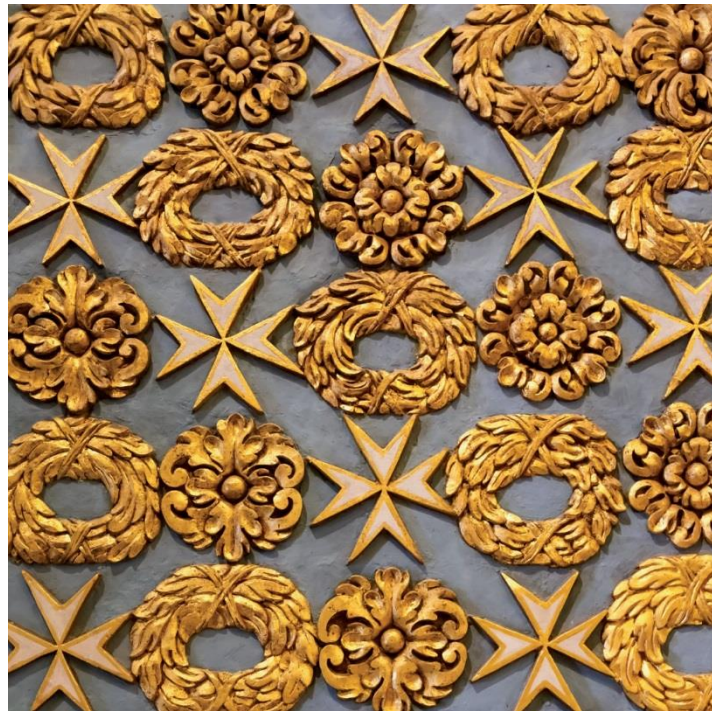


# THE MALTA FOUNDATIONS

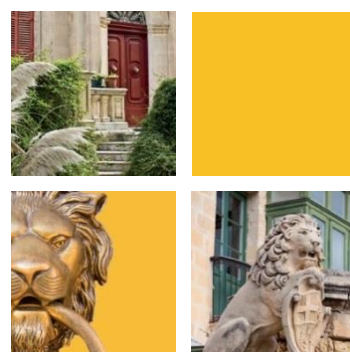
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Foundations have existed in Maltese law for more than a hundred years, but the amendment of the Civil Law 2007 and published guidance have clarified their practise in the non-commercial usage in the financial industry. The Maltese foundation is a separate legal entity and creates with its constitution a separate patrimony, which is detached from the founder's wealth, to the benefit of the designated beneficiaries or purpose. In the terms of the Maltese law, the foundation can be set up either as private foundation or purpose foundation, and can have any legal and lawful purpose, not only social or charitable. Contrary to the Maltese Purpose Trust, a Purpose Foundation can be used as a collective investment vehicle or for securitisation transactions with an unlimited term of existence. Another innovation of the Malta foundation is that the foundation can be constituted as a Protected Cell Foundation, similar to the Protected Cell Company, but without restriction in its usage (except for commercial activity). The Protected Cell Foundation creates segregated cells, each having a completely ring-fenced pool of assets and liabilities isolated from the foundation's core or other cell's assets and liabilities. The Private Foundation is a perfect tool when it comes to succession planning, as well as asset protection, established for the benefit of a beneficiary or group of beneficiaries, offering advantageous tax benefits.

## THE FOUNDATION IN GENERAL



The Maltese foundation is constituted either in writing by virtue of a public deed inter vivos or by will. The deed of foundation (the "statute"), is entered into between the founder, which can be an individual, a company or a trust, and the administrators. The statute has to be registered with the Registrar of Legal Persons for the foundation to acquire its status as legal personality. For private foundations, the statute does not contain the beneficiary statement, but a note of reference referring only to the founder. Furthermore, the statute is not available to third parties.

In order to constitute the foundation the founder should transfer a minimum endowment of EUR 1,164.69 to the foundation. In case the foundation is incorporated as non-profit organisation or for a social purpose, the minimum endowment is EUR 232.94. The endowment does not have to be contributed in cash, but in the event it is not cash the administrator must declare that property endowed upon or vested in the foundation has the value of at least the minimum required.

