

## EFC COUNTRY PROFILE JANUARY 2011: MALTA

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### Legal framework for foundations

- **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)?**

Maltese law is a civil law system but with strong influences of English law especially in the commercial sector. Being based on Roman law, Maltese law and the Courts in Malta have always recognised foundations of different types. However, prior to the Second Schedule<sup>1</sup> to the Civil Code, foundations lacked a clearly defined legal framework within which to operate, and it was only with the Second Schedule that the foundation was legislatively defined.

Art 26 (1) of the Second Schedule to the Civil Code<sup>2</sup> establishes that:

“A foundation is 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.”

Therefore, a foundation consists of a group of assets (such as money or other property) which are pooled together to achieve those aims which the founder has established in the deed of foundation through the services of administrators.

The term “foundation” includes all organisations, institutes or similarly titled patrimonies which are set up through a bequest, an endowment or appropriation of assets, however named, but does not include trusts. A foundation may only be constituted by virtue of a public deed *inter vivos* or by a will.

The two main types of foundations which can 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 patrimony is owned by the foundation itself (due to its separate legal personality) and is administered by designated persons (known as “administrators”) for the benefit of such beneficiaries.

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<sup>1</sup> Introduced in the Laws of Malta by means of Act XIII of 2007

<sup>2</sup> Chapter 16, Laws of Malta

- Purpose Foundations: Such foundations have no ascertained or ascertainable beneficiaries but are established exclusively:
  - (i) For any charitable, philanthropic or other social purpose<sup>3</sup>
  - (ii) As a non-profit making organisation, or
  - (iii) For any other lawful purpose (not necessarily a social purpose and can be a private purpose).

In this case, the foundation's patrimony is also owned by the foundation itself (due to its separate legal personality) and is administered by the administrators for the fulfilment of the purposes for which the foundation was established.

It is important to note that 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 will still be treated as a purpose foundation.

If the deed of foundation contains no specified purpose, the foundation is deemed to have been established for the private benefit of the founders or their successors in title.

In Malta, there are also pious foundations<sup>4</sup> (in which aggregates of things are destined for pious or religious purposes, that is, those which concern acts of piety, of the apostolate or of charity, whether spiritual or temporal) and foundations which classify as public organisations, that is, foundations which are controlled, directly or indirectly, by the Government. A foundation 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 does not apply to pious foundations and marriage legacies (which are endowments for unmarried women) in many of its aspects as it would be impossible to implement given the numbers involved and the fact that many are of unknown origin. This is so unless they opt to register as foundations in terms of the Second Schedule, in which case they shall be regulated by the provisions of the Schedule from such date.

Maltese law incorporated trusts into its legal system in 2004<sup>5</sup>, and there is close proximity between trusts and foundations, but only foundations have legal personality.

The Second Schedule also caters for foundations which existed prior to the coming into force of the Act and which were recognised as legal persons in terms of customary law or in terms of any final judgment. These existing foundations are bound to register as legal persons in terms of this Schedule until the 1 April 2012. Failure to register will not imply the loss of legal personality enjoyed by such an existing foundation. On the lapse of the aforementioned period, the existing foundation will continue to enjoy legal personality but the foundation, as well as its administrators, will be governed by the provisions of the Second Schedule which

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<sup>3</sup> "Social purpose" is defined in the Voluntary Organisations Act (Chapter 492, Laws of Malta) and 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 this Act

<sup>4</sup> For a full definition refer to Article 6(6), Second Schedule, Civil Code

<sup>5</sup> Trusts and Trustees Act, Cap 331, Laws of Malta

are applicable to unregistered organisations. An unregistered organisation enjoys limited recognition and legal powers to achieve the specific purpose for which it is constituted.

Foundations established after 1 April 2008 are obliged to register with the Registrar for Legal Persons and will only be granted legal personality upon registration.

➤ **What purposes can foundations pursue?**

Foundations must be established for a purpose(s) which is lawful, possible, and not immoral or against public policy. They must be established for a purpose in all cases whether the foundation is established with beneficiaries (private foundation) or is established solely for a purpose (purpose foundation). In either case, the purpose of a foundation may be the promotion of a private interest or benefit, a social purpose, any other lawful purpose or a combination of purposes.

A foundation may not be established to trade or to carry out commercial activities, even if the proceeds of such efforts are destined to social purposes. There are, however, some exceptions to this rule.<sup>6</sup>

➤ **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. These documents evidence the existence of the foundation and no other instrument suffices to constitute a foundation. For the deed of foundation to be valid, it must contain certain mandatory clauses, in the absence of which the deed will not be registrable with the Registrar for Legal Persons.

These clauses are:

- 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. Any foundation, in order to be validly registered, 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.<sup>7</sup>
- 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 named in the deed 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 agree to it. It is possible to appoint administrators who are non-residents of Malta. In such a case, however, it is essential to appoint and retain at all times, a person who is ordinarily resident in Malta to act as judicial representative of such foundation in Malta. . In this case, the deed

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<sup>6</sup> Article 32A, Second Schedule, Civil Code

<sup>7</sup> Existing foundations, that is, those foundations which were already in existence prior to the coming into force of the Second Schedule to the Civil Code (1<sup>st</sup> April, 2008) need not contain an endowment of money or property worth at least € 1,164.69 or € 232.94 (in the case of a foundation established exclusively for a social purpose or as non-profit making). Upon registration, if the value of the assets of an existing foundation is not clear, the administrators must declare that, in their considered opinion, the property endowed upon or vested in the foundation has a value of at least the amount required by law (€ 1,164.69 or € 232.94 as the case may be). This declaration is recorded in a statement which is attached to the application form for the registration of the existing foundation.

must include the name and address of the person resident in Malta who has been appointed to act as the local representative of the foundation in Malta.

- The legal representation: A foundation acquires separate legal personality upon registration. Being a legal person, it has to be represented in its legal and judicial affairs by a natural person. Such legal representation is vested in the manner stated in the statute of the foundation. The persons who have legal representation of the foundation have the authority to bind it to the extent of the powers vested in them.
- 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 can only be established for a maximum period of a hundred years, and if no term is specified, then the private 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 its 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 Registrar for Legal Persons has no authority to request that the beneficiary statement be presented to him. In fact, in the case of a private foundation, a note of reference referring only to the founder must be filed with the Registrar for Legal Persons.
- The deed of foundation may also contain additional clauses regulating the administration of the foundation. It can contain, for example, amongst other things dispositions regarding 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 designated administrators of the foundation to register the foundation in terms of such Schedule. The Second Schedule to the Civil Code regulates 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, must also be presented to the Registrar for Legal Persons.

