



EFC LEGAL AND FISCAL COUNTRY PROFILE

*The operating environment for
foundations*

MALTA – 2014

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The operating environment for foundations

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I. Legal framework for foundations

1. Does the jurisdiction have a basic legal definition of a foundation (Description where applicable)? What different legal types of foundation exist (autonomous, non-autonomous without legal personality, civil law, public law, church law, corporate foundations, enterprise foundations)?

Art. 26 (1) of the Second Schedule to the Civil Code (Cap. 16, Laws of Malta), hereinafter referred to as “the Second Schedule” 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.”

The term “foundation” includes all organisations, institutes or similarly titled patrimonies which are set up through a bequest, an endowment or appropriation of assets, howsoever made (whether by public deed or otherwise) or named, but does not include trusts. The foundation’s assets are administered by administrators in accordance with the law and the foundation’s statute.

The two main types of foundations which may be set up in terms of Maltese law are:

- **Private Foundations:** These are set up for the benefit of a named person or class of persons called “beneficiaries”. The foundation’s assets are administered by the administrators for the benefit of such beneficiaries.
- **Purpose Foundations:** Such foundations have no ascertained or ascertainable beneficiaries but are established exclusively for a charitable, philanthropic or other social purpose and as a non-profit organisation or for any other lawful purpose.

It is important to note that even though a foundation may have a named person or class of persons as beneficiaries, when the dominant purpose of a foundation is to support a class of persons which constitute a sector within the community as a whole, because of a particular social, physical or other need they may have or disability they may suffer from, such foundation is still considered to be a purpose foundation. In fact, the indication of such a class of persons or one or more members of such a class does not render it a private foundation but it shall still be treated as a purpose foundation. When the deed of foundation does not contain a specified purpose, the foundation is deemed to have been established for the private benefit of the founders or their successors in title.

Pious foundations may also be established under Maltese Law. In autonomous pious foundations, aggregates of things are destined for pious or religious purposes (those which concern acts of piety, of the apostolate or of charity, whether spiritual or temporal) and are established as juridical persons by competent ecclesiastical or other religious authorities. Non-autonomous pious foundations comprise of temporal goods given in any way to public juridical person established by the competent ecclesiastical or other religious authorities and carrying with it a long term obligation.

Public organisations may also be established as foundations. In this case, the public organisation is controlled, directly or indirectly, by the Government. An organisation is "controlled by the

Government" where the Government enjoys the power to appoint or remove a majority of the administrators of the foundation.

The Second Schedule to the Civil Code also caters for foundations which existed prior to the first (1st) April, 2008. Such existing foundations created by public deed are deemed to have had legal personality from the date of their establishment. These existing foundations were bound to register as legal persons in terms of the Second Schedule until the first (1st) April, 2012. If such existing foundations failed to register, these continue to enjoy legal personality. The administrators and the foundation itself, however, are governed by the provisions of the Second Schedule applicable to unregistered organisations.

An unregistered organisation enjoys limited recognition and legal powers to achieve the specific purpose for which it is constituted. The administrators of an unregistered organisation are jointly and severally liable, *inter alia*, for the use of assets to the fulfilment of the purposes expressly stated in the statute of the unregistered organisation.

Foundations established after the first (1st) April, 2008 are obliged to register with the Registrar for Legal Persons and are only granted legal personality upon registration.

2. What purposes can foundations pursue?

Foundations must be established for a purpose or purposes which is lawful, possible, and not immoral or against public policy. Such purposes may be a private benefit or purpose or may be non-profit making with a social or other purpose.

When the purpose is a private benefit it must be, on pain of nullity, for the benefit of a person or class of persons who can be ascertained or are ascertainable. In the absence of a specified purpose, the purpose of foundation shall be deemed to be the private benefit of the founders or their successors in title.

A foundation may not be established to trade or to carry on commercial activities, even if the proceeds of such efforts are destined to social purposes. There are, however, some exceptions to this prohibition.

3. What are the requirements for the setting up of a foundation (procedure, registration, approval)? What application documents are required? Are there any other specific criteria for registration?

The law establishes that a foundation may only be constituted by virtue of a public deed *inter vivos* or a will. The deed of foundation shall, on pain of nullity, state the following:

- The name of the foundation, which shall include the word "foundation";
- The registered address, in Malta. Every foundation must have an address in Malta where communications can be received and information requested about its activities;
- The purposes or objects;
- The constitutive assets with which it is formed. Every foundation must contain a minimum endowment. The endowment, which may consist of money or property, is set at €1,164.69. However, the law creates an exception with respect to those foundations which are established exclusively for a social purpose or as non-profit making, in which case the required minimum endowment is reduced to €232.94.

- The composition of the board of administration and the names of the first administrators, and if not yet appointed, the method of their appointment. It is essential that, prior to the registration of the foundation, the written consent of the administrators to act as administrators of the foundation, is delivered to the Registrar for Legal Persons. This document is proof that the administrators are not only aware of the registration but also agree to it.

In the case of a foundation, the administrators of which are non-residents of Malta, the deed of foundation must also indicate the name and address of a person resident in Malta who has been appointed to act as the local representative of the foundation in Malta;

- The legal representation: this is vested in the manner stated in the statute of the foundation or the law.

- The term for which it is established, if any: a legal person exists in perpetuity unless otherwise provided by law or its constitutive act. Indeed, the law provides that private foundations may only be established for a maximum period of a hundred years. If no term is specified, the foundation is valid for one hundred years from its establishment. In the event that a longer term is stipulated in the deed, it shall terminate on the one hundredth anniversary from when it came into existence. On the other hand, a purpose foundation, a foundation used as a collective investment vehicle or a foundation used in a securitisation transaction may be established for an unlimited period of time.

- In the case of a private foundation, either the names of beneficiaries or, in the absence of such indication, a declaration that the foundation is constituted for the benefit of beneficiaries. In this case, the beneficiaries must be indicated in a beneficiary statement, which need not form part of the public deed. This beneficiary statement must be signed by the founder and be addressed to the administrators and must be authenticated by the Notary Public who publishes the deed of foundation.

- The deed of foundation may contain additional clauses regulating, for example, the Duties of the Board of Administrators, the Removal of Administrators from the Board of Administrators and the Powers of the Founders.

Once the deed of foundation has been finalised, the next step is to register such deed with the Registrar for Legal Persons. It is the obligation of all the designated administrators of the foundation to register the foundation in terms of the Second Schedule.

The Second Schedule to the Civil Code also establishes the documents which must be delivered and filed with the Registrar for Legal Persons (these vary not only depending on whether the foundation is a purpose foundation or a private foundation, but also depending on whether it was created by public deed or by will). It also establishes who must deliver the appropriate registration documents to the Registrar for Legal Persons (again depending on whether the foundation was created by public deed or by will) and also establishes the timeframes for registration.

The appropriate forms listed in the Civil Code (Second Schedule) (Notifications and Forms) Regulations, Subsidiary Legislation 16.08, Laws of Malta, must also be presented to the Registrar for Legal Persons. The following documents must be delivered to the Registrar for Legal Persons for registration together with the deed of foundation:

- The application for the registration of an organisation established under the Laws of Malta (Form 'A' of the Civil Code (Second Schedule) (Notifications and Forms) Regulations);
- The applicable fees;
- An authentic copy of the deed of the foundation;
- The Administrator Consent Form: the written consent of the administrators consenting to act as such after the foundation is registered;
- A Resolution of the Administrators resolving to register the foundation with the Registrar for Legal Persons;
- Any other information requested by the Registrar for Legal Persons to register the foundation.

4. Is State approval required? (approval by a State Supervisory Authority with/without discretion? Registration with a state authority or court? Notarisation by a Notary public?)

A foundation must be registered with the Registrar for Legal Persons and acquires separate legal personality from the date of such registration.

The Registrar for Legal Persons may accept or refuse to register a foundation: once the Registrar for Legal Persons has received the required documentation and is satisfied that all the regulations have been complied with, such Registrar shall proceed to register the foundation. The issue of a registration certificate implies compliance with all conditions for the valid existence and registration of the foundation. The certificate of registration which is issued includes a registration number and specifies the legal form of the organisation.

The Registrar for Legal Persons may refuse to register the foundation if it appears to him that the conditions laid down by law are not satisfied. The applicant must be informed in writing of the reasons for refusal. Such applicant may appeal to the Court within thirty days of the receipt of the Registrar's decision. The applicant may also appeal to the Court if he does not receive a reply to an application submitted to the Registrar to register a foundation within forty-five days from the date of application for registration.

The Notary Public plays an important role in creating and registering a foundation. As seen above, a foundation may only be constituted by virtue of a public deed *inter vivos* or by will. A public deed is conclusive evidence of its contents, and therefore, does not need to be proved in a Court of law. Due to the public faith which attaches to a public deed, such public deed may only be drawn up and received, with the requisite formalities, by a Notary Public or other public officer lawfully authorised to attribute public faith thereto.

The most common type of will is the public will which is received and published by a Notary Public in the presence of two witnesses.

5. Do foundations have to register? If yes, in what register?

Yes. Foundations must be registered with the Registrar for Legal Persons.

a) If foundations are registered, what information is kept at the register?

The following information is kept at the register:

- An authentic copy of the deed of foundation and any annexes to such deed, such as the statute;
- In the case of a private foundation, a note of reference referring only to the founder;

- The registration form (Form A - The application for the registration of an organisation established under the Laws of Malta);
- The Administrator Consent Form which contains the names, addresses, identity card/passport number of the administrators (where the administrator is a legal person, its registration number must be included);
- The Resolution to Register (the resolution of the administrators resolving to register the foundation with the Registrar for Legal Persons); and
- Any other information requested by the Registrar for Legal Persons if in his discretion such information is required to register the foundation.

b) If foundations are registered, is the register publicly available?

The Registrar for Legal Persons must implement procedures to ensure the privacy of private foundations, their assets, activities and beneficiaries. The Registrar for Legal Persons implements such procedures without limiting the accessibility by persons with a legitimate interest of the registration records of a private foundation and all information contained therein and to the changes made thereto.

The Registrar for Legal Persons shall not make available to third parties the documents of private foundations which may be in his possession - other than those documents which are registered. Such documents may only be made available to third parties with the prior written consent of the administrators, the supervisory council, if any, or the Court. The Court only gives its consent when it is satisfied that such third parties have a legitimate interest in the information.

6. Is a minimum founding capital required? Is the foundation required to maintain these assets or any other specified asset level throughout its lifetime?

The deed of foundation must contain, on pain of nullity, an endowment of money or property worth at least €1,164.69. The endowment is reduced to €232.94 in the case of a foundation established exclusively for a social purpose or as non-profit making.

A foundation which has been duly registered does not lose its eligibility to remain registered if, subsequent to registration, the value of its assets is reduced to less than the minimum amount mentioned above.

7. What governance requirements are set out in the law?

Foundations are governed by administrators. For the purposes of the Second Schedule, an "administrator" means an officer or a person who is appointed to control and administer an organisation including a governor, a director, a trustee or a committee member and any person who carries out such functions even if under another name.

Administrators are responsible for maintaining possession and control of the property of the organisation, safeguarding such property and ensuring compliance with the statute of the organisation, the provisions of the Second Schedule and any other special law.

The foundation statute designates the first administrators or, if not appointed, the method of their appointment.

A foundation may have a supervisory council or a protector with the power to exercise supervision over the acts of the administrator/s. The supervisory council or protector may be vested with the

power of appointment, removal, substitution or addition of administrators. The exercise of any action or discretion on the part of the administrators may be subject to the express consent of the supervisory council or the protectors.

The founder may also exercise supervision over the administration of such foundation, obtain a copy of the accounts held by the administrators, a copy of the inventory or descriptive notes of property, and may intervene in the matter of appointment of administrators or in the disposal of the assets, when these issues are being dealt with by the Court.

a) Is it mandatory to have a supervisory board?

Under Maltese law, the equivalent of the supervisory board appears to be the supervisory council or the office of the protector referred to above. The terms of the foundation may provide for the establishment of a supervisory council consisting of at least one member or for the office of a protector or protectors with similar functions.