Purpose foundations, foundations used as collective investment vehicles and protected cell foundations may be constituted by law with an unlimited term of existence, while the private foundation has a maximum period of existence of 100 years.

A Maltese foundation can convert into another organisation having a different form (provided that this organisation is a legal person) or into a trust for the benefit of the same beneficiaries who hold a beneficial interest in the foundation. The foundation can also merge with one or more organisation(s) or may also be divided into two or more organisations.

The Roles

The administrators, who may be individual persons or a legal person having at least three directors, are bound by fiduciary obligations. The founder may also be appointed as administrator, and as a beneficiary, but in the latter case shall not be appointed as sole administrator. Purpose foundations must have at least three administrators or one legal person having at least three directors. There are no restrictions as to the nationality of the administrators, but if all administrators are non-Maltese, a local Maltese representative must be appointed. This representative should be a licensed administrator of foundations in Malta which is an add-on licence to the trust licence.

A protector, or a supervisory council with at least one member, may be appointed by the founder in the statute, or at a later date, can be vested with the power to exercise supervision over the acts of the administrators, the power of appointment, removal, substitution or addition of administrators.

According to the Civil Law, if it is specified in the statute, the founder may have power to exercise supervision over the administrator of the foundation, may obtain copies of the accounts or inventory or descriptive notes of the property and may intervene in the matter of appointment of administrators or in the disposal of assets, when these issues are being dealt with by the Court. It is advisable to not assign too many powers to the founder in case of a discretionary foundation.

Purpose foundations do not need to have beneficiaries, unlike the private foundation where the beneficiary/beneficiaries or group of beneficiaries should be named in the beneficiary statement (a supplement to the statute). The beneficiary statement does not



have be filed with the Registrar. The beneficiary can be a natural or legal person, a trust or another foundation.

Since implementation of the Civil Code (Second Schedule) (Register of Beneficial Owners - Foundations) Regulations in 2018, the beneficial owners must be registered with the Registrar of Legal Persons. In the case of a foundation these are the founder, the administrator(s), the protector or the member of a supervisory committee, the beneficiaries being natural persons (where identified in the statute or determined once they have benefited from the foundation) or in the case a legal entity is a beneficiary its ultimate beneficial owner. In case of a class of beneficiaries and if any other natural person has an interest in the

foundation, these must also be registered. This information is only accessible to national competent authorities with designated responsibilities for combating money laundering and terrorist financing, national competent authorities that have the function of investigating or prosecuting money laundering, the FIAU, national tax authorities; any other national competent authority within the meaning given to it under the Prevention of Money Laundering and Funding of Terrorism Regulations (PMLFTR), subject persons (licensed financial intermediaries) for the purpose of carrying out customer due diligence and persons with a legitimate interest (related to the prevention of money laundering and the financing of terrorism). The foundation is also obliged to keep an internal register at its registered office.

# THE PRIVATE FOUNDATION

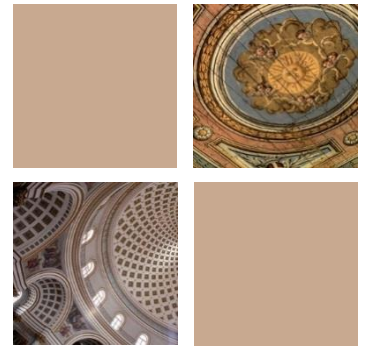
To set up a private foundation brings with it advantages mainly with regard to asset protection, estate planning and tax.

A private foundation is established by the founder for the benefit of the named beneficiary/beneficiaries or class of beneficiaries, having legally enforceable rights against the foundation. The interest of the beneficiary in the foundation is deemed as movable property, even when it includes immovable property, and is personal to the benefit of the designated beneficiary. However, the personal entitlement of a beneficiary is subject to any applicable laws and only as stated in the terms of the foundation. The beneficiary's creditors, spouses, heirs or legatees may have rights to the extent of the beneficiary's entitlement, but have no further rights to the assets of the foundation since as the assets and liabilities of the foundation are kept distinct from the assets of the founder, beneficiaries and administrators. Creditors of a founder

can only redress the foundation when the foundation was constituted to perpetrate fraud, but cannot enforce the founder's right to revoke the foundation.