In summary, the following documents must be delivered to the Registrar for Legal Persons for registration:

- 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 which is a written consent form duly signed and delivered by the administrators named in the deed, whereby they consent to act as administrators 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 if in his discretion this is required to register the foundation

The Registrar for Legal Persons can accept or refuse to register a foundation: Once the Registrar for Legal Persons has received all the documents, and he is satisfied that all the regulations have been complied with, he shall proceed to register the foundation. The certificate of registration includes a registration number and specifies the legal form and the nature of the organisation. The issue of a registration certificate implies compliance with all conditions for the valid existence and registration of the foundation.

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. The applicant who is aggrieved by the decision of the Registrar for Legal Persons may appeal to the Court within thirty days of the receipt of the Registrar for Legal Persons' decision. The applicant can also appeal to the Court if he does not receive a reply to an application he submitted to the Registrar for Legal Persons to register a foundation within forty-five days from the date of application for registration.

The Registrar for Legal Persons has the right to ask for any information from any person if he considers such information to be necessary for the registration of the foundation. In the case of a private foundation, however, the Registrar for Legal Persons is not entitled to request a copy of the beneficiary statement from the administrators or the Notary Public, since the beneficiary statement is confidential.

The Registrar for Legal Person's right to ask for any information does not limit any powers of the Malta Financial Services Authority (MFSA) under applicable law. Foundations are not regulated by the MFSA. However, any person who acts as an administrator over the patrimony of a private foundation or of a purpose foundation not established for a charitable purpose requires the authorisation of the MFSA.

Purpose foundations which are established for a social purpose or are non-profit making may enrol as voluntary organisations provided that they comply with the requirements contained in the Voluntary Organisations Act.<sup>8</sup> This enrolment is optional. Private foundations cannot enrol.

➤ **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? )**

Yes. As explained above, a foundation must be registered with the Registrar for Legal Persons and acquires separate legal personality from the date of such registration.<sup>9</sup> The Registrar for Legal Persons does have the discretion to refuse to register a foundation if he is not satisfied that all regulations have been complied with but cannot refuse to register on the basis of disagreement with the purposes or such matters.

The Notary plays an important role in creating and registering a foundation. As seen above, a foundation can 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 or other public officer lawfully authorised to attribute public faith thereto.

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

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<sup>8</sup> Chapter 492, Laws of Malta

<sup>9</sup> Pious foundations and marriage legacies are not bound to register and continue to enjoy legal personality until they are wound up. Existing foundations created by public deed and existing on the 1 April, 2008 continue to enjoy legal personality notwithstanding that they fail to register until the 1 April, 2012. After such date, the existing foundation, as well as its administrators, will be governed by the provisions of the Second Schedule which are applicable to unregistered organisations

The documents which are presented to the Registrar for Legal Persons for registration must be authenticated<sup>10</sup> by the Notary (the original is kept in the notary's custody.)

➤ **Do foundations have to register? If yes, in what register?**

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

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 Administrator Consent Form which would contain 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, and
- Any other information requested by the Registrar for Legal Persons if in his discretion such information is required to register the foundation

If foundations are registered, is the register publicly available?

Yes. The documents mentioned right here above would be publicly available. However, 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<sup>11</sup> to the registration records of a private foundation and to 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.

The confidentiality of private foundations is further ensured as proceedings are held *in camera* and only the parties to the proceedings, the administrators, the beneficiaries, if they prove they have an interest in the proceedings to the satisfaction of the Court, and their respective advocates and legal procurators shall be allowed in Court during the hearings.

➤ **Is a minimum capital required?**

Yes, €1,164.69 for private foundations, but reduced to €232.94 for social purpose or non-profit foundations.

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<sup>10</sup> Authentication: Article 77 of the Notarial Profession and Notarial Archives Act, Chapter 55 of the Laws of Malta states that every copy or extract shall bear at the end, the date of its issue and shall be authenticated by the notary who shall affix his signature and a declaration stating that the copy is in conformity with the original. The law further states that where the copy or extract consists of more than one leaf, each leaf shall be signed in the margin by the notary or archivist

<sup>11</sup> Legitimate interest refers to anything which is lawful. The interest must be real, valid and genuine

➤ **What governance requirements are set out in the law?**

All foundations must have an administrator/s who is responsible for the administration of the foundation. A foundation may have a supervisory council or a protector with the power to exercise supervision over the acts of the administrator/s. Furthermore, all foundations must be set up by a founder who can also be the administrator of the foundation and who does perform certain functions which are of an administrative nature.

Administrators: An administrator is responsible for maintaining possession and control of the property of the organisation, safeguarding such property and ensuring compliance with the statutes of the organisation, the provisions of the Second Schedule and any special law applicable to its particular legal form. (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.)<sup>12</sup>

The administrators constitute the Board of Administrators, which represents and administers the foundation according to the powers vested in it by law and/or the deed of foundation.

The administrators have a number of functions. They must, at all times, act in the interest of the foundation and, *inter alia*, must act so as to achieve the designated purposes of the foundation, ensure that the assets of the foundation are used to pursue the purposes and objects for which the foundation was set up and keep a proper inventory of the foundation's assets and liabilities.

Administrators must keep records of all income and expenditure of the foundation, draw up accounts and prepare reports. Administrators represent and bind the foundation to the extent of the powers vested in them by law, the deed of foundation and any other by-laws or as otherwise stated in the law applicable to the foundation. Administrators also have the obligation to declare any possible or actual conflicts of interests to the Board of Administrators. Failure to declare conflicts of interest may lead to the removal of the administrator.

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*, also 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.

Due to its separate legal personality, it is the foundation which is liable for the fulfilment of its obligations. The Second Schedule however establishes those instances in which the administrators can be held liable for the obligations of the foundation. They can be held liable to third parties, to the foundation itself and to the beneficiaries of the foundation.