The supervisory council or protectors have the power to exercise supervision over the acts of the administrators. They may be vested with the power of appointment, removal, substitution or addition of administrators. This is however subject to the terms of the foundation. The exercise of any action or discretion on the part of the administrators may be subject to the express consent of the supervisory council or the protectors.

It is not mandatory for a foundation to have a supervisory council or a protector under Maltese law.

b) What are the requirements concerning board members? Is a minimum/maximum number of board members specified? What are the rules concerning appointment of board members? And their resignation/removal?

Under Maltese law the equivalent of board members is the administrators.

Administrators may be either natural persons or juridical persons. If a juridical person is appointed to act as the administrator of a foundation it must have at least three directors.

Purpose foundations must have at least three administrators or at least one juridical person acting as administrator. In the case of a private foundation, one administrator (whether natural or juridical) is sufficient.

The composition of the board of administration and the names of the first administrators (if these are appointed) must be indicated by the founder in the deed of foundation. If these are not yet appointed, the method of appointment must be included in the deed of foundation.

Administrators must consent to such appointment. If the person nominated as an administrator in the constitutive deed is unwilling or unable to accept such responsibility, he must notify his intentions in writing to the Registrar for Legal Persons, the founder or his heirs and the persons named as succeeding, if any. However, if such person takes possession of any assets of the foundation, there is implied acceptance to act as administrator. In this case, such person must confirm his acceptance in writing on demand of any interested person or the Registrar. Failure to do so within thirty days from a written request is considered to be a breach of duty by the administrator.

Any person named or appointed to succeed in the administration of the foundation enters into the same obligations as if he were the person named in the first place. He must notify the Registrar for Legal Persons in writing upon taking up office.

An administrator, upon taking up office, but not later than thirty days after, can notify the Registrar for Legal Persons and any interested parties, in writing, of any reservations he may have regarding anything relating to the foundation or the actions of the previous administrators. In this case, such administrator is not liable for any matters so reserved until such time as the reservations are operative.

The administrator's term of office comes to an end upon:

- *His resignation*: an administrator may resign from office by notice in writing to his co-administrators. If there is no other administrator, the administrator shall deliver this notice to the founder, beneficiaries (or, if impracticable, to at least one beneficiary). If there are none, this notice shall be delivered to the administrator's duly appointed successor. Registration takes effect on the delivery of this notice.

However, a resignation given in order to facilitate a breach of duty, or which would result in there being no administrator for the foundation, has no effect. An administrator may however still resign from office even though this would result in there being no administrator for the foundation if, before the resignation takes effect, application is made to the Court for the appointment of a new administrator and a new administrator is so appointed;

- *His removal*: administrators may be removed in cases of misconduct, failure to declare conflicts of interest, breach of duty or failure to comply with the statute or the law. The removal of administrators should primarily follow the procedure established in the deed of foundation. However, if the remedies provided for in such deed have been exhausted, an interested party may apply to the Court at any time for the removal of an administrator. The Court issues such orders as it deems necessary after hearing the applicant and the administrator and considering any other relevant evidence;

- The *coming into effect of a condition* in the deed of foundation in terms of which an administrator is removed from office; or

- *Steps being taken for the winding up of the administrator when a legal person.*

When administrators have made any acts of administration, they must submit an account of their administration on relinquishing the administration. This requirement is in addition to such accounts as are required to be submitted in accordance with applicable law. This account is submitted to the succeeding administrators or in their absence to the Registrar for Legal Persons.

An administrator who ceases to be an administrator must also immediately deliver all property of the foundation which may be in his possession to the remaining or successor administrators and to take all such formal or other actions as may be necessary in the interests of the foundation.

c) What are the duties and what are the rights of board members, as specified by national legislation?

The duties of the administrators of a foundation include the following:

- registering the foundation (and maintaining such registration);
- maintaining possession and control of the property of the foundation;

- safeguarding such property;
- ensuring compliance with the statute of the foundation, the provisions of the Second Schedule and any special law;
- acting in the interest of the foundation to achieve its designated purposes;
- representing and binding the foundation;
- keeping records of all assets and liabilities and all income and expenditure of the foundation for annual financial periods;
- declaring any possible or actual conflicts of interests to the Board of Administrators;
- filing with the Registrar for Legal Persons, within three months from any grant, an inventory or descriptive note of the assets added to the foundation;
- providing full and accurate information as to the state and amount of the foundation property, including the accounts of the foundation (upon a request being made in writing by the persons mentioned in the Schedule);
- informing the beneficiary of his entitlement (unless the terms of the foundation expressly determine the time when and the method how beneficiaries are to be informed of their entitlement under the foundation). This duty does not arise in certain cases;
- submitting accounts of their administration on relinquishing the administration.

Administrators are also bound by fiduciary obligations: they must carry out their obligations with utmost good faith and act honestly in all cases. Administrators must, inter alia, exercise the diligence of a bonus paterfamilias when performing their functions, avoid conflicts of interest, act impartially when fiduciary duties are owed to more than one person, keep the property of the foundation segregated from their personal property and generally observe the law regulating the foundation.

The rights of administrators include the following - they may:

- bind the foundation to the extent of the powers vested in them by law, the deed of foundation and any by-laws;
- delegate their powers of legal and judicial representation in favour of any third parties;
- add a person as a beneficiary or exclude a beneficiary from a benefit at their discretion (however, sufficient indication is to be given in the deed of foundation or in the beneficiary statement as to the class of which the beneficiary forms part. In the absence of such indication the power is null and void);
- be granted the right to decide which beneficiaries are to benefit, the quantity of any benefit, at what time and in what manner beneficiaries are to benefit, and such other powers relating to the appointment, application and advancement of property of the foundation;
- apply to the Court for directives concerning the manner in which they may or should act in connection with any matter concerning the foundation;
- apply to the Court for authorisation to amend or add to the purpose of a foundation by means of an additional public deed (this is possible after the death of the founder);

- make specific proposals to the Court for authorisation to use or dispose of the assets of the foundation (when the purpose is achieved, exhausted or becomes impossible and no indication is made in the deed of foundation regarding how the assets are to be applied in such cases);
- be remunerated from the income or capital of the foundation unless the deed of foundation provides otherwise;
- have the right to resign from office.

d) What are the rights of founders? Can fundamental decisions, such as change of purpose, be made at the discretion of the founder? What are the legal requirements in such circumstances?

The founder has a number of rights, he may:

- exercise supervision over the administration of the foundation;
- obtain a copy of the accounts held by the administrators, a copy of the inventory or descriptive notes of property;
- intervene in the matter of the appointment of administrators or in the disposal of assets when these issues are being dealt with by the Court;
- be an administrator of the foundation;
- be the beneficiary of a private foundation during his lifetime (in this case, he may not be the sole administrator of the foundation);
- add to the assets of the foundation by additional endowments at any time;
- add, remove or substitute beneficiaries (subject to the terms of the deed of foundation);
- appoint the members of the supervisory council or protector/s in the deed of foundation or in a subsequent instrument;
- reserve the right to revoke a private foundation.

The founder may amend or add to the purpose of a foundation by means of an additional public deed.

e) What are the rights of beneficiaries (e.g. right of information)?

Under Maltese law, beneficiaries have a number of rights including:

- the right to be informed of their beneficial interest. This allows them not only to be able to exercise their rights but also to ensure that these rights are being safeguarded. An administrator is obliged to inform any beneficiary of his entitlement, in writing, within a reasonable time of his accepting to act. This is so unless the terms of the foundation expressly determine the time when and the method how

beneficiaries are to be informed of their entitlement under the foundation. Administrators may, in certain cases, be released from this duty to inform beneficiaries of their entitlement;

- the right to request information from the administrators. They may request detailed information as to the state and amount of the foundation's assets. They may request information regarding the foundation's accounts and its administration;
- legally enforceable rights against the foundation;
- the right to sell, charge, transfer or otherwise deal with their interest in any manner. This right is subject to the terms of the deed of foundation;
- the right to disclaim the whole of their interest or part of it;
- a private foundation may be terminated on the demand of all the beneficiaries. This is only possible if such beneficiaries are in existence, have been ascertained and no one of them is interdicted or a minor. If the founder is still alive, such revocation may only occur with his consent. The founder may establish that the consent of a person stated in the deed of foundation is necessary for the foundation to be terminated. He may also expressly exclude the possibility of the foundation being revoked on demand of all the beneficiaries. After the death of the founder and notwithstanding any disposition in the deed of foundation, all the beneficiaries may request the Court to dissolve and wind up a private foundation;
- If the founder is deceased, a beneficiary may apply to the Court requesting it to eliminate any condition or requirement which is considered to be unreasonable paying regard to all the circumstances.

f) What rules are in place to ensure against conflict of interest? What is the legal definition of a conflict of interest under your legislation? How is self-dealing prohibited?

Administrators are bound by fiduciary obligations and must avoid any conflict of interest. If there is any conflict of interest, they are under an obligation to declare it. Failure to do so may result in their removal from office and/or liability. Administrators may be held liable to:

- *the foundation*, for the performance of the obligations that they have entered into on its behalf, without being entitled to the benefits. They are also liable for any benefit which accrues to them personally if they have failed to declare any personal interest or a conflict of interest. Administrators must also account for any loss if they act in breach of duty as stated in the statute or the Second Schedule in bad faith or have been negligent in the carrying on of their duties.
- *the beneficiaries* of the foundation or the *Attorney General* on their behalf.

There is no definition of "conflict of interest" in the Second Schedule to the Civil Code.

However, a definition found in the Malta Competition and Consumer Affairs Authority Act, Cap. 510 of the Laws of Malta, defines a conflict of interest as "*that situation in which members of the Board, officers and employees of the Authority and advisors, consultants and other persons engaged with the Authority have private or personal interests sufficient to influence or appear to influence the objective exercise of their official duties.*"

A similar definition is found in the Restorative Justice Act, Cap. 516 of the Laws of Malta: "*conflict of interest*" means a situation in which any member of any Board or Committee, established under this

Act, has a private or personal interest sufficient to influence or appear to influence the objective exercise of his functions.

Fiduciary obligations under Maltese Law ensure that there is no self-dealing. The administrator, as a fiduciary:

- owes a duty to protect the interests of another person;
- holds and exercises control or powers of disposition over property for the benefit of other persons;
- is bound to avoid any conflict of interest;
- must not receive undisclosed or unauthorised profit from his position or functions;
- keeps any property as may be acquired or held as a fiduciary segregated from his personal property and that of other persons towards whom he may have similar obligations;
- maintains suitable records in writing of the interest of the person to whom such fiduciary obligations are owed;
- renders account in relation to the property subject to such fiduciary obligations.

A founder who is a beneficiary may not also be the sole administrator. This avoids the situation in which the founder, as administrator, would owe fiduciary duties to himself, as beneficiary.

It is also important to note that where the foundation is a voluntary organisation and/or is aspiring to enrol or is already enrolled with the Commissioner for Voluntary Organisations, the law requires such foundation to ensure that there is no self-dealing. The Voluntary Organisations Act requires voluntary organisations to be non-profit making. For a voluntary organisation to qualify as a non-profit making entity, it must be ensured that no part of the income, capital or property is available directly or indirectly to any promoter, founder, member, administrator, donor or any other private interest. This means that on the dissolution of such foundation, any remaining assets must go to another purpose foundation with similar purposes.

Furthermore, the Commissioner for Voluntary Organisations is required to monitor the promotion of voluntary organisations and the behaviour of the administrators of such organisations to ensure the observance of high standards of accountability, transparency and compliance with the law. He must also investigate any complaints relating to voluntary organisations and must monitor the activities of voluntary organisations in general.

g) Can staff (director and/or officers) participate in decision making? How and to what extent?

There is no provision which prohibits members of staff from participating in decision making. Generally speaking, however, such decisions are taken by the administrators as it is their responsibility to maintain possession and control of the property of the organisation, to safeguard such property and ensure compliance with the statute of the foundation, the provisions of the Second Schedule and any applicable special law.

However, it appears that a clause may be included in the deed of foundation giving members of staff the power to take certain decisions.

