequent appointment of a Supervisory Council or Protector.

Confidentiality

In the case of private foundations, the Maltese Registrar implements a number of internal security controls to ensure the privacy and confidential status of such private foundation, of its assets, activities and list of beneficiaries.

Such internal security controls do not however limit the accessibility to the registration records of the foundation and all information contained therein as well as any changes thereto by persons with a legitimate interest.

Maltese Taxation on Foundations

In general, foundations are treated for Malta tax purposes in the same manner as companies ordinarily resident and domiciled in Malta. As a result, Maltese laws applicable to the taxation of income and gains derived by Maltese resident companies apply equally to foundations.

As a general rule, taxable income and/or capital gains earned by a foundation are subject to tax in Malta at the standard corporate tax rate of 35%. However, upon receipt of a distribution of profit from the foundation, the beneficiaries thereof would be eligible to claim back a refund of the tax paid in Malta at the level of the foundation as envisaged under the Income Tax Management Act, in the same manner as if the beneficiaries of the foundation were shareholders of a company.

In case the Foundation receives dividends and/or capital gains that meet the Maltese participation exemption criteria, such incomes should be exempt from Malta taxation.

Election for the Foundation to be treated as transparent for tax purposes

Alternatively, it is also possible for the administrators of the foundation to irrevocably elect for the foundation to be taxed in the same way as Maltese trusts. If such an election is made, the profits received by the foundation are still taxed at the corporate rate of 35%, however where the foundation's income is all foreign sourced and all the beneficiaries are non-Maltese residents, the income of the foundation shall (for the purposes of the Maltese Income Tax) be deemed to have been received directly by the beneficiaries and no Maltese tax would be due at the level of the foundation. This mechanism is commonly referred to as Tax Transparency and is not available if no election is made. On the basis that the beneficiaries are neither ordinarily resident in Malta, nor domiciled, they should be exempt from any Malta tax.

Furthermore, it is possible to establish a foundation with **segregated cells** and in such a case the Regulations specify that each cell of the foundation is deemed to be a separate foundation for income tax purposes.

Finally, in the specific case of public foundations registered in Malta which are engaged in philanthropic work, subject to the satisfaction of certain conditions, the income thereof may be exempt from Malta tax.

NOTES:

The above is intended to provide a brief guide only. It is essential that appropriate professional advice is obtained. Our company will be glad to assist you in this respect. Please do not hesitate to contact us.