They are liable to third parties when they:

- Are guilty of fraud or bad faith in entering into any obligations
- Enter into obligations in favour of third parties when they knew or ought to have known that there was no reasonable prospect that the foundation would avoid being wound up due to insolvency

They are liable to the foundation when they:

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<sup>12</sup> Refer to Article 7, Second Schedule, Civil Code  
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- Fail to declare a personal interest or a conflict of interest for obligations which they have entered into on behalf of the foundation and for any benefit which accrued to them personally, without being entitled to the benefits
- Act in breach of duty (as stated in the deed of foundation or in the Second Schedule), in bad faith, or have been negligent in the exercise of their duties

They are liable to the beneficiaries (or to the Attorney General acting on their behalf) when they:

- Have a conflict of interest
- Act in breach of duty

Administrators are always liable in cases of wilful misconduct, gross negligence and breach of duty. In fact, the law renders null and void any provision in the deed of foundation to the effect that an administrator may not be removed in the event of misconduct, failure to declare conflicts of interest, breach of duty or failure to comply with the statute.

The founder: The founder is the person who sets up the foundation and can be either a natural person or a legal person. When a foundation is set up by means of a will, the founder must be a natural person as only natural persons can draw up wills.

The founder:

- Contributes the first endowment: He may add to the assets of the foundation through additional endowments
- Determines the purposes or objects of the foundation: He can also alter or add such purposes
- Nominates beneficiaries: He can also add, remove or substitute beneficiaries
- Determines who the administrators of the foundation are: He can also be one of the administrators of the foundation
- Appoints the members of the supervisory council or protectors in the deed of foundation or by means of a subsequent instrument
- Determines the manner in which the foundation is to operate and exercises supervision over the administration of such foundation. He can obtain copies of documents relating to the foundation such as accounts, inventories, descriptive notes of property
- Can be a beneficiary: In this case, the founder cannot be the sole administrator of the foundation
- Can reserve the right to revoke a private foundation. There are a number of implications to such power. This right cannot be exercisable by the heirs or spouse of the founder unless expressly provided otherwise in the deed of foundation. The creditors of the founder may not exercise the right to revoke a foundation. Purpose foundations may only be constituted in an irrevocable manner

Founders exercise their rights in accordance with the deed of foundation. In the absence of any provisions in the deed to this effect, decisions are taken by majority. If there are two founders, decisions must be taken unanimously.

The Supervisory Council or Protector/s: The deed of foundation may provide for the establishment of a supervisory council consisting of at least one member or for the office of a protector/s with similar functions. It is the founder who appoints the members of the supervisory council or protector/s in the deed of foundation or subsequently. The members of the supervisory council or protectors can also be substituted or replaced (the deed of foundation may contain dispositions in this regard).

The supervisory council or protectors have the power to exercise supervision over the acts of the administrators and may be vested with the power of appointment, removal, substitution or

addition of the administrators. The founder may also grant the supervisory council or protectors other powers. They may not be considered to be administrators.

In certain cases, 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.

Is it mandatory to have a supervisory board?

No. 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 law states that the terms of the foundation may provide for the establishment of a supervisory council or for the office of a protector or protectors with similar functions.

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 (individuals) or legal persons (for example, companies). If a legal person is appointed 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 legal) is sufficient.

Persons who have been convicted of crimes affecting public trust, crimes affecting public trade, including bankruptcy offences, and crimes against property and public safety are disqualified from acting as administrators.

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. However, 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.

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.

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

- His resignation. 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 office if application is made to the Court for the appointment of a new administrator and a new administrator is so appointed

- Removal by the Court (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 such administrator)
- the coming into effect of a condition in the deed of foundation in terms of which an administrator is removed from office
- Steps being taken to wind up the foundation

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:

- Maintaining possession and control of the property of the foundation
- Safeguarding such property
- Ensuring compliance with the statutes of the foundation, the provisions of the Second Schedule and any special law
- Registering the foundation (and maintaining such registration)
- 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. Accounts, reports and records are held for a period of ten years after the relevant annual period to which they refer
- 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.

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
- May delegate their powers of legal and judicial representation in favour of any third parties
- May delegate the administration of assets to a third party
- May appoint and remove beneficiaries if the terms of foundation allow them to do so
- May 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
- Have the right to apply to the Court to be released from the obligation of providing information regarding the foundation property
- May apply to the Court for directives concerning the manner in which they may or should act in connection with any matter concerning the foundation

- May 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)
- Can exercise their discretion regarding the way in which the moneys or property of the foundation may be used for the attainment of the purpose for which the foundation is established (when no indication is made in the deed of foundation)
- May 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 such indication is made in the deed of foundation)
- May be remunerated from the income or capital of the foundation unless the deed of foundation provides otherwise
- Have the right to resign from office

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?

As stated above, the founder has a number of rights, he may:

- Add to the assets of the foundation through additional endowments
- Alter or add to the purposes of the foundation (in this case, an additional public deed is necessary)
- Add, remove or substitute beneficiaries
- Be one of the administrators of the foundation
- Appoint the members of the supervisory council or protector/s in the deed of foundation or in a subsequent instrument
- Obtain copies of documents relating to the foundation such as accounts, inventories etc
- Be a beneficiary
- Reserve the right to revoke a private foundation

Yes, the founder can take certain fundamental decisions. He can, for example, alter the purposes of the foundation. This is done by means of an additional public deed.

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

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

- They have a 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. The administrators are 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 can, in certain cases, be released from this duty to inform beneficiaries
- They can request information from the administrator. 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. (The administrator is exempted from disclosing information relating to a private foundation which divulges the deliberations or reasons why that administrator acted in a particular way when exercising his power or discretion)
- They have legally enforceable rights against the foundation
- They may sell, charge, transfer or otherwise deal with their interest in any manner. This right is subject to the terms of the deed of foundation

- They may disclaim the whole of their interest or part of it. They can therefore renounce to their benefit for any reason
- 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 can 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

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 have fiduciary obligations and one of these obligations is to prevent any conflict of interest. Administrators are also under the obligation to declare any conflict of interest. Failure to do so may result in removal from office and/or liability. Administrators can 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 conflict of interest. If administrators act in breach of their obligations, they must return any property together with all other benefits derived by them whether directly or indirectly, to the foundation. 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 appears to be no legal definition of conflict of interest under Maltese Law.