8. Who can represent a foundation towards third parties? Is this specified in law or is it up to the statutes of the organisation?

Administrators act on behalf of the foundation. Legal and judicial representation is vested in the manner stated in the statute of the foundation or the law and the administrators are deemed to enjoy the power to delegate such powers of representation by means of a written resolution or written power of attorney in favour of any third parties. The administrators of the foundation bind it to the extent of the powers vested in them by law or the constitutive act.

If the administrators are not ordinarily resident in Malta, it is essential that the foundation appoints and retains at all times a person who is ordinarily resident in Malta to act as judicial representative of such foundation in Malta.

a) Do the director and officers have powers of representation?

Yes. If the director and officers are administrators they will have the powers of representation referred to above. Where such director and officers are not administrators such power may be granted to or delegated to them as indicated above.

9. Liability of the foundation and its organs

The rules on liability vary depending on whether the foundation is or is not registered with the Registrar for Legal Persons. If it is *registered*, it is vested with separate juridical personality and is separate and distinct from its founders, administrators and beneficiaries. Any acts entered into by the foundation bind no one but the foundation itself. It is liable for the fulfilment of acts which it has bound itself to perform with all its present and future assets and its liability is kept distinct from that of its promoters, founders, administrators and members. In fact, the founders, the donors or the beneficiaries are not liable for the obligations of the foundation, except to the extent they expressly agree to be so liable or as expressly stated in the Second Schedule or any special law.

The promoters are liable towards the foundation for anything they have bound themselves to contribute to it in writing, unless otherwise provided by law. In the case of unlawful acts, the Court may declare the founders, promoters or administrators who consented to such act (or knowingly took part in the unlawful act to the detriment of the foundation) as personally liable for any damage suffered by the foundation.

If the foundation is registered, the general rule is that the administrator shall not be personally liable for the obligations of the organisation except in the following cases:

- *to third parties for the obligations of the organisation* if: he is guilty of fraud or bad faith in entering into any obligations; he has entered into obligations in favour of third parties at a time when he knew or ought to have known that there was no reasonable prospect that the organisation would avoid being wound up due to insolvency;
- *to the organisation* for the performance of the obligations that he has entered into on its behalf, without being entitled to the benefits, and for any benefit which accrues to him personally, if he has failed to declare a personal interest or a conflict of interest;
- *to the organisation* to account for any loss if he has acted in breach of duty as stated in the statute or the Second Schedule, in bad faith or has been negligent in the carrying on of his duties;

- *to the beneficiaries of an organisation or the Attorney General on their behalf*, if he has acted as stated in the preceding paragraph or in a situation where there is a conflict of interest.

It must be noted that the administrator shall not be liable more than once for the same act. If the organisation has more than one administrator, the responsibility of the administrators shall be joint and several unless some particular duty has been exclusively entrusted to one particular administrator, in which case only he shall be liable.

It is also relevant to note that an administrator shall not be liable for the acts of another administrator if he shows that he was not aware of the breach at the time of its occurrence and on becoming aware of it he signified his dissent in writing without delay and took all reasonable measures to hinder the continuation of the breach or knowing of the intended breach he took all reasonable measures to avoid its occurrence.

The Second Schedule also provides that any provision in the statute of a registered organisation or any agreement exonerating an administrator from liability for wilful misconduct, gross negligence or breach of duty shall be null and void.

The administrators of an *unregistered foundation* are jointly and severally liable:

- to keep the property of the unregistered foundation identified as such and distinct from their own personal property and other property they may be administering;
- for the preservation of any property received;
- for the use of assets to the fulfilment of the purposes expressly stated in the statute of the unregistered organisation; and
- to ensure, to the extent possible, considering their functions, observance of the law applicable to the unregistered organisation and its activities.

The administrators, whether still in office or not, are jointly and severally liable among themselves and with the organisation for any of its liabilities incurred and for the observance of all legal requirements in relation to the activities of such organisation. However, an administrator's liability is limited to liabilities incurred and performance of obligations while such administrator was in office. Except in the case of fraud, the liability of the administrators for the obligations of the unregistered organisation shall be *in subsidium* and they enjoy the benefit of discussion of the property of the organisation prior to being personally obliged to fulfil obligations. Administrators may not waive such benefit and any waiver of such benefit shall be unenforceable.

a) What is the general standard of diligence for board members? Does your country differentiate between voluntary (unpaid) and paid board members?

Administrators must carry out their obligations with utmost good faith and must act honestly in all cases. They must exercise the diligence of a *bonus paterfamilias* in the performance of their obligations.

Malta does not differentiate between voluntary (unpaid) and paid board members in this regard.

b) Is there a “business judgment rule”, giving a board member a “safe harbour”, if she/he (1) acts on an informed basis; (2) acts in good faith, (3) acts in the best interests of the corporation, (4) does not act out of self-interest (duty of loyalty concept plays a role here), and (5) is not wasteful?

Administrators must act with utmost good faith and honestly in all cases. In such cases, they are not liable for the obligations of the foundation except to the extent they expressly agree to be so liable or as expressly stated in any provision of the Second Schedule or any special law. They are not liable for the acts of another administrator if they show that they were not aware of the breach at the time of its occurrence and on becoming aware of it they signified their dissent in writing without delay and took all reasonable measures to hinder the continuation of the breach, or knowing of the intended breach, took all reasonable measures to avoid its occurrence.

c) What is the liability of executive staff?

If the members of the executive staff are administrators, their liability will vary depending on whether the organisation is registered or not.

If the organisation is *registered*, the administrator shall not be personally liable for the obligations of the organisation except in the cases outlined above.

If the organisation is *not registered*, the administrators are jointly and severally liable to keep the property of the organisation identified as such and distinct from their own personal property, to preserve such property, to use such assets to fulfil the purposes expressly stated in the statute and to ensure, to the extent possible, observance of the applicable law and its activities. The administrators are also jointly and severally liable among themselves and with the organisation for any of its liabilities and for the observance of all legal requirements in relation to the activities of such organisation. The liability of an administrator is, however, limited to liabilities incurred and performance of obligations while such administrator was in office.

d) Can the founder modify the standard of diligence for board members in the foundation’s statutes?

The law establishes that a fiduciary must carry out his obligations with utmost good faith and must act honestly in all cases. He is bound to exercise the diligence of a bonus paterfamilias in the performance of his obligations. *This is so unless the terms of the foundation modify such duty.* However, the deed of foundation cannot include any provision exonerating an administrator from liability for wilful misconduct, gross negligence or breach of duty. Such provision is null and void.

e) Can board members be held civilly and/or criminally liable in the following cases?

	Yes	Probably yes	Unclear	Probably no	No
The foundation distributes money for a purpose which is a public benefit purpose but not accepted in the foundation’s statutes.	X				

The foundation loses its status of a tax benefit foundation (because one requirement in tax law was not fulfilled).		X			
The foundation loses money because a board member has acquired some stocks in a company which unexpectedly went bankrupt.					X
The foundation sells immovable property to the spouse of a board member. The board member was unaware that the price was too low.	X				
The foundation sells immovable property to a third person. The board member was unaware that the price was too low.		X (depends on whether the board member was negligent)			

10. Are economic activities¹ allowed (related/unrelated)? If so, is there a ceiling/limit on economic activities (related/unrelated)?

Art. 32A of the Second Schedule to the Civil Code makes it clear that a foundation may not be established to trade or to carry on commercial activities, even if the proceeds of such efforts are destined for a social purpose.

There are some exceptions to this general prohibition. In fact, 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, provided that the foundation is only the passive owner of such assets;
- 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 and employee benefit arrangements. This is subject to such authorisations as may be necessary under applicable laws;
- be used 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 provisions of the Voluntary Organisations Act must also be taken into consideration as these apply to foundations which are voluntary organisations and/or are aspiring to enrol or are already enrolled with the Commissioner for Voluntary Organisations.

A voluntary organisation cannot be established for trading purposes nor to promote the interests of a commercial enterprise nor to principally engage in trade. This prohibition is in line with the Second

¹ For the purposes of this profile economic activity can be understood as “trade or business activity involving the sale of goods and services”. “Related” economic activity is in itself related to and supports the pursuance of the public benefit purpose of the foundation. According to the above, normal asset administration by foundations (including investment in bonds, shares, real estate) would not be considered as economic activity.

Schedule to the Civil Code (foundations may not be established to trade or to carry on commercial activities).

If a voluntary organisation wishes to carry out a trading activity in order to raise funds to achieve its purposes, the voluntary organisation must establish an appropriate legal entity. The administrators must however ensure that such activity does not burden the human and financial resources of the organisation beyond its means.

However, certain activities which are carried out by a voluntary organisation directly in the achievement of the purposes of such organisation are not trading activities. These are:

- fees for educational services;
- consideration for sale of goods and services to members;
- admission fees for entrance to art galleries, exhibitions and museums or attendance at theatrical or musical activities;
- participation fees in competitions organised for members;
- payment for residential accommodation and care;
- similar income which may be payable to voluntary organisations established for specific social purposes for which they have been established;
- such other classes of income as may be prescribed by regulation made by the Minister;
- the grant of lease or a management contract of land or buildings or other commercial property to a third party, where no services are provided by the voluntary organisation;
- the investment of the property of the voluntary organisation.

It is important to note, however, that voluntary organisations carrying out the abovementioned activities will have to obtain any necessary authorisations or licences which may be required by law. It is possible to seek a ruling from the Commissioner of Voluntary Organisations as to whether an activity amounts to a trading activity or not. The decision of the Commissioner is subject to an appeal to the Administrative Review Tribunal.

11. Are foundations permitted to be major shareholders?

Yes

12. Are there any rules/limitations in civil and/or in tax law regarding foundations' asset management? What, if any, types of investment are prohibited?

As seen above, foundations may not be established to trade or to carry on commercial activities even if the proceeds of such efforts are destined to social purposes. A number of exceptions (listed above) however exist.

This restriction does not hinder or limit the administrators from protecting the rights of the foundation in relation to such assets or from delegating the management of such assets to a third party.

The foundation's *patrimony* is separate and distinct from that of the founders, administrators and beneficiaries. This patrimony cannot be used to satisfy the debts of the players within the foundation and the foundation property cannot be attacked by their creditors. The creditors of the foundation can however enforce their debt over the administrator's personal estate if there is fraud or dishonesty on his part.

A foundation can establish *segregated cells* to achieve particular purposes with particular assets. In this case, the assets and liabilities of the cell constitute a distinct patrimony which is distinct from all other assets and liabilities of the organisation or other cells which may be established. The assets of a segregated cell are only available for the fulfilment of any obligations undertaken by the foundation in relation to that cell but not for any other liabilities entered into by the foundation for itself

or in respect of other cells. The assets of the foundation are also not available for the fulfilment of the obligations undertaken in relation to the cell.

When a foundation which has segregated cells enters into any transaction it must be implied that:

- the assets attributable to a cell may only be used to satisfy the liabilities attributable to that cell;
- if any person uses a cell's assets to satisfy a liability not attributable to that cell, such person is liable to pay the foundation a sum equal to the value of the benefit obtained by him, and any asset or sum recovered by the foundation is applied by the foundation to compensate the cell (this is so after the deduction or payment of any costs of recovery).

The assets of the cell must be segregated from all other assets of the foundation and are held and administered separately and distinct accounts must be maintained in accordance with applicable law in relation to each cell. The existence or termination of each cell must be disclosed in the reports and accounts of the foundation.

These legal effects however only arise only if:

- all activities relating to a cell are undertaken in a manner that it is expressly disclosed to third parties that the activities are those in respect of the particular cell. This requirement is satisfied if third parties are otherwise aware or ought, from the circumstances, to be aware of the fact that the activities undertaken are those in respect of the particular cell;
- no statement or representation is made by the administrators of the foundation to the effect that the foundation is liable for the obligations undertaken in respect of the cell;
- the cell is established in accordance with the Second Schedule to the Civil Code and all relative procedures and formalities are observed at all times.

In the above cases, no court shall order the issue of any warrant, precautionary or executive, against the assets of a cell in respect of a claim for which the foundation or another cell is liable.