A private foundation may also be established in view of wealth management and estate planning. A typical example for this is the use of foundation for the administration of property of a minor. The parental authority terminates when the minor reaches the majority, but the foundation continues to operate. Further, the foundation can be used as a tool to ensure that in the case of death or incapability of the founder the assets are administrated with care and to the benefit of the beneficiaries.

Unless expressed otherwise in the statute, upon the death of a beneficiary, the benefit is not transferred to his heirs but terminated.



# THE PURPOSE FOUNDATION

The traditional use of the purpose foundation is typically for charitable, philanthropic or social purposes and may therefore be exempt from tax (subject to approval by local taxation authorities) since charitable activities are exempt from income tax. However, the purpose foundation also offers a wide variety of uses in the modern financial world. Nevertheless, a foundation, no matter whether a private or a purpose foundation, may not be established to trade or carry on commercial activities. A purpose 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. The purpose foundation can also be constituted as a collective investment vehicle, including pension or employee benefit arrangements, or for the purpose of securitisation transactions, incorporating and holding the shares of a special purpose vehicle issuing Notes.

Contrary to the private foundation, the purpose foundation has no beneficiaries and has no perpetuity limits set out by law.

# THE CELL FOUNDATION

Maltese foundations may establish cells, under the condition that the administrators have the vested rights pursuant to the statute. This is a similar concept to the Maltese protected cell company, but while the protected cell company provides benefits to stand-alone insurance companies or captives, the use of a cell foundation is without restrictions as to the usage, as long as it is not a commercial one. The cells in a foundation create and segregate cellular assets, each with their own cell rules, beneficiaries and distribution rules and may be created by reference to shares and interests, rights of beneficiaries or purposes. The cell has no own legal personality but each cell constitutes a distinct patrimony from any other assets and liabilities of the foundation or other

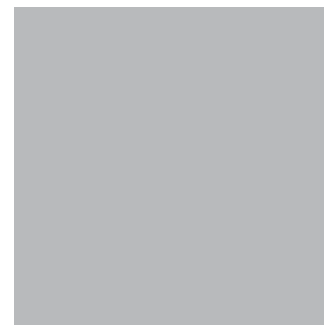
established cells. The administrators therefore manage the cells separately having distinct accounts.

The beneficiaries of a cell are only entitled to receive information and distributions from the cell they are named as beneficiaries of, and creditors of the cell may only claim to the extent of the cell beneficiaries' entitlement.

The cell foundation can have either structure, private foundation or purpose foundation, depending on the purpose of the foundation.



# TAXATION OF MALTESE FOUNDATIONS



Private foundations and purpose foundations not having a charitable, social or philanthropic purpose, are taxed in the same manner as companies. The initial or subsequent endowments in cash from the founder to the Maltese foundation do not give rise to any tax in Malta. The tax rate on worldwide income of the foundation is 35%. Distributable profits, i.e. the profits which are available for distribution to the beneficiaries and resulting from the income, are to be taxed in the same manner as dividends. The Malta Income Tax Act provides for an exemption applicable to foundations in respect of any income or gains derived by a foundation registered in Malta (likewise a company) from a participating holding or from the transfer of such holding. The participating holding is considered to exist when a Maltese foundation holds equity shares in either one of the following cases:

- At least 10% of the equity shares of another company, provided that the holding converse an entitlement of at least 10% of any two of the following rights: a right to vote; profits available for distribution; available assets for distribution upon winding up the foundation.
- It is an equity shareholder and on account of its equity holding, it has a certain level of control and/or other rights in another company.
- It has an equity shareholding in another company for the furtherance of its business, but not as trading stock for the purpose of a trade

In respect of dividends derived from a participating holding, the participation exemption is available as long as any one of the following “safe harbour” tests is satisfied in which the foundation holds shares

- Less than 50% of its income consists of passive interest or royalties
- Is a resident or incorporated in an EU country
- Income is subject to foreign tax at a rate of 15% or more

The beneficiaries of a Maltese foundation may be able to benefit from significant tax refunds based on the imputation tax system. The refunds may be claimed as soon as the foundation distributes

benefits to the beneficiaries.