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, including when he is vested with ownership of such property for such purpose
- 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.

The Maltese Civil Code also contains dispositions regulating purpose foundations so as to ensure that no self-dealing takes place. On the dissolution of a purpose foundation, the

assets do not devolve on the founder or his heirs. Any disposal of assets can only be made to another purpose foundation with similar purposes.

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 dissolution of such foundation, any remaining assets must go to another organisation with similar purposes and it must be ensured that no persons involved within the organisation are making any gains from such organisation. In a foundation of this type, it is essential that the assets are used to attain the purposes of such foundation.

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. The Commissioner for Voluntary Organisations may, in certain circumstances, issue a public statement in cases of fraud. He may also apply to the Board of Appeal to issue suspension or cancellation orders where the organisation is not pursuing the purposes for which it was established, is carrying out unlawful activities or is misapplying funds.

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

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

Maltese law states that a foundation must have at least one administrator who can act on its behalf. 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, the constitutive act and any bye-law or as otherwise stated in the law applicable to their particular legal form.

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.

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 in the answer to the above query. Where such director and officers are not administrators such power may be delegated to them as indicated above.

➤ **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 from the moment of its registration 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 founders, promoters, or administrators who consented to such act (or knowingly took part in the unlawful act to the detriment of the foundation) are personally liable for any damage suffered by the foundation.

The main difference between a foundation which is registered and one which is not is the liability of the administrators of the foundation. In the case of a foundation which has not been registered, the foundation, as well as its administrators, is governed by the provisions of the Second Schedule applicable to unregistered organisations. The administrators of an unregistered organisation are jointly and severally liable:

- To keep the property of the unregistered organisation 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 shall 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.

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

- 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 point ) 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 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 provides that any provision in the statutes of the registered organisation or any agreement exonerating an administrator from liability for wilful misconduct, gross negligence or breach of duty shall be null and void.

Where unlawful acts have been performed, a Court may, on the application of any interested party, declare the administrators who have consented to or otherwise have knowingly taken part in the unlawful act to the detriment of the legal person, as personally liable for any damage suffered by the legal person.

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.

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 always act with utmost good faith and honestly in all cases. If they act in this way, 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.

What is the liability of directors and officers?

Assuming that the directors and officers are employees of the foundation, this would be regulated by Malta's employment legislation.

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.

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	

➤ **Are economic activities allowed (related/unrelated)?**

Art. 32A of the Second Schedule to the Civil Code makes it clear that a foundation may not be established for the purposes of engaging in active trade or commercial activities even if the proceeds derived from such activities are destined towards social purposes.

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 trademark 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
- 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 considered 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.

Article 38 of the Voluntary Organisations Act, which regulates the trading activities of voluntary organisations, overrides Article 32A of the Second Schedule as the Voluntary Organisations Act is considered to be a special law, and therefore, overrides the Second Schedule.

A voluntary organisation cannot be established for trading purposes or to principally engage in trade. Moreover, it cannot be set up with the purpose of promoting the interests of a commercial enterprise. Therefore, commercial entities cannot be enrolled as voluntary organisations. This prohibition is in line with the Second Schedule to the Civil Code (foundations cannot trade).

If a voluntary organisation wishes to carry out some form of trading activity with the intention of raising money in furtherance of its purposes, it must set up an appropriate legal entity, such as a company, for this purpose. This does not mean that voluntary organisations cannot engage in *any* commercial activity. In fact an organisation does not lose its status as a voluntary organisation where it engages in activity – including the provision of goods and services – which are directly related to the principal purpose for which the organisation was set up.

In fact, some activities are not considered to be trading activities: Notwithstanding the general prohibition to trade, a voluntary organisation may carry out the following activities in return for remuneration for the direct achievement of its purposes, namely:

- Fees for educational services;
- Consideration for sale of goods and services to members (this is deemed to apply only in the case of associations as only associations have 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 (again this is deemed to apply only in the case of associations as only associations have 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

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 Board of Appeal.

➤ **Are there any rules/limitations regarding foundations' asset management?**

As seen above, foundations may not be established for the purpose of engaging in active trading or commercial activities. A foundation may however:

- Be endowed with commercial property or a shareholding in a profit making enterprise, a franchise, a trademark 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 scheme and issue units to investors for the passive holding of a common pool of assets, the management of which is delegated to a third party, including employee benefit arrangements
- Be used as a vehicle for the purpose of securitisation and do all ancillary acts

**Asset Protection:** 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 a foundation. The founders, the donors or the beneficiaries of a registered foundation are not liable for any of its obligations, except to the extent they expressly agree to be so liable or as expressly stated in the law. Moreover, 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. Also, any of the beneficiary's creditors or any other persons (spouses, heirs or legatees of the beneficiary) may only seek redress from the foundation up to the extent of the debtor's (beneficiary's) entitlements under the foundation. The creditors of the founder can attack the assets held in the foundation, notwithstanding its legal personality, if such foundation was established in order to perpetrate fraud. Without prejudice to any other remedies available at law, the creditors of the founder may not exercise the right to revoke a foundation.

The terms of a foundation may make the interest of a beneficiary:

- Liable to termination
- Subject to restriction on alienation or dealing
- Subject to diminution or termination in the event of the beneficiary becoming bankrupt, or insolvent, or any of his property becoming liable to seizure for the benefit of his creditors, or
- Not liable to attachment under a garnishee order issued against the administrator or to termination without the prior consent of the Court, when the interest is expressed to be for the maintenance of the beneficiary or as a pension

Where the benefit consists in an annuity or pension or the use and enjoyment of property and the enjoyment of fruits there from, the terms of the foundation may make the interests of the beneficiary:

- Subject to restriction on alienation or dealing
- Not liable to attachment under a garnishee order served on the administrators as garnishees, or
- Not liable to termination without the prior consent of the Court

Upon the death of the beneficiary, the beneficiary's entitlement under the foundation does not devolve to his or her heirs, but terminates. This is so unless expressly provided for in the deed of foundation.

If a foundation is not registered, it will be considered to be an unregistered organisation. It will not have its own patrimony and its assets will be held in co-ownership between the promoters. The administrators and promoters will be jointly and severally personally liable for the liabilities of the organisation.