13. Are foundations legally allowed to allocate grant funds towards furthering their public benefit purpose/programmes which (can) also generate income? (recoverable grants; low interest loans; equities)

Foundations may carry out any activities which are consistent with their purposes and objects, provided that such activities do not constitute trading or commercial activities, even if the proceeds of such efforts are destined for social purposes. (There are a number of exceptions to the general trading prohibition which are listed above.)

14. What are the requirements for an amendment of statutes/amendment of foundations purpose?

The founder, or any other body or person permitted by the statute, may amend or add to the purpose of the foundation. Such amendment or addition is made by means of an additional public deed.

When there is more than one founder, amendments can be made in accordance with the statute. When the statute is silent, in case of two founders, decisions will be taken unanimously and when there are more than two founders, in accordance with the decision of the majority. In a multi-founder foundation, the default rule in the law (unless the statute states otherwise) establishes that decisions must be supported by at least fifty-one per cent of the founders on the basis of one vote per member.

After the death of the founder, the Court may authorise such amendment or addition to the purpose of the foundation on the application of any administrator, the Supervisory Council or any other interested party.

Subject to the terms of the deed of foundation, the founders of a private foundation, if they are still alive and capable of acting, are free to amend the deed and substitute, add or remove beneficiaries. However, this decision will not affect the validity of anything lawfully done by the administrators prior to such decision, before they receive notice of such amendment. It will neither affect nor interrupt lawful acts in progress or lawful commitments made or not yet fulfilled by the administrators.

It is the duty of the administrators of a foundation to notify the Registrar for Legal Persons within fourteen days from the date of any amendment made to the statute of the foundation. Where the statute is amended, the persons amending the statute must also approve a consolidated version of the statute, whether such amendments are done by resolution, private writing or by notarial deed. The law also specifies the documents which the administrators are bound to deliver to the Registrar for Legal Persons.

15. What are requirements with regard to reporting, accountability, auditing?

a) What type(s) of report must be produced?

- annual financial report
- annual activity report
- public benefit/activity report,
- tax report/tax return,
- other reports e.g. on 1% schemes)

The Maltese Civil Code requires the administrators of foundations to keep records of all assets and liabilities and all income and expenditure for annual financial periods. The administrators must also prepare accounts and reports at such times and with such form and content as may be prescribed.

Under the law as it currently stands there is no express requirement to have such accounts audited but foundations may do so if they wish and are free to adhere to the highest standards of accounting, such as the International Financial Reporting Standards (IFRSs). It is also important to note that at the moment there is no requirement to submit such accounts to the Registrar for Legal Persons when applying for the registration of the foundation and annually thereafter. However, this may all change in the future because the law establishes that Regulations may be issued in this regard.

At the moment the law states that administrators must prepare such accounts and reports at such times and with such form and content as may be prescribed. Such accounts and reports shall be reviewed as may be prescribed or as may be required by applicable law.

Such accounts, reports and records must be held for a period of ten years after the relevant annual period to which they refer, (or for such other period imposed in relation to an organisation under any special law applicable to its legal form.)

The Voluntary Organisations (Annual Returns and Annual Accounts) Regulations are binding on all enrolled voluntary organisations. (They also serve as guidelines for non-enrolled voluntary organisations.). Enrolled voluntary organisations must prepare an annual return including an organisational chart; a list of current administrators; any documents amending the statute; the annual report; *annual accounts*, and a statement of account relative to any event organized and/or activity performed to make public collections. Category 3 enrolled voluntary organisations are required to submit to the Commissioner for Voluntary Organisations annual audited accounts compiled in terms of the International Financial Reporting Standards (IFRSs) and duly audited by an auditor. An enrolled voluntary organisation is considered to be a category 3 organisation if its revenue exceeds €200,000 for three consecutive calendar years.

b) Must all/any of the reports produced by the foundation be submitted to the supervisory authorities? If so, to which authorities (e.g. foundation authority, tax authority)?

There is no obligation to submit reports to the Registrar for Legal Persons under the Second Schedule to the Civil Code, even though administrators must prepare accounts and reports for annual financial periods and these must include information about all assets and liabilities and all income and expenditure of the foundation.

The Voluntary Organisations (Annual Returns and Annual Accounts) Regulations require all enrolled voluntary organisations to submit an annual return to the Commissioner for Voluntary Organisations. The Annual return shall include a statement on the number of members as at the date of the annual return and the following documents as attachments to it:

- (a) an organisational chart;
- (b) a copy of the annual report which shall be authenticated by one administrator;
- (c) a copy of the annual accounts which shall be authenticated by two administrators;
- (d) a statement of account relative to any event organised and/or activity performed to make public collections.

Where the foundation is an enrolled voluntary organisation, the Government, government departments, public agencies and entities controlled by the Government shall rely upon the Certificate of Enrolment, as evidence of the status of an organisation as a voluntary organisation. They do not require any further evidence of its existence or status when dealing with such an organisation. It, cannot, however, be said that no other documents will be necessary as the Certificate of Enrolment does not imply any exemption of such organisation from any procedure,

duty, obligation, liability, fees or dues unless expressly stated in the applicable law, regulation or policy.

For tax purposes, as the default position for a foundation is to be treated as a company that is ordinarily resident and domiciled in Malta, in general, a foundation is required to submit an annual income tax return to the Commissioner of Inland Revenue showing its chargeable income for the year and the tax chargeable thereon. The income tax return of the foundation is required to be based on audited financial statements.

We are not aware of any other reports that foundations may have to submit under other laws or in terms of policy but we cannot rule out the fact that this may be required. When a foundation applies to benefit from a scheme, for example, to obtain funds from the Government or the European Union, it would need to comply with the requirements established in such scheme such as submitting certain reports. These are usually a matter of policy not law.

c) Are the reports checked/reviewed? By whom (supervisory/tax authorities)?

The reports are not reviewed by the Registrar for Legal Persons. The reports which are submitted to the Commissioner for Voluntary Organisations by enrolled voluntary organisations are reviewed by such Commissioner.

The income tax return that is submitted to the tax authorities by a foundation is made on a self-assessment basis. The tax authorities may then raise an assessment against the foundation if it has reason to believe that the tax return submitted by the foundation is incorrect or incomplete.

d) Do any or all of the reports and/or accounts of foundations need to be made publicly available? If so, which reports and where (website, upon request)

Where the foundation is registered, or is applying for registration with the Registrar for Legal Persons, there is no requirement to make accounts and annual reports publically available.

If, on the other hand, the foundation is a purpose foundation and it applies for enrolment or is already enrolled with the Commissioner for Voluntary Organisations, the accounts and annual reports of the foundation will be made publically available following enrolment.

Information of this kind is publically available in the Register at the Office of the Commissioner for Voluntary Organisations. However, we cannot rule out the possibility that a foundation may register in other registries in Malta where such information would also be made publically available.

e) What are the legal requirements concerning external audit? Is external audit required by law for all foundations?

The Voluntary Organisations (Annual Returns and Annual Accounts) Regulations require all enrolled voluntary organisations in terms of the Voluntary Organisations Act to prepare accounts in accordance with the requirements laid down in the said Regulations. Category 3 organisations (organisations whose annual revenue exceeds € 200,000 for three consecutive calendar years) are

required to prepare their accounts in accordance with International Financial Reporting Standards and must be audited by a certified public accountant holding a practicing certificate in auditing.

Furthermore, as the default position for a foundation in terms of tax legislation is that the foundation is to be treated as a company ordinarily resident and domiciled in Malta for income tax purposes, a foundation is required to prepare and submit an income tax return to the Maltese tax authorities based on audited financial statements unless the foundation is a voluntary organisation which is taxed at the progressive rates of tax – refer to below.

f) By whom should audits be undertaken? Do requirements/guidelines exist regarding international and national auditing agencies and standards?

Where the foundation is required to have its accounts audited, the auditor must be a certified public accountant holding a practicing certificate in auditing in terms of the Accountancy Profession Act.

16. Supervision (which authority – what measures / sanctions?)

The *Registrar for Legal Persons*: The Registrar may accept or refuse to register a foundation if this does not comply with the Second Schedule to the Civil Code. The Registrar also has the right to require any information from any person, if such information is deemed to be necessary for the registration of a foundation but, in the case of a private foundation, he is not entitled to request a copy of the beneficiary statement from the administrators or the Notary Public.

The *Commissioner for Voluntary Organisations* is the watchdog of the voluntary sector and voluntary organisations in general. He has the right to accept or refuse enrolment applications and to request more information from an organisation which is applying for enrolment. The law gives the Commissioner the duty to supervise, monitor and investigate voluntary organisations, their activities and persons involved within such organisations such as the administrators. This ensures accountability and transparency. Where the Commissioner for Voluntary Organisations investigates the affairs of any voluntary organisation, and requests information to be supplied, any person who fails to provide such information shall be guilty of an offence.

Furthermore, the Commissioner for Voluntary Organisations may issue directives demanding compliance with the law and failure of any person to comply will amount to a breach of duty. The Commissioner for Voluntary Organisations may set a period for compliance and may impose penalties for non-compliance within such period.

The Commissioner for Voluntary Organisations may, in cases where there is wrongdoing issue cancellation or suspension orders to both enrolled and non-enrolled voluntary organisations. He may issue public statements about voluntary organisations or about any person purporting to act on behalf of a voluntary organisation. The Commissioner also has the right to withdraw the Certificate of Enrolment of an enrolled voluntary organisation at any time.

The *Malta Financial Services Authority* supervises the administrators of private foundations who are required to be authorised as trustees in terms of the Trusts and Trustees Act (Cap 331, Laws of Malta).

The *Civil Court in its voluntary jurisdiction* has jurisdiction in relation to foundations, their administrators, beneficiaries and other parties having an interest therein. The Court has a number of functions. It may, if it thinks fit make an order concerning:

- the execution or the administration of any foundation;
- the administrator of any foundation, including an order relating to the exercise of any power, discretion or duty of the administrator, the appointment or removal of an administrator, the remuneration of an administrator, the submission of accounts, the conduct of the administrator and any payments into the Court; or
- any beneficiary or any person having any connection with the foundation.

The Court may also, if it thinks fit make any declaration as to the validity or enforcement of a foundation; and it may rescind or vary any order or declaration made regarding foundations and associations, or make any new or further order or declaration.

a) Does the supervisory authority comprise of a public administrative body, a public independent body, a combination of a governmental body and a court, or a public body and an independent body?

The *Registrar for Legal Persons* forms part of the Public Registry which is a government department. Therefore, the Registrar for Legal Persons is a public administrative body.

The *Commissioner for Voluntary Organisations* is appointed by the Minister responsible for Social Policy, after consultation with the Social Affairs Committee of the House of Representatives or any other committee substituting the same. The Commissioner may, at any time, be removed or suspended from office by the Minister, after consultation with the Social Affairs Committee of the House of Representatives or any committee substituting the same, on the grounds of proved inability to perform the functions of the office of the Commissioner or proved misbehaviour. However, the Commissioner must, in the exercise of his functions, act impartially and shall not be subject to the direction of any other person or authority.

The *Maltese Courts* are independent of the Government.

b) What is the extent of the supervision? Does the body review reports and make inquiries? Are public benefit organisations subject to inspection?

The *Registrar for Legal Persons* ensures that the registration documents are in conformity with the requirements laid down by Maltese law. The Registrar, for example, ensures that the deed of foundation contains all the mandatory clauses required by law. If not, the Registrar will refuse to register the foundation.

The *Commissioner for Voluntary Organisations* has vast supervisory powers. The Commissioner, for example, monitors accounts and other documents of organisations that fall under the purview of the Voluntary Organisations Act; he reviews documentation and makes inquiries where he feels that more information is required and/or suspects that the organisation is going against the spirit of the Voluntary Organisations Act. He can apply to the Administrative Review Tribunal for a Suspension Order for the suspension of the activities of an enrolled voluntary organisation or for a Cancellation Order, that is, for the cancellation of its enrolment. These Suspension and Cancellation Orders may be issued if the voluntary organisation, for example, is not pursuing the purposes for which it was established and in so doing is misleading the general public.