The following types of tax refund may be claimed by the beneficiaries:

1. full Malta tax refund
2. 6/7ths Malta tax refund
3. 5/7ths Malta tax refund
4. 2/3rds Malta tax refund

In essence, the tax rate in Malta can be effectively reduced to between 0-5%. Passive interests in royalties would amount to an applicable rate of 10%. When utilising double taxation relief or Flat Rate Foreign Tax Credit (FRFTC), the income will be subject to a refund of 2/3rds.

A Malta foundation can elect to be taxed as a trust, i.e. transparently, when the foundation fulfils certain conditions. As a general rule, when at least one of the administrators is resident in Malta, the income of the foundation would be taxed at 35%. However, there are exemptions of this rule. When the income is derived outside Malta or contains only specific income classes, and all the beneficiaries are resident outside Malta, the income is not deemed attributable to the foundation, i.e. the foundation is not taxed on income, but the income is deemed as directly received by the beneficiaries. When income consists of dividends received from Maltese companies and all of the beneficiaries are not resident in Malta, and the foundation has in this respect issued a certificate confirming the latter, the income shall also be deemed as directly derived by the beneficiaries and is not income attributable to the foundation.

Purpose foundations having a charitable, social or philanthropic purpose may apply for tax exemption with the local taxation authorities. The applications are considered on a case by case basis.

When it comes to the taxation of a cell foundation, each cell is treated for tax purposes as if it was a foundation of its own with the options described herein before.

# CONTINUATION OF FOREIGN FOUNDATIONS IN MALTA

Since the amendment of the Second Schedule of the Civil Code foreign foundations are now permitted to redomicile to Malta. Prior to the amendment of the Act, the relocation of a foreign foundation to Malta involved a lengthy process of establishing a Maltese Foundation appointing the foreign assets from the overseas foundation to it and thereafter terminating the foreign foundation. Due to the new redomiciliation rules, this process is now simplified.

The redomiciliation rules allow for an existing foundation to continue under the Maltese laws. This may avoid adverse tax consequences, i.e. the deemed liquidation of the foreign

foundation with distribution of all of its assets to the beneficiaries and subsequent set-up of a new Maltese foundation.

Any foundation formed and incorporated or registered under the laws of a state within the European Union or European Economic Area is allowed to redomicile to Malta. Any other jurisdiction or country may be approved from time to time by notice of the Minister of Justice. A foundation continuing in Malta shall require the adoption of the Maltese law, as well as compliance with all matters required for the foundation to be established and registered under the Maltese rules and formalities.

## SUCCESSION LAWS, WILLS AND PROBATE

The determination of the assets to inheritors can be structured and executed by a foundation or by a Will of the deceased. The advantage of a foundation is that it may be used to negate the expense and lengthy exercise relating to the process of probate in Malta or overseas, to preserve the assets until a minor is of an age of majority and/or allow for the disposition of assets to the founder's heirs without those assets being transferred immediately upon the founder's death.

The inheritance of immovable property or shares in a company, not listed on the Malta Stock Exchange, held by an individual requires a *causa mortis* declaration, via public deed which is created by a Notary Public, who registers the declaration in the Public Registry in Malta. A share transfer in a Maltese company following a death shall always be registered with the Register of Companies in Malta (MFSA); this is a formality which needs to be followed irrespective of whether a person has a will or is intestate. Further, there is also no difference as to whether the shares in a Maltese company are owned by a Maltese resident or not. To avoid this inconvenience, an interposing foundation between the company and individual may be utilised so that a share transfer, upon death, is no longer required.