Estate Planning: Private Foundations can be used for Estate Planning Purposes. Foundations can, for example, be used to address the lack of capacity of a relative or member of family or protect an estate from perishing in the hands of a spendthrift.

Foundations can also be used for other purposes such as, for example, to safeguard the interests of persons with similar interests or objectives, to provide a flexible structure that is less regulated than more conventional (trading) structures and for the preservation of assets. Foundations are also very important in the charitable sector.

Segregated Cells: 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)

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.

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.

➤ **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)**

As already explained above, a foundation may not be established to trade or carry out commercial activities, even if the proceeds of such efforts are destined to social purposes. There are however certain exceptions to this general prohibition which are listed in Article 32A of the Second Schedule to the Civil Code:

- A foundation may be endowed with commercial property or a shareholding in a profit making enterprise, a franchise, a trade mark or other asset which gives rise to income, as well as a ship as long as the organisation is only the passive owner of such assets
- A foundation may, subject to such authorisations as may be necessary under applicable laws, be used as a collective investment vehicle, and issue units to investors therein, for the passive holding of a common pool of assets, the management of which is delegated to a third party, including a pension or employee benefit arrangements, and
- A foundation may 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

Where the foundation is a voluntary organisation and/or is aspiring to enrol or is already enrolled with the Commissioner for Voluntary Organisations, the provisions of the Voluntary Organisations Act must also be considered. Voluntary organisations cannot be established for trading purposes nor to promote the interests of a commercial enterprise nor shall they principally engage in trade. In fact, when a voluntary organisation wishes to carry out a trading activity in order to raise funds to achieve its purposes, such organisation shall establish an appropriate legal entity.

A voluntary organisation can however perform certain activities directly in the achievement of the purposes of such organisation. These are not considered to be trading activities and do not fall within the general prohibition against trading mentioned previously. Such activities 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 class of income as may be prescribed by regulations made by the Minister on the recommendation of the Council

The investment of the property of a voluntary organisation is also not deemed to be a trading activity.

➤ **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. However, where the foundation is a multi-founder foundation, that is, it has three or more founders, 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 members (administrators and 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 statutes of the foundation. Where the statutes are amended, the persons amending the statutes 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.

The following additions or alterations to the statute of a foundation require a written resolution or decision of the appropriate body or person which shall be notified to the Registrar for Legal Persons in the prescribed form within fourteen days from the date of the resolution or decision:

- Change of the registered address in Malta
- The appointment, removal or resignation of any administrator
- Any change in the person vested with the legal representation
- The appointment, removal or resignation of the local representative of an organisation whose administrator(s) is/are not ordinarily resident in Malta

It is not necessary to notify the Registrar for Legal Persons of any changes among the members of a supervisory body or of the office of protector(s) of a foundation.

The Civil Code (Second Schedule) (Notifications and Forms) Regulations comprises forms which must be presented to the Registrar for Legal Persons when certain changes are made to the statute of the foundation.

➤ **What are requirements with regard to reporting, accountability, auditing?**

The Maltese Civil Code requires the administrators of foundations (whether or not such foundations are registered with the Registrar for Legal Persons) to simply keep accounts. The law, at the moment, does not go into any details regarding what type of accounts must be submitted. It simply requires administrators to keep records of all assets and liabilities and all income and expenditure for annual financial periods. 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 very 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 or as may be applicable to their particular legal form. 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.)

Where the foundation applies for enrolment with the Commissioner for Voluntary Organisations, the foundation would have to submit its annual accounts to the Commissioner and annually thereafter, if the foundation is actually enrolled. On enrolment, such annual accounts will become publically available. At the moment, under the Voluntary Organisations Act, there are no rules whatsoever regarding the form and content of accounts and apart from this, there is no obligation to have such accounts audited. This may once again change in the future because regulations regarding the form and content of such accounts may be issued under the Voluntary Organisations Act.

Reporting requirements: Do annual reports and/or accounts of foundations need to be made publicly available?

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.

What type(s) of report must be submitted (annual report including details of finances and activities, public benefit report, tax report/tax return, other reports e.g. on 1% schemes)?

The Second Schedule states that administrator/s must prepare accounts and reports for annual financial periods and these must include information about all assets and liabilities and all income and expenditure.<sup>13</sup>

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<sup>13</sup> When a foundation requests that its registration be terminated, the administrators must render a statement of accounts, declaring the assets and liabilities of the foundation and stating how they are to be dealt with on the termination of registration.

Where the foundation is a purpose foundation and it applies for enrolment or is already enrolled with the Commissioner for Voluntary Organisations, the law does not go into the particulars regarding the type of accounts that need to be prepared.

The Voluntary Organisations Act also requires purpose foundations that apply for enrolment or that are already enrolled with the Commissioner for Voluntary Organisations to submit annual reports. Annual reports are simply activity reports which state that, for instance, the foundation organised a coffee morning or that it organised a fundraising event. The Voluntary Organisations Act does not go into the details regarding the form and content of such annual reports.

For tax purposes, we assume that foundations are required to submit a tax return to the Commissioner of Inland Revenue unless the foundations happen to be exempt from tax.

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. However, it may be that when a foundation applies to benefit from some scheme, for example, to obtain funds from the Government or the EU, it would need to comply with any requirements established in such scheme such as submitting certain reports. These are usually a matter of policy not law.

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.

#### Who checks (supervisory/tax authorities)?

Government departments, public agencies and entities controlled by the Government. These include the Registrar for Legal Persons and the Commissioner of Inland Revenue. Another supervisory authority is the Commissioner for Voluntary Organisations.

#### Where is the required information publicised?

Information of this kind would be made publically available in the Register at the Office of the Commissioner for Voluntary Organisations where such foundation has been enrolled. 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.

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

There are currently no legal requirements regarding external audit for foundations. Currently, they are not even obliged to have accounts audited. However, foundations are free to adhere to any rules regarding auditing and the standard International Financial Reporting Standards (IFRSs).

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

There is no such requirement under Maltese law at the moment.

#### ➤ **Supervision (which authority – what measures / sanctions?)**

The Registrar for Legal Persons: The Registrar may accept or refuse to register a foundation. He also has the right to require any information from any person, if such information is deemed by him 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. When a new foundation has been set up and it fails to apply for registration within the time frames established by law, the persons who have the obligation to deliver the registration documents shall be liable to a penalty, payable to the Registrar of €232.94 each, but the law does establish some exceptions to this rule.