The *Malta Financial Services Authority* reviews documentation when an application for the authorisation of an administrator is filed.

The *Civil Court in its voluntary jurisdiction* may make various orders concerning:

- (i) the execution or the administration of any foundation; or
- (ii) the administration of any foundation, including an order relating to the exercise of any power, discretion or duty of the administrator, the appointment or removal of an administrator, the remuneration of an administrator, the submission of accounts, the conduct of the administrator and any payments into the Court; or
- (iii) any beneficiary or any person having any connection with the foundation.

The Court may also make any declaration as to the validity or enforcement of a foundation and may rescind or vary any order or declaration made in relation to foundations and associations or make any new or further order or declaration.

There is no appeal from any decree, order, declaration or direction of the Court. Such decrees, orders, declarations or directions remain in force until they are substituted or varied by the Court in either its voluntary or contentious jurisdiction.

In the case of Voluntary Organisations, the Administrative Review Tribunal has jurisdiction to determine matters in relation to any breach of the Voluntary Organisations Act, or any regulations made thereunder, when such breach does not constitute a criminal offence.

c) Is approval from the authority required for certain decisions of the Board of Directors?

In this case, an assumption is being made that Board of Directors means the Administrators. The terms of the foundation may provide for the establishment of a supervisory council consisting of at least one member or for the office of a protector with similar functions. The exercise of any action or discretion on the part of the administrators may be subject to the express consent of the supervisory council or the protectors.

The administrators also require approval from the relevant authority depending on what decisions are being taken. The following are a few examples.

The Administrators require the approval of the *Registrar for Legal Persons* in certain cases. The decision to register a foundation depends on the acceptance and approval, by the Registrar for Legal Persons, of the documents submitted for registration.

It is also clear that administrators require the consent of the Registrar for Legal Persons in the case of revocation of endowments. Endowments made to foundations may only be revoked with the approval of the Registrar for Legal Persons and revocation is suspended until such time as the administrators certify to the Registrar that all commitments have been fulfilled.

The administrators of voluntary organisations require the approval of the *Commissioner for Voluntary Organisations* in certain cases. His approval is, for example, required for the organisation to be enrolled as a voluntary organisation.

The Administrators also require the approval of the *Court* in certain cases. The administrators of a foundation, for example, may not renounce to a benefit to the foundation under a will pursuant to a

disposition in its favour except with the prior consent of the beneficiaries or the Court. Another instance in which the administrators require the approval of the Court arises when the administrators want to amend or add to the purpose of a foundation after the death of the founder. They may only do so with the authority of the Court.

d) Is it mandatory to have a state supervisory official on the board?

No

e) What enforcement measures are in place (including compliance measures and sanctions for non-compliance) concerning registrations, governance, reporting, and public benefit status?

In the case of an application for the registration of a foundation with the Registrar for Legal Persons, persons who, having a duty to submit the registration documents, do not do so within the stipulated time frames, are liable to a penalty of €232.94 each.

There are a number of measures which the Commissioner for Voluntary Organisations may take if the provisions of the Voluntary Organisations Act are not complied with. He may not only act against voluntary organisations which are in breach of the law but also against the players within such voluntary organisations who go against the spirit of the Voluntary Organisations Act.

The Commissioner may, for example, apply to the Administrative Review Tribunal to order the suspension of the activities of an enrolled voluntary organisation (Suspension Order) or the cancellation of the enrolment of a voluntary organisation (Cancellation Order). In those cases where the Commissioner is of the opinion that a person or a voluntary organisation is making or has made abusive use of a Certificate of Enrolment or has made or made use of a forgery thereof, he may:

- (a) prohibit such person from using such certificate by giving notice to such person in writing;
- (b) issue public statements on the facts to warn the public about any abuse by the person or voluntary organisation; or
- (c) apply to the Tribunal to take action to seize any funds raised or public collections made by such person or organisation and to return such funds to the donor. If it is not possible to locate such donors within six months from such seizure, the funds are paid into the Voluntary Organisations Fund.

However certain conditions apply.

All the measures which may be taken by the Commissioner for Voluntary Organisations are found in the Voluntary Organisations Act and any regulations made thereunder.

17. When and how does a foundation dissolve?

The *registration* of a foundation can be terminated in one of two ways:

- *a request is made by the Foundation itself:* A foundation may request the termination of its registration by means of a written request signed by all its administrators or as otherwise required by its statute. The foundation must also present a statement of accounts, declaring what the assets

and liabilities of the foundation are, and must state how such assets and liabilities are to be dealt with on the termination of registration.

- a *request is made by any interested party or any competent authority*: These may apply to the Court for termination of registration and, or the cessation of the foundation. If a request is made for the termination of the registration of a foundation on grounds which imply that the foundation may no longer operate, the Court order stating that the registration must be terminated will also include an order requiring the cessation of such foundation as a foundation, and as a legal person.

All foundations may be *wound up* by one of two procedures: Voluntary winding up and Court ordered winding up.

Voluntary Winding Up: Unless otherwise stated in the foundation deed, the winding up of a foundation must be agreed to by a majority of all administrators. The administrators must follow the procedures laid down in the statute of the organisation and must prepare a scheme of distribution of the remaining assets of the foundation. The administrators must also obtain the approval of the founder or the beneficiaries before implementing the scheme of distribution. In their absence, the approval of the Registrar for Legal Persons must be obtained. This scheme of distribution must in all cases be notified to the Registrar and all interested parties.

In the absence of a clear statement in the statute of a purpose foundation as to how assets are to be disposed of on termination of the foundation, the administrators may apply for directions and shall dispose of the assets as ordered by the Court.

In the case of the dissolution and winding up of private foundations, if there is no indication in the foundation statute regarding how the assets are to be distributed in the case of winding up, the assets are either paid to the beneficiaries or returned to the founder's estate. However, this is only possible after all the expenses of the foundation have been paid. It is the Court which determines to whom the assets must be paid keeping in view the intentions of the founder. The Court will only order that the assets be paid to the beneficiaries if it is satisfied that the founder intended such assets to be available to them. If the Court is not satisfied, the assets will be paid to the founder or his heirs at law.

There are some situations in which the administrators of the foundation must dissolve and wind up the foundation. A foundation terminates when its term elapses, which can be a maximum of 100 years in the case of a private foundation. A foundation also terminates if it has achieved its purpose or the purpose has become impossible. The founder may amend the statute at any time to remove the reason for dissolution.

Court Ordered Winding Up: Any interested party may apply to the Court to issue an order for the winding up of the foundation. The foundation can be wound up for reasons valid at law in terms of its statute or the Second Schedule to the Civil Code. The Court will accept the application and will order that the foundation be wound up if:

- it considers it necessary in the public interest;
- if the provisions of the Second Schedule or any other laws are not being observed by the foundation;
- the situation is so grave as to merit such an order (this situation arises when the ordinary remedies for breach of laws are not sufficient in the circumstances).

When ordering that a foundation be wound up, the Court shall:

- outline the reasons for its decision;

- outline the steps which are to be taken in relation to the assets of any relevant foundation; and
- order the appointment of a liquidator for the foundation.

However the decision of the Court is not absolute and the administrators and any interested person have a right to appeal to the Court of Appeal within fifteen days of the Court's decision ordering the winding up of the foundation.

The Registrar may request the Court to order the winding up of the foundation if this does not have any administrators for more than six months. In this case, any interested person may apply to the Court to appoint suitable persons to act as administrators. In case of default, the Registrar can request the Court to order the winding up of the organisation and to appoint a liquidator. The Registrar is given this power exclusively in the case of purpose foundations. In the case of private foundations, the Malta Financial Services Authority also has the power to apply to the Court.

Winding up also takes place where the foundation is found to be operating illegally or is abandoned. The Registrar first tries to obtain the cooperation of the administrators or other interested persons to wind up the foundation formally. In case of default, the Registrar will request the Court to order the winding up of the organisation.

For a foundation to be wound up any segregated cells which may be in existence must be wound up prior to the winding up of the foundation.

18. Under what conditions does the civil law in your country recognise a foreign foundation?

Maltese law states that foreign foundations which have legal personality under the laws by which they are established shall be recognised as legal persons for all purposes of law.

The law applicable to the establishment of such foreign foundations shall apply to all matters regarding such legal persons, including their existence, the construction and effects of their deed of establishment and their administration.

Unless exempted by express provision of law, any foreign foundation, whether vested with legal personality or not, which carries on an activity in Malta on a regular basis is required to register with the Registrar for Legal Persons prior to commencing its activities. "Regular activity" means activity having a duration of more than three months or which is carried out through a permanent establishment in Malta.

19. Does the civil law in your country allow a foundation to conduct (some or all) activities (grant-making, operating, asset administration, fundraising) abroad? Is there any limitation?

Foundations may carry out all the activities which they are authorised to perform by their statute and by applicable law.

II. Tax treatment of the foundation

1. What are the requirements to receive tax exemptions (pursuing public benefit purposes, non-distribution constraint, being resident in the country?). Is there a special approval process for receiving tax exemption? If so does the process have to be repeated every year?

The income of a foundation which is of a public character and is engaged in philanthropic work and, either qualifies for exemptions in accordance with rules made for this purpose by the Minister responsible for finance, or is named by the said Minister as engaged in philanthropic work, (and there

is not in respect of it a declaration by the said Minister that it has ceased to be so named), is exempt from tax in terms of the Income Tax Act, Chapter 123 of the Laws of Malta. Some entities like political parties and philharmonic societies do enjoy particular exemptions under the Income Tax Act, although these are rarely foundations but are rather associations of persons.

Thus in order for a foundation to benefit from a tax exemption, it is required to be named by the Minister and as the law stands today must be engaged in philanthropic work.

2. What are reporting/proof requirements to claim tax exemptions? What does the foundation have to submit to the authorities (statutes, financial reports, activity reports, other?)

In order for the foundation to be able to claim a tax exemption, it must:

- be of a public character
- be engaged in philanthropic work
- either qualifies for exemptions in accordance with rules made by the Minister responsible for finance, or
- be named by such Minister as engaged in philanthropic work (and there is no declaration by the Minister that it has ceased to be so named).

3. Is specific reporting required for the use of state funds?

In reality this is a matter of policy and not of law. We are aware of cases where the State does require foundations, and other types of organisations, which benefit from its funds, to submit reports on the way such funds will and/or have been utilised. Maltese law does require administrators of foundations to draw up accounts and, in the case of foundations which are enrolled voluntary organisations or which are going to enrol, such foundations must draw up annual accounts and annual reports. These reports and accounts must be submitted to the Commissioner for Voluntary Organisations and they become available to the public. The way funds have been utilised can be verified by reading through the annual accounts and annual reports.

4. Is there an obligation to report on donors and beneficiaries?

Once again this appears to be a matter of policy.

5. Are there specific accounting rules for foundations?

The Voluntary Organisations (Annual Returns and Annual Accounts) Regulations require all enrolled voluntary organisations in terms of the Voluntary Organisations Act to prepare accounts in accordance with the requirements laid down in the said Regulations. Category 3 organisations (organisations whose annual revenue exceeds € 200,000 for three consecutive calendar years) are required to prepare their accounts in accordance with International Financial Reporting Standards and must be audited by a certified public accountant holding a practicing certificate in auditing.

Other voluntary organisations who are enrolled in terms of the Voluntary Organisations Act and whose revenue is more than €20,000 but does not exceed €200,000 for three consecutive calendar years may choose to draw up either cash basis accounts or accrual accounts. Enrolled voluntary organisations whose revenue is less than €20,000 for three consecutive calendar years are required to prepare their accounts on a cash basis.

Although the Voluntary Organisations (Annual Returns and Annual Accounts) Regulations provide that such reporting requirements are binding only on enrolled organisations, the Regulations encourage voluntary organisations to follow such rules even if they are not enrolled in terms of the Act in order to encourage good governance. Accordingly, although voluntary organisations which are

set up as a foundation and which are not enrolled in terms of the Voluntary Organisations Act are not subject to specific accounting requirements, the said Regulations should serve as non-binding guidelines to the administrators of the foundation.