A transfer of immovable property through *causa mortis* is taxable, unless held by a foundation. The default rate of which is 5% on the value of the immovable property inherited. However there are a

number of scenarios in which the tax is exempt such as:

- (a) when the property transferred *causa mortis* consists of a dwelling house or a part thereof, or of any real right over a dwelling house;
  - (b) when the property is transferred by the person from whom the transfer *causa mortis* originates to his descendants in the direct line;
  - (c) at the time of the transfer, and during the whole period of three years preceding the transfer, the dwelling house was the ordinary residence of the person from whom the transfer originates (this exemption is subject to further conditions)
  - (d) where the value of the usufruct of immovable property bequeathed by the person from whom the transfer *causa mortis* originates in favour of his/her surviving spouse is not subject to duty;
  - (e) where immovable property consists of a dwelling house, being the ordinary residence of the person from whom the transfer originates, and the beneficiary of such residence is the surviving spouse, then no duty shall be applied at the time of the transfer.
- In situations where a heir submits a *causa mortis* declaration within 6 months from the death of the deceased and is liable to pay less than €2,300 in *causa mortis* tax, a tax rebate of €250 on the payable shall apply. The *causa mortis* declaration shall be carried out by any qualified Notary Public, but does not necessarily need to be the same Notary Public who published the deceased's

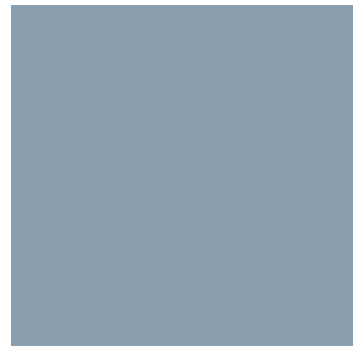
Will. A Notary Public will be required to carry out the necessary testamentary searches in order to ascertain which Will or succession law regulates the deceased's estate.

In the event that shares in a Maltese company are held by an individual, ideally a Will would have been put in place, clearly stipulating to whom the shareholder is bequeathing the shares. A Will or Testament is a legal declaration by a person, the testator, which provides for the transfer and distribution of his/her property upon death. A Will may contain dispositions by universal title and dispositions by singular titles. A disposition by universal title indicates that the testator bequeaths to one or more persons the whole of his/her property or a portion thereof and he nominated his heirs. All other dispositions are referred to as singular title and those receiving such property are known as a Legatee. Upon the demise of the shareholder, a testamentary search will show that this Will has been made to regulate the said shares. Ideally, any other Will in other jurisdictions should also have dispositions reflecting the same intention (to avoid conflicting dispositions in Wills).

Probate is the judicial process assessing the validity of a deceased's Will in court and is the process by which the claims over the estate of the deceased are resolved and distributed under a valid Will or Testament. A probate court shall interpret the Will or Testament and determine whether it is valid and if so shall grant approval known as granting of probate to the executor (as legal representatives empowered to dispose of the testator's estate). The probated Will shall be classified as a legal instrument under

the courts of law.

EU Regulation 650/2012 on international successions provides a framework for those persons who have private and financial interests in at least two countries, within and outside the European Union. This regulation applies only to successions opened from 17 August 2015 and regulates all aspects of a succession including administration and disposition of property. The regulation proposes that unless provided for in the Regulation, the law of the last habitual residence of the deceased at the time of death shall designate both the competent jurisdiction to preside on the entire succession and the applicable law to a succession. However a person may decide the law to govern his/her succession as the whole law of the State whose nationality he/she possess during the time at which the Will is created or at the time of death. In the case that the person possesses multiple nationalities the validity of the determination of law of the State shall be expressly stated in a Will drawn up and produced validly in the country where it is created. The Regulation provides for the creation of a European Certificate of Succession, intended to simplify the process of succession for heirs and as such the European Certificate of Succession is recognised in all Member States. It should be noted that the regulation expressly prohibits succession relating to donations, life insurance contracts, tontines, trusts (i.e. a foundation taxed as a trust), matrimonial property regimes, maintenance obligations, the nature of rights in rem and taxation.



**Mandaris Trust Company (Malta) Ltd. is a licensed Trustee with an approved extension of the authorised trustee's licence for acting as administrator of private foundations. We are specialised in the area of foundations and other asset structuring solutions. Our multi-lingual professionals have particular knowledge and experience with regard to legal, tax and administrative questions surrounding the structuring of assets in an international environment.**

Please do not hesitate to contact us if you have any questions or queries.

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