The Commissioner for Voluntary Organisations is the watchdog of the voluntary sector and organisations in general. The law gives him the duty to supervise, monitor and investigate voluntary organisations, their activities and persons involved within such organisations such as the administrators. The whole point of this is to ensure that there is accountability and transparency. Where the Commissioner for Voluntary Organisations investigates the affairs of any voluntary organisation, and he 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 with the law and may impose penalties for non-compliance within such period. The law also grants power to the Commissioner for Voluntary Organisations over organisations which do not even qualify as voluntary organisations and he may even provide certain assistance to such organisations.

The Commissioner for Voluntary Organisations may, in cases where there is wrongdoing such as misappropriation of funds, 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. Apart from that, the Commissioner has the right to withdraw the Certificate of Enrolment of an enrolled voluntary organisation at any time.

Furthermore, the Commissioner for Voluntary Organisations has the right to accept or refuse enrolment applications and to request more information from an organisation which is applying for enrolment.

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

There is supervision by a commissioner in the case of public benefit foundations if they register as voluntary organisations and to a limited extent even if they do not register.

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 variety 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.

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 Lands and Public Registry which is a government department. Therefore, the Registrar for Legal Persons is a public administrative body.

The Commissioner for Voluntary Organisations is independent to the Government up to a certain extent. He 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. Furthermore, the same Ministry pays all of the Commissioner's bills. The said Ministry grants funds to the Commissioner and other Ministries may also grant funds to the Commissioner. He 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 Office of the Commissioner can be classified as partially independent because the law states that "In the exercise of his functions, the Commissioner shall act impartially and shall not be subject to the direction of any other person or authority."<sup>14</sup> It is a public body which is partly independent from the Government.

The Malta Financial Services Authority is described as parastatal organisation. It is independent of the Government but it may receive funds from the Government. It appears to be a public independent body. However, it may obtain funds from the Maltese Government.

The Maltese Courts are independent of the Government.

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 simply ensures that the registration documents are in conformity with the requirements laid down by Maltese law. The Registrar, for instance, ensures that the deed of foundation contains all the mandatory clauses required by law. If not, the Registrar will refuse to register the foundation. However, it is important to note that the Registrar only concerns himself with the registration. He does not deal with substantive matters.

The Commissioner for Voluntary Organisations has vast supervisory powers. He, 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 Board of Appeal for a Suspension Order for the suspension of the activities of an enrolled voluntary organisation or for a Cancellation Order, i.e. for its cancellation. 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 or is carrying out unlawful activities, including making public collections without the necessary authorisation.

If the Voluntary Organisation uses its Certificate of Enrolment in an abusive manner, the Commissioner may prohibit such person from using the certificate by giving him notice in writing; or issuing public statements on the facts to warn the public about any abuse by the person or voluntary organisation; or applying to the Board of Appeal 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 the donors within six months from the seizure, the funds will be paid into the Voluntary Organisations Fund.

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<sup>14</sup> Art. 7 (2), Voluntary Organisations Act  
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MFSA also reviews documentation when an application for the authorisation of an administrator is filed. It requires the person, applying for authorisation to act as an administrator, to fill in a personal questionnaire because such person would have to satisfy a “fit and proper” test before being granted approval by the MFSA.

The Civil Court in its voluntary jurisdiction can make various orders, may make any declarations as to the validity or enforcement of a foundation (and may vary any order or declaration made). 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 Board of Appeal has jurisdiction to determine matters in relation to any breach of the Voluntary Organisations Act, or any regulations made, when such breach does not constitute a criminal offence. Appeals to the Board of Appeal are made on grounds, for example, that the organisation is not being administered in accordance with its statutes or the Voluntary Organisations Act.

An appeal to the First Hall, Civil Court may be made on a point of law and on issues involving the determination of a civil right which may arise as a result of a decision of the Board of Appeal. The Court may confirm, modify or overturn the decision of the Board of Appeal if it considers it necessary to do so in the light of its determination or it may refer its decision back to the Board of Appeal. There is no appeal from the decisions of the First Hall, Civil Court.

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

Assuming that the Board of Directors means the Administrators, these do require approval from the relevant authority depending what decisions are being taken. The following are a few examples.

The Administrators do 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. Amongst such documents there is the Administrator Consent Form which is signed by all the administrators and the Resolution to Register which is usually signed by all the administrators. These must be approved by the Registrar for Legal Persons.

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 can only be revoked with the approval of the Registrar for Legal Persons. In fact, the revocation of an endowment is suspended until such time as the administrators certify to the Registrar that all commitments have been fulfilled.

The Administrators also require the approval of the Commissioner for Voluntary Organisations in certain cases. For example, any decision of the administrators to enrol a foundation as a voluntary organisation must be approved by the Commissioner for Voluntary Organisation. Amongst the documents submitted for registration there are the Administrator Consent Form which is signed by all the administrators, and the Resolution to Register which is usually signed by all the administrators. These documents must be approved by the Commissioner for Voluntary Organisations.

The Administrators shall 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.

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

No

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 of submitting the registration documents, do not do so within the stipulated time frames, are liable to a penalty of €232.94.

Under the Voluntary Organisations Act, a number of penalties may be issued to voluntary organisations and persons involved within them when the law is not complied with. The Commissioner of Voluntary Organisations may take action against voluntary organisations in breach of the law and the players within such voluntary organisations who go against the spirit of the Voluntary Organisations Act.

➤ **When and how does a foundation dissolve?**

The registration of a foundation can be terminated in one of two ways:<sup>15</sup>

- A Request is made by the Foundation Itself: A foundation may request the Registrar for Legal Persons to terminate its registration by means of a written request signed by all its administrators. (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 can be wound up by one of two procedures: Voluntary winding up and court ordered winding up.

Voluntary Winding Up<sup>16</sup>: 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 prepare a scheme of distribution of the remaining assets of the foundation and must obtain the approval of the founder or the beneficiaries. In their absence, the approval of the Registrar for Legal Persons must be obtained before this is implemented. This scheme of distribution must in all cases be notified to the Registrar and all interested parties.

The founder, in the deed of a purpose foundation, can establish how the assets of such foundation are to be utilised if its purpose is achieved, is exhausted, and becomes impossible.