6. Is there a statutory definition in the civil law (foundation law, trust law) of your country what a public benefit purpose (charitable purpose) is? If yes, please give us the definition.

There is no statutory definition of *public benefit* purpose under Maltese law. Under Maltese law, a purpose foundation is a foundation which is established for the achievement of a lawful purpose, including a social purpose without beneficiaries. In a purpose foundation there are no ascertained or ascertainable beneficiaries.

The Income Tax Act makes reference to foundations of a "*public character*". There is no definition of "public character" in our law; however, it has been defined in case-law.

"In Case 23 of 1960, the Board held that a charitable institution retained its public character even though the benefits provided by such institution could apply only to an identifiable sector of the general public. The Board suggested that for an institution to qualify as a public institution restrictions regarding admittance must be "acceptable" and admission must not be "absolutely limited".

*The Court of Appeal expressed itself on the matter in Case 27, a case which involved a bequest of money used to promote the canonisation of a Saint. The Court overruled the decision of the Board in Case 29 of 1959 and ruled that as an eventual canonisation of the Maltese individual to be promoted to sainthood would benefit spiritually the whole Maltese community, such a bequest qualified for the purposes of the publicity degree required by law."*²

The Voluntary Organisations Act establishes that "charitable purpose" means a social purpose. On the other hand, "social purpose" means any charitable or philanthropic purpose, and without prejudice to the generality of the aforesaid, includes:

- (a) the advancement of education, including physical education and sports;
- (b) the advancement of religion;
- (c) the advancement of health;
- (d) social and community advancement;
- (e) the advancement of culture, arts and national heritage;
- (f) the advancement of environmental protection and improvement, including the protection of animals;
- (g) the promotion of human rights, conflict resolution, democracy and reconciliation;
- (h) the promotion or protection of the interests of other social purpose organisations, including federations of such organisations; or
- (i) any other purpose as may be prescribed by the Minister by means of regulations made by virtue of the Second Schedule to the Civil Code.

Under the Trusts and Trustees Act, Chapter 331 of the Laws of Malta, the meaning of *charitable purpose* does include the definition of *social purpose* mentioned above, but does not include a political purpose. A "political purpose" means the promotion of the interests of a political party or a political candidate, whether at local, national or international level, or to seek or oppose changes in the law or governmental policy or decisions except when such law or government policies or decisions directly concern the achievement of charitable purposes.

7. Is there a statutory definition in the tax law of your country of what a public benefit purpose is? If yes, please give us the definition.

² Attard Robert, *An Introduction to Income Tax Theory*, Malta, (Editorial, Agenda, 2005), pgs. 147-148;

Please see above.

8. Please indicate whether the following purposes would or would not be accepted for tax privileges in your country:

Public benefit purpose	Accepted in tax law (for tax privileges)			
	Yes	Probably yes	Probably no	No
Arts, culture or historical preservation	X			
Environmental protection				X
Civil or human rights				X
Elimination of discrimination based on gender, race, ethnicity, religion, disability, sexual orientation or any other legally prescribed form of discrimination				X
Social welfare, including prevention or relief of poverty	X			
Humanitarian or disaster relief				X
Development aid and development cooperation				X
Assistance to refugees or immigrants				X
Protection of, and support for, children, youth or elderly				X
Assistance to, or protection of, people with disabilities	X			
Protection of animals	X			
Science, research and innovation	X			
Education and training	X			
European and international understanding				X
Health, well-being and medical care	X			
Consumer protection				X
Assistance to, or protection of vulnerable and disadvantaged persons	X			
Amateur sports	X			
Infrastructure support for public benefit purpose organisations				X
<i>Other – please list other purposes accepted in tax law for tax privileges in your country</i>				

9. Support of “the public at large”

a) Do the activities of a tax-exempt foundation generally have to benefit “the public at

large”?

No. The foundation must benefit the public but this need not necessarily be the public at large. Case law regarding the definition of “public character”, quoted above, suggests that the benefit could be for a particular sector of the public. However in order for the exemption to apply the foundation must:

- Be engaged in philanthropic work and has been so declared by the Minister, or
- Be operated exclusively for social welfare, civic improvement or for a non-profit purpose to the satisfaction of the Commissioner

b) If yes, can a tax-exempt foundation support a small number of disadvantaged/ underprivileged individuals?

Yes.

Examples: Do the following purposes promote the public at large?

	Yes	Probably yes	Unclear	Probably no	No
For benefit of the inhabitants of a city with 1,000,000 inhabitants		X			
For benefit of the inhabitants of a village with 10,000 inhabitants		X			
For benefit of the employees of a company					X
For benefit of the members of a family					X
For benefit of the students of a university		X			
Award for the best student of a university		X			

10. Non-Distribution Constraint

a) Does a tax-exempt foundation generally have to follow a “non-distribution constraint” which forbids any financial support of the foundation board, staff, etc.?

This all depends on what type of foundation the organisation is. The only type of foundation which may qualify for a tax exemption under Maltese law at the moment is a foundation of a public character which is engaged in philanthropic work. Case law indicates that foundations of “public character” must use all their funds to provide benefits for at least an identifiable sector of the general public, if not the public at large. This seems to suggest that administrators and other players within the foundation should not get any financial support from the foundation because such foundation is set up for the benefit of the public and not for private interests. Unfortunately Maltese tax law and tax case-law do not go into detail on this matter so we are unable to clarify this.

It is also important to point out that foundations of a public character which do philanthropic work and are exempt from tax are usually non-profit making foundations and would probably qualify as voluntary organisations for the purposes of the Voluntary Organisations Act. For a foundation to qualify as a voluntary organisation for the purposes of our law, it must satisfy the criteria laid down in that law, such as the definition of "non-profit making". For a foundation to be non-profit making it is imperative that no part of the income, capital or property can be available directly or indirectly to any promoter, founder, administrator, donor or any other private interest. Such a foundation may even be enrolled with the Commissioner for Voluntary Organisations - where this is the case, it is assumed that none of its income, capital or property is made available to any private interest, because for the Commissioner for Voluntary Organisations to allow a foundation to enrol, he must be satisfied that no gains are made by founders, administrators and any other players within the organisation.

Therefore, case-law seems to suggest and/or implies that a tax exempt foundation should be bound by a non-distribution constraint but this is never explicitly stated in case-law. Where such foundation qualifies as a voluntary organisation in terms of the Voluntary Organisations Act and/or where it is enrolled with the Commissioner for Voluntary Organisations we can confirm that such foundation is definitely bound by the non-distribution constraint referred to in the question.

b) What happens with the foundation's assets in case of dissolution?

This depends on whether the foundation is a purpose foundation or a private foundation. In the case of purpose foundations, any disposal of assets shall be made only to another purpose foundation with similar purposes. In the case of private foundations, on dissolution, the assets shall, subject to the terms of the foundation, devolve on the founder or his heirs at law.

11. "Altruistic" Element

a) Is remuneration of board members allowed in civil law and in tax law? If remuneration is allowed, are there any limits in civil law and/or in tax law?

Yes. The Second Schedule to the Civil Code establishes that administrators (that is, board members) may be remunerated for their services from the income or capital of the foundation, unless the deed of foundation states otherwise. Such remuneration shall be in such amounts and in such manner as may be stated in the deed of foundation or in any agreement between the founder and the administrator or in accordance with applicable law. Remuneration may also be established by the Court on application of the administrator or any interested party.

The Voluntary Organisations Act establishes that unless the statute provides otherwise, administrators may receive a reasonable honorarium for services rendered insofar as the payment of such honorarium does not materially prejudice the achievement of the purposes of the voluntary organisation. Furthermore, if an administrator is also an employee of the foundation, the Voluntary Organisations Act permits such person to receive remuneration for the services he provides as an employee.

b) Does tax law allow a donor/funder to receive some type of benefit in return for a

donation? (e.g. postcards, free tickets for a concert)

No Capital Gains Tax is paid by the donor when the donation is made to philanthropic institutions named by the Minister for finance as being engaged in philanthropic work. A

Donor may reserve rights when making a donation and it is even possible to reserve rights to income and capital in case of need emerging after a donation.

c) Is there a maximum amount that can be spent on office/administration costs in civil law and in tax law?

The Second Schedule to the Civil Code does not establish any limitations. The Voluntary Organisations Act, however, establishes that unless the statute provides otherwise, administrators may receive a reasonable honorarium for services rendered insofar as the payment of such honorarium does not materially prejudice the achievement of the purposes of the voluntary organisation. Moreover, the remuneration of persons who are employed to carry out management, executive or fundraising functions in a voluntary organisation shall not be such as to materially prejudice the achievement of the purposes of the voluntary organisation.

If yes, how are “administration costs” defined? Please indicate which of the following types of expenditures would/would not be considered as “administration costs”:

- Personnel costs (staff salaries/payroll costs)
- Board remuneration
- Costs of external audit
- Other legal/accounting costs
- General office overheads (rent/mortgage payments, utilities, office materials, computers, telecommunications, postage)
- Insurance
- Publicity and promotion of the foundation (e.g. website, printed promotional materials)
- Asset administration costs
- In the case of an operating foundation – costs related to programmes/institutions run by the foundation
- Costs related to fundraising

12. Hybrid Structures (elements of private benefit in public benefit foundations)

a) Does the civil law of your country accept the following provisions/activities of a public benefit foundation?

	Yes	Probably yes	Unclear	Probably no	No
The founder restricts the use of the endowment by specifying that the foundation is required to maintain the founder, his spouse and descendants.					X

The founder retains a beneficial reversionary interest in the capital of a property or other asset for his own continuing use.			X		
The gift is of only the <i>freehold reversion</i> (residuary interest) in a residence that is subject to an existing lease (for a term of years, or even for life) in favor of the founder (or another member of her/his family) as tenant.	X				
A foundation distributes a (small) part of its income to the founder or his family.					X

b) Does the tax law of your country accept the following provisions/activities of a tax-exempt foundation?

	Yes	Probably yes	Unclear	Probably no	No
The founder restricts the use of the endowment by specifying that the foundation is required to maintain the founder, his spouse and descendants.					X
The founder retains a beneficial <i>reversionary</i> interest in the capital of a property or other asset to retain for its own continuing use.			X		
The gift is of only the <i>freehold reversion</i> (residuary interest) in a residence that is subject to an existing lease (for a term of years, or even for life) in favor of the founder (or another member of her/his family) as tenant.	X				
A foundation distributes a (small) part of its income to the founder or his family.					X

13. Distributions and Timely Disbursement

a) Are foundations allowed to spend down their capital?

Yes

b) Are they allowed to be set up for a limited period of time only? If so is there a minimum length of time for which the foundation must exist?

Yes. Private foundations are of limited duration. A private foundation may be established for a maximum period of one hundred years. In the event that a longer term is stated in the deed, the private foundation terminates on the hundredth anniversary from when it came into existence. The limitation on duration also applies when the foundation results from the conversion of another organisation or of a trust in accordance with the Civil Code and any regulations. In such a case, periods of existence must be considered cumulatively. Purpose foundations, foundations used as collective investment vehicles or foundations used in securitisation transactions may be established for an unlimited term.

There is no minimum length of time for which the foundation must exist.

c) Does the civil law and/or the tax law of your country require a foundation to spend its income (or a certain amount of the income) within a certain period of time, e.g. within the next financial year? If so, is there a specific amount/percentage of the income that must be spent within this time? Which resources would be considered as income? E.g. would donations/contributions designated as being for building up the endowment be included in /excluded from the income to be spent? What expenditures would count towards the disbursement of income (e.g. would administration costs be included/excluded?)?

No. This depends on the terms of the deed of foundation.

d) Does the civil law and/or the tax law of your country require a foundation to spend a percentage of its overall assets in the form of a “payout rule”?

No. We are not aware of any provisions of this kind in our civil law or tax law.

Example: Does the civil law of your country accept the following activities of a public benefit foundation?

Our comments below must be seen within the context of our comments above i.e. a tax exempt foundation must not only satisfy the requirement that it is of a public character but it has to satisfy additional requirements.