If the founder has made no such indication in the deed of foundation, the administrators or the supervisory council may specifically request the Court for authorisation to dispose of the assets. The administrators must dispose of such assets as ordered by the Court. The disposal of assets of a purpose foundation can only be made to another purpose foundation with similar purposes. Therefore, on the termination of a purpose foundation, no part of the income, capital or property of the foundation must be available directly or indirectly to any promoter, founder, administrator, donor or any other private interest.

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<sup>15</sup> The termination of registration does not imply that the foundation is being wound up. Such foundation becomes an unregistered foundation and is regulated by the articles of the Second Schedule which regulate unregistered organisations.

<sup>16</sup> This is only possible if the assets of the organisation exceed its liabilities and all its debts have been paid

In the case of the dissolution and winding up of private foundations, if there is no indication in the foundation statutes 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. 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 and perpetuity in the case of purpose foundations. If all the beneficiaries wish to terminate a foundation, they may do so unless prohibited by the statute. But even in such a case the court may consent to its termination if the court is satisfied that its purposes have been achieved.

A foundation also terminates if it has achieved its purpose or the purpose has become impossible. A social purpose foundation does not terminate (i.e. it can be perpetual) and through the administrators or the courts can be given new purposes. It may be terminated if the statutes so provide and in the manner stated in the statutes.

Unlike purpose foundations, the statutes of a private foundation may provide that it is revocable. Purpose foundations may only be constituted in an irrevocable manner. Any clause in the statute of the purpose foundation which reserves the right to revoke the foundation shall be disregarded.

**Court Ordered Winding Up:** Any interested party can 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

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

- 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 also has the authority to 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 can 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. He does not however enjoy this power exclusively in the case of private foundations as the Malta Financial Services Authority (MFSA) 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, he will demand from the Court an order for the winding up of the organisation.

➤ **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 foundation 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.

➤ **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?**

We are not aware of any provision in Maltese law which prohibits foundations from conducting activities abroad or of any provision which limits foundations.

## **II. Tax treatment of the foundation**

➤ **What are the requirements to receive tax exemptions (pursuing public benefit purposes, non-distribution constraint, being resident in the country?)**

The income of any foundation of a public character which 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 under Malta's 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, though these are rarely foundations but are rather associations of persons.

➤ **What are reporting/proof requirements to claim tax exemptions?**

It is imperative that the foundation:

- Is of a public character
- Is engaged in philanthropic work
- Either qualifies for exemptions in accordance with rules made by the Minister responsible for finance, or
- Is 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)

➤ **Is specific reporting required for the use of state funds?**

In reality this is a matter of policy and not of law. We 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.

➤ **Is there an obligation to report on donors and beneficiaries?**

Once again this appears to be a matter of policy.

➤ **Are there specific accounting rules for foundations?**

No

➤ **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. However, our Civil Code does contain a definition of “purpose foundation” which appears to have a similar meaning to public benefit purpose. A purpose foundation is a foundation established for the achievement of a lawful purpose, including a social purpose without beneficiaries. The whole point of a purpose foundation is that it has no ascertained or ascertainable beneficiaries. It is also important to point out that Malta’s 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. When welfare societies derive income from activities of a commercial nature such income is taxable in full. Gains received by a philanthropic institution from the running of a hostel on a commercial basis were held to be taxable because such gains were extraneous to the gains expected from a philanthropic institution.<sup>17,18</sup>

Our Voluntary Organisations Act states 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

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<sup>17</sup> Case 8 of 1974

<sup>18</sup> Robert Attard, *An Introduction to Income Tax Theory*, Agenda (Malta: 2005), pg. 147-148

- (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 this Act”

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.

- **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.**

Please see above.

- **Support of “the public at large”**

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

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? – The main issue is not whether the foundation benefits the public at large (see our comments above).

	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			

➤ **Non-Distribution Constraint**

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.

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. Purpose foundations, including those which are voluntary organisations and/or enrolled with the Commissioner for Voluntary Organisations, must give their assets to another organisation with similar purposes on dissolution. In the case of a private foundation, on dissolution, the assets shall, subject to the terms of the foundation, devolve on the founder or his heirs at law.

➤ **“Altruistic” Element**

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 Maltese Civil Code states 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. However, our Voluntary Organisations Act states that where the foundation qualifies as a voluntary organisation and/or applies for enrolment, the administrators cannot receive remuneration for the services they provide as administrators but they may receive a reasonable honorarium. Furthermore, if an administrator also happens to be an employee of the foundation, the Voluntary Organisations Act permits such person to receive remuneration for the services he provides as an employee and it must be made clear that this person is not receiving any remuneration for his services as an administrator.

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.

Is there a maximum amount that can be spent on office/administration costs in **civil law** and in **tax law**? If yes, how are “administration costs” defined?

The Civil Code does not establish any limitations. However, the Voluntary Organisations Act establishes a rather vague limitation because it only allows administrators to receive a reasonable honorarium. The words “reasonable honorarium” have not been defined at all. There is a logical limit that the remuneration must not in any way hinder the achievement of purposes by the organisation.

➤ **Hybrid Structures (elements of private benefit in public benefit foundations)**

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 favour 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

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			X		

<i>reversionary</i> interest in the capital of a property or other asset to retain for its own continuing use.					
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 favour 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

Are there any other examples from your country (in **civil law** and/or **tax law**) regarding such “hybrid structures” (e.g. law provisions, court decisions, etc.)?

No

➤ **Distributions and Timely Disbursement**

Are foundations allowed to spend down their capital?

Yes

Are they allowed to be set up for a limited period of time only?

Yes. Private foundations are of limited duration. A private foundation can 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 in the case that a 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 can be established for an unlimited term.

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?

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

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 <sup>th</sup> 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 <sup>th</sup> year are there distributions for the public benefit purpose of the foundation.	X				

Are there any examples or cases from your country (in **civil law** and/or **tax law**) regarding the question of “timely disbursement” (e.g. law provisions, court decisions, etc.)?

No

➤ **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 this foundation is conducting abroad.

➤ **Income tax treatment**

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 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
- The above mentioned exemption does not apply, and
- The donor is subject to the jurisdiction of Maltese tax

Tax on capital gains may be payable. The tax rate ranges from 12% to 35%.

### Investment income (asset administration)

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 generally taxed at the rate of 35% like all companies on the income it receives from investments.

Alternatively, a foundation may opt to be taxed as a trust. In such case, it may be that the income is deemed not to be income attributable to the foundation but to be income derived directly by the beneficiaries, who will be taxed in this case.

Voluntary foundations 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, tax shall in no case exceed 30% of 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 a rate.

### Economic activities (related/unrelated)

The rules mentioned above apply.

### Major shareholding considered as 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 non-Maltese 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.

➤ **Capital gains tax, where separate from income tax**

Unless one of the above exemptions mentioned above applies, tax on capital gains on transfers of marketable securities and immovable property will apply. The applicable tax rates range from 12% to 35%.

➤ **Withholding tax on foreign investment income?**

From a Maltese tax perspective, any foreign tax suffered on investment income will be relieved through double taxation relief (including the availability of unilateral relief in situations where no double tax treaty applies). 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 mute point which typically depends on the interpretation adopted by the source country.

➤ **Gift- and inheritance tax**

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

➤ **Value added tax (VAT)**

There are some minor exemptions for non-profit making organisations.

➤ **Capital taxes on value of assets, where applicable?**

None

➤ **Taxes on the transfer of assets?**

When a foundation acquires property chargeable to duty it must pay Duty on Documents and Transfers. The said duty only applies in respect of transfers executed in Malta or transfers executed outside Malta which are made use of in Malta.

➤ **Other taxes, where applicable (Real property tax)**

There are no other property taxes under Maltese law.

- **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?**

A foreign foundation is only taxable if it has any Maltese source income, unless it becomes resident and domiciled in Malta, in which case it can be taxed on its worldwide income on the basis of residence.

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

- The same treatment of Maltese resident foundations apply i.e. duty may be payable depending on whether the inheritance is of a chargeable asset. The rate is 5% in the case of Maltese immovable property and 2% in the case of marketable securities.

- **Are there current discussions about the question of whether cross-border activities of foundations or other non-profit organisations are protected by the fundamental freedoms of the EC Treaty? Especially: Are the consequences of the Stauffer decision of the European Court of Justice and/or the current infringement procedures of the European Commission discussed by legal scholars or by practitioners? (e.g. publications in law journals) / Have there been any resulting changes to you county's legislation, or are changes being discussed?**

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

### **III. Tax treatment of donors**

- **System of tax credit or tax deduction?**

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)

- **Tax treatment of individual donors**

See comments above.

- **Tax treatment of corporate donors**

See comments above.

- **Tax treatment of donations to non-resident public-benefit foundations**

n/a

➤ **Other frameworks such as percentage law systems**

None

➤ **What are reporting/proof requirements to claim tax benefits?**

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.

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

**Individuals**

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

**Legal entities**

n/a

**V. Trends and developments**

➤ **Recent trends or developments affecting the legal and fiscal environment for public benefit foundations**

If a foundation qualifies as a voluntary organisation because it has a social purpose, is non-profit-making, is voluntary (as defined in the law) and is independent of the State, it may enrol under the Voluntary Organisations Act and be eligible for certain benefits such as EU funds, government funds and the right to make public collections without the need to obtain a police licence. However, enrolment as a voluntary organisation does not mean that the foundation would be exempt from tax under Malta's tax laws.

The usual tax exemptions apply to foundations of a public character (this term has a similar meaning to public benefit) which carry out philanthropic work (as indicated above). There are no special exemptions for purpose foundations which are enrolled or non enrolled voluntary organisations (such foundations would normally be set up for the benefit of the public or some sectors of the public).

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%. 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 may opt to be taxable according to progressive rates of tax or like a company.

➤ **Impact of anti-terrorist debate**

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

Yes. In Malta the main legislation currently in force in this regard is the Criminal Code, Chapter 9 of the Laws of Malta. The Maltese Criminal Code came into force in 1854 but the anti-terrorism provisions in the said Code came into force in 2005. Another law intended to prevent terrorism is the Prevention of Money Laundering and Funding of Terrorism Regulations hereinafter referred to as the "Regulations" (which came into force in 2008).

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

There is no specific provision in the Criminal Code which explicitly mentions foundations and this means that no new legal and regulatory requirements have been introduced expressly for foundations under this particular law. However, we cannot rule out the possibility that the Criminal Code provisions on anti-terrorism may also cover foundations because the said law states 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 kind of 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 state that for a subject person (for example, notaries and other independent legal professionals) to be able to form a business relationship or carry out an occasional 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. A consultation document entitled: "Procedures and Guidance Implementing the Prevention of Money Laundering and Funding of Terrorism Regulations – Part I Consultation Document" issued by Malta's Financial Intelligence Analysis Unit states that a foundation would be classified as an applicant for business under Maltese law and consequently would be subject to due diligence checks (this document has not yet been finalised).

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.

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

Yes. The supervisory authority that we are concerned with in this case is the Malta Financial Services Authority (MFSA) which is the main authority in charge of anti-money laundering issues. We also have the Financial Intelligence Analysis Unit (FIAU) which is not an authority but its duty is to receive, analyse and disseminate financial intelligence with a view to combating money laundering and the funding of terrorism in Malta.

The MFSA introduced some 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.

However, the FIAU has prepared a consultation document containing procedures and guidance for implementing the provisions of the Prevention of Money Laundering and Funding of Terrorism Regulations. This document does not appear to have been finalised as yet. It is unclear whether this document would apply to foundations.

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

No

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 some policies on Anti-money laundering-combating the financing of terrorism (AML-CFT) for voluntary organisations but nothing was ever finalised. We cannot rule out the possibility that such consultation could take place in the future.

➤ **Public fundraising**

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

Yes. Fund raising is regulated by Malta's Public Collections Act. A foundation must generally obtain a licence from Commissioner of Police in order to make public collections. However, the 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, and 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 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**

Second Schedule to the Civil Code  
Voluntary Organisations Act  
Trusts and Trustees Act  
Income Tax Act  
Duty on Documents and Transfers Act  
The Prevention of Money Laundering Act  
The Prevention of Money Laundering and Funding of Terrorism Regulations  
Public Collections Act.

These can be found on the website of the Ministry for Justice and Home Affairs: [www.mjha.gov.mt](http://www.mjha.gov.mt)