	Yes	Probably yes	Unclear	Probably no	No
A foundation accumulates its income for 5 years, only in the 6 th year are there distributions for the public benefit purpose of the foundation.	X				

Example: Does the tax law of your country accept the following activities of a public benefit foundation?

	Yes	Probably yes	Unclear	Probably no	No
A foundation accumulates its income for 5 years, only in the 6 th year are there distributions for the public benefit purpose of the foundation.	X				

14. Does activity abroad put the tax-exempt status at risk?

This is generally not the case. However, this would depend on what type of activity the foundation is conducting abroad.

15. Are there any civil and/or tax law rules regulating cross-border grants by a foundation? If yes, please provide a description of the requirements the foundation must fulfil in such cases.

We are not aware of any rules regulating cross-border grants by a foundation.

16. Income tax treatment

How are the following types of income treated for income tax purposes?

Grants and donations

Grants and donations may only be subject to tax on capital gains if the transfer made by the donor to the foundation is of certain chargeable assets including marketable securities and immovable property and the beneficiaries are not part of an exempt class or are for a charitable or philanthropic purpose.

No tax on capital gains applies if the donation/grant is of cash.

Furthermore the law provides for an exemption from tax on capital gains if the donation of chargeable assets is made to a philanthropic institution approved by the Minister for such purpose.

In cases where:

- the donation consists of chargeable assets, and
- the above mentioned exemption does not apply, and
- the donor is subject to the jurisdiction of Maltese tax,

tax may be payable on any capital gain made by the donor. The applicable tax rate is either:

- 12% of the market value of any immovable property situated in Malta; or
- -between 0% to 35% on any capital gain made in case of all chargeable assets.

Investment income (asset administration)

- Interest from fixed rate bonds;
- Equities;
- Income from leasing of a property that belongs to the foundation;

The Income Tax Act provides for the exemption in respect of the income of a foundation of a public character which is engaged in philanthropic work and is named by the Minister of Finance for the purposes of the said exemption.

The Income Tax Act also provides for an exemption of an institution which the Commissioner is satisfied is organised and operated exclusively for social welfare, civic improvement or for any other purpose where no part of the income is payable to, or is otherwise available for the personal benefit

of any proprietor, member or shareholder, as long as such institution is not deemed to be carrying on a business.

Where the above exemptions do not apply, the general rule is that a foundation shall be treated in the same manner as a company which is ordinarily resident and domiciled in Malta. This means that it would be taxed at the corporate tax rate of 35% like Malta companies on any income derived which does not benefit from the exemptions.

Alternatively, a foundation may opt to be taxed as a trust. In such case, the foundation may benefit from tax transparency such that any income derived by the foundation will be considered not to be attributable to the foundation but instead is considered to be derived directly by the beneficiaries of the foundation.

Voluntary organisations enrolled in terms of the Voluntary Organisations Act, or which though not so enrolled are established for a social purpose and are non-profit making, are taxable at progressive rates as follows (unless they irrevocably opt to be treated as a company):

- First €2,400 at 15%
- Next €2,400 at 20%
- Next €3,500 at 30%
- Remainder at 35%

However, the tax payable by a voluntary organisation shall in no case exceed 30% of its profits.

There are also final taxes on some forms of investment income e.g. interest on a bank account is subject to a final withholding tax of 15%, and some profits from investment funds licensed in Malta are also subject to such reduced rate.

The aim of investing in bonds would normally be to make a profit and should not be considered to be income derived from activities organised for social welfare, civic improvement, pleasure of recreation, or from activities of a philharmonic society and thus if such income would be available for the personal benefit of any proprietor, member or shareholder it should not be exempt and should be subject to tax in Malta (a) if the organisation is established in Malta, or (b) if not established in Malta, when such income arises in Malta, or is remitted to Malta.

Any dividends derived by a foundation from equities may benefit from a participation exemption if:

- a) the foundation is taxed in Malta as a company ordinarily resident and domiciled in Malta; and
- b) the holding of the foundation qualifies as a participating holding in terms of the Income Tax Act.

Income derived from the leasing of property should not be considered to be income derived from activities organised and operated for social welfare, civic improvement, pleasure or recreation, and thus if the aim of the leasing of the property is to make a profit, or such income would be available for the personal benefit of any proprietor, it should not fall under the income tax exemption referred to above. In such cases, any rental income derived should be taxable at the normal rates of income tax if (a) the organisation is established in Malta; or (b) if not established in Malta, when such income arises in Malta, or is remitted to Malta.

Economic activities related/unrelated

- Income from running a hospital/museum/opera

The income of any institution, trust, bequest or foundation, of a public character, and of any other similar organisation or body of persons, also of a public character, which is engaged in philanthropic work and is named by the Minister, is exempt from income tax. There are currently (December 2013) 156 named institutions/ foundations by the Minister.

Furthermore, the law also exempts the following from income tax:

- the income of a club or similar institution which the Commissioner is satisfied that is organised and operated exclusively for social welfare, civic improvement, pleasure or recreation, or for any other purpose except profit, no part of the income of which is payable to, or is otherwise available for the personal benefit of, any proprietor, member or shareholder, so long as such club of similar institution is not deemed to carry out business for the purposes of the Income Tax Acts.

- the income of a club or similar institution which the Commissioner is satisfied constitutes a *bona fide* sports club, provided that no part of the income of which is payable to, or is otherwise available for the personal benefit of, any proprietor, member or shareholder, and provided also on winding up of such club or institution, no funds are distributed or available to such proprietor, member or shareholder.

Unless the income of a public benefit organisation falls under one of the above exemptions, tax will be due on any income or gains derived by the organisation.

- Income from producing/selling books (e.g. art books sold by a cultural foundation)

The general rules applicable to foundations as referred to above should apply depending on whether the foundation is being treated as a company or as a trust.

- Income from running a bookshop inside a museum/opera run by the foundation

The general rules applicable to foundations as referred to above should apply depending on whether the foundation is being treated as a company or as a trust.

- Income from running a café in the hospital/museum run by the foundation

The general rules applicable to foundations as referred to above should apply depending on whether the foundation is being treated as a company or as a trust.

- Income from selling T-shirts (activity not related to the pursuance of the public benefit purpose)

The general rules applicable to foundations referred to above should apply depending on whether the foundation is being treated as a company or as a trust.

- Income from intellectual property (e.g. royalties and licence fees)

The general rules applicable to foundations as referred to above should apply depending on whether the foundation is being treated as a company or as a trust.

Income deriving from grant expenditure towards public benefit purpose/programme activities (such as loans, guarantees, equities)?

Is major shareholding considered as an economic activity and taxed accordingly?

This would be taxed according to the normal rules depending on whether the foundation is being treated as a company or as a trust.

In cases where the foundation is treated as a company, an exemption applies in terms of Maltese laws where such foundation has a “participating holding” (inter alia existing if the foundation has a 10% equity holding which entitles it to a minimum of 10% of two of the following three rights: rights to profits; voting rights; and rights to assets upon a liquidation) in a company/partnership. In the case of a participating holding, any income derived therefrom would only be exempt if an anti-abuse test is satisfied. The anti-abuse test would be satisfied if the holding is in an entity which is incorporated or resident in the EU.

Income deriving from grant expenditure towards public benefit purpose/ programme activities (such as loans, guarantees, equities)?

The Income Tax Act provides for an exemption in respect of the income of a foundation of a public character which is engaged in philanthropic work and is named by the Minister of Finance for the purposes of the said exemption.

The Income Tax Act also provides for the exemption of an institution which the Commissioner is satisfied is organised and operated exclusively for social welfare, civic improvement or for any other purpose where no part of the income is payable to, or is otherwise available for the personal benefit of any proprietor, member or shareholder, as long as such institution is not deemed to be carrying on a business.

In cases where the exemption does not apply, it is typically arguable that grants and donations should not be treated as receipts of an income nature but of a capital nature and thus as non-taxable. However fund-raising activities and income from business activities will normally be taxable.

The Income Tax Act also provides for a deductible expense in respect of certain donations made to athletes or sports regulatory bodies participating in certain approved events and to national heritage organisations.

17. Are capital gains subject to tax? If so, are they taxed as income or liable to a separate tax?

Unless one of the above-mentioned exemptions applies, tax on capital gains on transfers of marketable securities and immovable property will apply. The applicable tax rate is 35% on any capital gain derived from the transfer of a chargeable asset, or 12% of the market value of an immovable property situated in Malta.

18. Does any kind of value added tax (VAT) refund scheme for the irrecoverable VAT costs of public-benefit foundations exist in your country?

As the law stands today, we are not aware that there is a VAT refund scheme applicable to public-benefit foundations.

19. Is capital tax levied on the value of assets, where applicable?

No.

20. Are there taxes on the transfer of assets by foundations?

Tax on capital gains may be payable by a foundation on the transfer of a chargeable asset. The Maltese Income Tax Act lists a number of assets which are chargeable to tax on capital gains upon their transfer including:

- Immovable property
- Securities
- Business
- Goodwill
- Business permits
- Copyright
- Patents, Trademarks and trade names.

21. Are there any other taxes to which public-benefit foundations are subject there (e.g. real property tax)?

There are no other property taxes under Maltese law except for tax on the transfer of immovable property.

22. Can a foreign foundation get the same tax benefits as a national foundation according to the wording of the tax law in your country? If yes, under what conditions – if they have to fulfil exactly the same requirements as local based public benefit foundations, please refer to above but indicate which documents need to be provided and translated:

- Statutes (translation required?)
- Last annual financial report (translation required?)
- Documents providing evidence for certain tax law requirements e.g. that income was actually spent for public benefit purposes, which may not be required by the organisation's country of seat but are required according to the legislation of the country from which tax benefits are sought?
- Other?

A foreign foundation that is not resident and domiciled in Malta is only taxable in Malta if it derives Maltese source income and capital gains. If the foreign foundation becomes resident or domiciled in Malta then apart from being taxable on any income and capital gains arising in Malta it would also be taxable on any income arising outside Malta that is remitted to Malta.

23. Does your country apply withholding tax to the income from local investments held by domestic and/or foreign-based foundations? If so, can domestic or foreign-based foundations reclaim all or part of the withholding tax under domestic law?

From a Maltese tax perspective, any foreign tax suffered on investment income will be relieved through double taxation relief (Maltese legislation provides for unilateral relief in situations where no double tax treaty is available). The issue of whether a foundation is a treaty subject for the purposes of double tax treaties (especially when the foundation is not subject to tax in its residence state) and thus eligible for lower withholding taxes is a moot point which typically depends on the interpretation adopted by the source country.

III. Tax treatment of donors of public benefit foundations

1. System of tax credit³ or tax deduction⁴?

The Income Tax Act establishes rules providing for a deductible expense in respect of certain donations:

- Cash donations made to athletes; sports regulatory bodies participating in certain approved events and to bona fide artists (applicable solely to donors which are companies)
- Cash or asset donations (except immovable property) of not less than €2,320 made to certain national heritage organisations
- Cash donations to the Arts Fund or non-profit making cultural organisations approved by the Arts Fund (applicable only to donors which are companies)

2. Tax treatment of individual donors

a) What tax relief is provided for individual donors? Is there a minimum and/or a ceiling to a contribution on which tax incentives can be claimed?

See comments above.

b) Which assets qualify for tax deductibility?

See comments above.

3. Tax treatment of corporate donors

a) What tax relief is provided for corporate donors? Is there a minimum and/or a ceiling to a contribution on which tax incentives can be claimed?

See comments above.

b) Which assets qualify for tax deductibility?

See comments above.

³ For the purposes of this profile tax credit can be defined as an amount that can be deducted from the actual tax to be paid (reduction in amount of tax paid)

⁴ For the purposes of this profile tax deduction can be defined as a reduction in the gross amount on which tax is calculated (reduction in taxable income/tax base)

4. Tax treatment of donations to non-resident public-benefit foundations – do donors get the same tax incentive?

n/a

5. Other frameworks such as percentage law systems

None

6. What are the requirements that the donor must fulfil/ information they must provide in order to claim tax benefits?

What information do donors have to provide to their tax authority in order receive tax incentives for their donation (e.g. submitting details on the organisation they support: statutes, annual financial report, documents providing evidence for certain tax law requirements e.g. that income was actually spent for public benefit purposes?)?

It must be proven that a donation of not less than € 2,320 has been made to:

- The Superintendent of Cultural Heritage;
- Heritage Malta;
- Fondazzjoni Patrimonju Malti ;
- Non-Government cultural heritage organisations.

Certain documents must also be submitted with the income tax return for the relevant year and other requirements must also be complied with.

When donations are made to the Malta's Arts Fund or cash donations are made to certain non-profit making cultural organisations, the organisation must prove to the satisfaction of the Commissioner of Inland Revenue that it has made a cash donation to the said Fund or non-profit making cultural organisation approved by the Arts Fund. Certain documents must also be submitted and other criteria must also be satisfied. In the case of tax exemptions, the foundation must be of a public character and must be engaged in philanthropic work. To qualify for such exemption it must either fall under rules made for this purpose by the Minister responsible for finance or be named by the said Minister as engaged in philanthropic work.

7. Are there any different or additional requirements to be fulfilled when a donor is giving to a foreign-based foundation?

No.

What information do donors to foreign-based organisations have to provide in order receive tax incentives for their donation (e.g. Statutes (translation required?)? Annual financial report (translation required?)? Documents providing evidence for certain tax law requirements e.g. that income was actually spent for public benefit purposes?)?

Same implications as domestic organisations apply.

IV. Tax treatment of the beneficiary (receiving a grant or other benefit from a foundation)

1. Individuals

It is arguable that the grants should not be taxable since such receipts are not of an income but of a capital nature.

2. Legal entities

n/a

3. Are there any different or additional requirements that must be fulfilled by a beneficiary receiving funding from abroad?

No.

V. Gift and inheritance tax

1. Does gift and inheritance tax/transfer tax exist in your country and if yes who has to pay the tax in the case of a donation/legacy to a public-benefit organisation (the donor or the recipient organisation)?

Duty causa mortis is payable upon the transmission causa mortis of certain chargeable assets such as immovable property situated in Malta and marketable securities.

2. What are the tax rates? Is there a preferential system for PBO's? Which PBO's qualify? Is there a difference according to the region or the legal status of the PBO?

In case of immovable property the rate of stamp duty is 5%. In case of marketable securities the duty is 2% (which may be increased to 5% where the securities are in immovable property companies).

3. Is there a threshold (non-taxable amount) from gift and inheritance tax for donations/legacies to public-benefit organisations?

n/a

4. Is there a legal part of the estate that is reserved for certain protected heirs and which a donor cannot give to third parties?

Yes. The reserved portion is that portion of the property of the deceased which is saved by law to the descendants. The reserved portion is a third part of the property of the deceased, if such children are not more than four in number or one-half of such property if they are five or more in number.

5. What is the tax treatment (inheritance and gift tax) of legacies to non-resident public benefit foundations?

Same tax treatment as resident public benefit foundations applies.

VI. Trends and developments

1. Are there current discussions about the question of whether cross-border activities of foundations or other non-profit organisations and their donors are protected by the fundamental freedoms of the EC Treaty? Have there been any changes to your country's legislation, resulting from the Persche, Stauffer, Missionswerk or other relevant ECJ judgments, or are changes being discussed?

No, so far there are no discussions in this regard.

2. Has the fight against terrorism and financial crime led to the introduction in recent years of new laws / rules affecting the foundation sector (e.g. implementation of EU Anti Money Laundering Directive, or reactions to recommendations of the Financial Action Task Force)?

a) Is there a specific national/regional anti-terrorism act (legislation) in your country, (which one and date of entry into force or adoption)?

Yes. The Criminal Code, Chapter 9 of the Laws of Malta, regulates acts of terrorism, the funding of terrorism and ancillary offences. (These articles were introduced into the Criminal Code in 2005). The combating of money laundering and funding of terrorism is also regulated, *inter alia*, through the Prevention of Money Laundering Act, Cap. 373, Laws of Malta (which came into force in 1994) and the Prevention of Money Laundering and Funding of Terrorism Regulations, S.L. 373.01, Laws of Malta (which came into force in 2008).

b) If so, has this law introduced new legal and regulatory requirements for foundations (please describe)?

No new legal and regulatory requirements have been introduced expressly for foundations. However, the Criminal Code provisions on anti-terrorism may also cover foundations because the law establishes that: "Whosoever commits an act of terrorism shall be guilty of an offence and shall be liable on conviction to the punishment ...". The use of the word "whosoever" means that any person who commits some act of terrorism would be guilty of an offence under that law which suggests that foundations and the players within the foundation, such as the founders and the administrators, are regulated by this law. In summary, the aim of the law is to punish any person for committing acts of terrorism and to deter persons from committing such acts. It also aims, amongst other things, to punish such persons for accumulating money or other property in order to fund terrorism, using money or other property for the purposes of terrorism, and possessing money or other property intending it to be used for the purposes of terrorism.

The Regulations cover the emerging threat of the funding of terrorism and aim to prevent it. The Regulations establish that for a subject person (for example, notaries and other independent legal professionals) to be able to form a business relationship or carry out a transaction with an applicant

for business such subject person must perform due diligence on the said applicant. An "applicant for business" means a legal or natural person who aspires to form a business relationship, or to carry out an occasional transaction with a person who is acting in the course of either relevant financial business or relevant activity.

The Regulations do not expressly mention foundations, however, a foundation appears to qualify as an applicant for business for the purposes of this Regulation because (i) when it is an existing foundation it has legal personality and (ii) when it is a newly set up foundation it must register with the Registrar for Legal Persons and acquires legal personality when it is registered. Therefore, it seems that when the foundation seeks to enter into a business relationship with a subject person it would be subject to due diligence and would have to submit any required documents to the subject person in order to enable the subject person to conduct such due diligence.

In the future, new legal and regulatory requirements that relate to anti-money laundering and the prevention of funding of terrorism may be introduced for voluntary organisations and/or for all organisations in general.

c) Has the foundation supervisory authority introduced new regulatory/oversight requirements to comply with counter terrorism measures/law?

The Prevention of Money Laundering Act (Cap. 373 Of the Laws of Malta) established the Financial Intelligence Analysis Unit (FIAU) the duty of which is to receive, analyse and disseminate financial intelligence with a view to combating money laundering and the funding of terrorism in Malta.

The Malta Financial Services Authority introduced Guidance Notes for Investment Services and Life Assurance Business and also introduced Guidance Notes for Credit and Financial Institutions to prevent money laundering in general. However, so far, the MFSA has not introduced any guidance notes for foundations.

d) Has the foundation supervisory / regulatory authority(ies) introduced guidance tools to assist foundations to comply with counterterrorism measures/law?

No

e) If so, did the foundation supervisory authority engage in a consultation with the foundation sector on counter terrorism measures/ does it plan such a consultation?

No. In recent years, attempts have been made to draw up policies on anti-money laundering-combating the financing of terrorism (AML-CFT) for voluntary organisations but these have not been finalised.

3. Are there any other recent trends or developments affecting the legal and fiscal environment for public benefit foundations in your country?

If a foundation is an enrolled voluntary organisation in terms of the Voluntary Organisations Act it may:

- (a) receive or be the beneficiary of grants, sponsorships or other financial aid from the Government, any entity controlled by the Government or the Voluntary Organisations Fund;
- (b) be the beneficiary of any policies supporting voluntary action as they may be developed by the Government;
- (c) receive or be the beneficiary of exemptions, privileges or other entitlements in terms of any law;
- (d) be a party to contracts and other engagements, whether against remuneration or not, for the carrying out of services for the achievement of its social purpose at the request of the Government or any entity controlled by the Government.

Moreover, a voluntary organisation which is enrolled in terms of the Voluntary Organisations Act may make public collections without further authorisations.

However, enrolment as a voluntary organisation does not mean that the foundation would be exempt from tax under Malta's tax laws.

New regulations were enacted in Malta in 2010 to regulate the way foundations may be taxed. The general rule is that a foundation may be taxed like a company, that is, at the rate of 35%, or it may opt to be taxed like a trust and in this case it will also be taxed at the rate of 35% unless tax transparency applies (refer to above). Where the foundation is a voluntary organisation enrolled in terms of the Voluntary Organisations Act or which, though not enrolled, is established for a social purpose and is non-profit making, it will be taxable according to progressive rates of tax starting from 0% and going up to 35% (but in no case must the tax on the profits of the foundation exceed 30% of its profits) unless the foundation elects to be treated like a company.

4. Public fundraising

Are there any specific laws that regulate fundraising and do they affect foundations?

Yes. Fund raising is regulated by the Public Collections Act (Cap. 279 of the Laws of Malta). A foundation must obtain a licence from the Commissioner of Police in order to make public collections. However, a foundation may be granted an exemption from the requirement to obtain such licence if it pursues a charitable purpose. Such exemption may be granted where the Minister responsible for the Police is satisfied that the organisation pursues a charitable purpose in Malta and is desirous to promote collections for that purpose.

Where the foundation is an enrolled voluntary organisation it can make public collections without the need to obtain a licence from the Commissioner of Police. A public collection means an appeal to the public, or to a part thereof, by means of visits from house to house, or by any overt act in the street or other public place, or by means of an advertisement or in any other manner, to give money or other property. A public collection does not include the selling of articles in the ordinary course of trade, to earn a livelihood, when no representation is made by or on behalf of the seller that any part of the proceeds of the sale will be devoted to any charitable or similar purpose (also excluded are any collections made in a church or by a political party). It must be noted that for the purposes of the Voluntary Organisations Act, the term "public" within the context of a collection does not include existing founders or donors of the voluntary organisation, even if in large numbers, nor does it include a group of less than fifty persons taken on one or more occasions.

Useful contacts

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Selected bibliography

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Civil Code (Second Schedule) (Notifications and Forms) Regulations, S.L. 16.08, Laws of Malta;
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Civil Code (Second Schedule) (Existing Organisations) Regulations, S.L. 16.10, Laws of Malta;
Voluntary Organisations Act, Cap. 492, Laws of Malta;
Voluntary Organisations (Annual Returns and Annual Accounts) Regulations, S.L. 492.01, Laws of Malta;
Trusts and Trustees Act, Cap. 331, Laws of Malta;
Income Tax Act, Cap. 123, Laws of Malta;
Foundations (Income Tax) Regulations, Cap. 123.114, Laws of Malta;
Duty on Documents and Transfers Act, Cap. 364, Laws of Malta;
Prevention of Money Laundering Act, Cap. 373, Laws of Malta;
Prevention of Money Laundering and Funding of Terrorism Regulations, Cap. 373.01, Laws of Malta;
Public Collections Act, Cap. 279, Laws of Malta.

The above laws can be found on the website of the Ministry for Justice and Home Affairs:
www.mjha.gov.mt

Attard Robert, *An Introduction to Income Tax Theory*, Malta, (Editorial, Agenda, 2005).

About the EFC Legal and Fiscal Country profiles

This profile is part of a series of profiles of the legal and fiscal environments for foundations in 42 different countries across the wider Europe, as well as some countries in other world regions. The aim of these profiles is to paint a picture of the current operating environment for foundations in these countries to better understand the legislative landscape foundations inhabit. The profiles are produced in collaboration with foundations, legal experts, and associations in each country. Each profile is written by the national-level expert. A comparative overview of the country profiles from wider Europe can be downloaded from the EFC website: “Comparative Highlights of Foundation Laws: The Operating Environment for Foundations in Europe.”

www.efc.be

About the European Foundation Centre

The European Foundation Centre, founded in 1989, is an international membership association representing public-benefit foundations and corporate funders active in philanthropy in Europe, and beyond. The EFC develops and pursues activities in line with its four key objectives: creating an enabling legal and fiscal environment; documenting the foundation landscape; building the capacity of foundation professionals; and promoting collaboration, both among foundations and between foundations and other actors. Emphasising transparency and best practice, all members sign up to and uphold the EFC Principles of Good Practice.