

# Malta

## Legal Environment for Philanthropy in Europe 2020

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## I. Legal framework for foundations

### 1. Does the jurisdiction recognise a basic legal definition of a foundation? (please describe) What different legal types of foundations exist (autonomous organisations with legal personality, non-autonomous without legal personality, civil law, public law, church law, corporate foundations, enterprise foundations, party political foundations, family foundations, foundations of banking origin as a specific type, companies limited by liability, trusts)? Does your jurisdiction recognise other types of philanthropic organisations?

In terms of Article 26(1) of the Second Schedule to the Civil Code, Chapter 16 of the Laws of Malta:

*“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; and, or*

*(b) for the benefit of a named person or class of persons,*

*and which are entrusted to the administration of a designated person or persons.*

*The patrimony, namely assets and liabilities, of the foundation is distinct from that of its founder, administrators or any beneficiaries ...”.*

The term “foundation” includes all organisations, institutes or similarly titled patrimonies which are set up through the bequest, endowment or appropriation of assets, howsoever made (whether by public deed or otherwise) or named but does not include trusts as defined in the Trusts and Trustees Act<sup>1</sup>.

In terms of the Second Schedule to the Civil Code, a foundation may be established for a *stated purpose* or for *the benefit of a named person or a class of persons*.<sup>2</sup> These are the two main types of foundations which may be set up in terms of Maltese law.

A purpose foundation may have many purposes:

*Public benefit:* Foundations may be established for a social, charitable or philanthropic purpose. Associations and trusts may also be established for charitable purposes. Such foundations, associations and trusts may in certain cases be subject to mandatory enrolment as voluntary organisations with the Commissioner for Voluntary Organisations in terms of the Voluntary Organisations Act, Chapter 492, Laws of Malta.

Some other purposes, like *sports* organisations and *political* parties, are regulated by special laws.

The Second Schedule to the Civil Code applies to all foundations in the absence of rules on the same subject in special laws<sup>3</sup> or the Second Schedule itself<sup>4</sup>.

Some *religious foundations* are excluded from the Second Schedule unless they register formally. *Pious foundations* may be established under Maltese Law. In the case of *autonomous pious foundations*, aggregates of things (see wording of law above) are destined for pious or religious purposes and are established as juridical persons by competent ecclesiastical or other religious authorities. In *non-autonomous pious*

<sup>1</sup> Art. 26(2), Second Schedule to the Civil Code, Cap. 16, Laws of Malta; The Trusts and Trustees Act is Cap. 331, Laws of Malta.

<sup>2</sup> Art. 26(2), Second Schedule to the Civil Code.

<sup>3</sup> Art. 25, Second Schedule to the Civil Code.

<sup>4</sup> See Article 28 on religious organisations.

*foundations*, temporal goods are given to a public juridical person established by the competent ecclesiastical or other religious authorities and carrying with them a long-term obligation (the period to be determined by applicable religious or national law), and where a long-term obligation consists of binding the juridical person, from the annual income, to celebrate Masses or other religious ceremonies, to perform other determined ecclesiastical functions, or to fulfil pious or religious purposes.<sup>5</sup>

## 2. What purposes can foundations legally pursue?<sup>6</sup>

- Only public-benefit
- Both public- and private-benefit

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

In terms of Article 29 of the Second Schedule to the Civil Code, a foundation may only be constituted by virtue of a notarial public deed *inter vivos* or by a will. The deed of foundation shall state:

- a) The name of the foundation, which shall include the word "foundation".
- b) The registered address, in Malta.
- c) The purposes or objects (in certain instances the category of the foundation must be indicated in the statutes).
- d) The constitutive assets with which it is formed. Every foundation must have a minimum endowment. The minimum endowment, which may consist of money or property, is set at €1,164.69. However, the law provides for an exception with respect to public-benefit foundations, in which case the minimum endowment is reduced to €232.94.
- e) The composition of the board of administration and the name, surname, identification, passport or registration number, as applicable, nationality and residential address of the administrators, if any, or when there are no administrators at the time of establishment or registration, the person who has the power to appoint the administrators. The manner in which administrators are appointed and removed from office and the duration of their appointment, if any, are also to be included. If the duration of the appointment of the administrators is not stated in the deed, the administrators are deemed to have been appointed indefinitely until they retire or are removed.  
  
If the foundation has more than one board or committee, the deed must specify which board or committee is the board of administration.
- f) The term for which it is established. If the term is not stated, the foundation is presumed to be established for an indefinite term although beneficiary foundations may only be established for a maximum of 125 years.
- g) If the administrators are non-residents of Malta, the name and address of a person ordinarily resident in Malta who has been appointed to act as the local representative of the foundation in Malta.

<sup>5</sup> Art. 26(7), Second Schedule to the Civil Code.

<sup>6</sup> This question focuses only on public-benefit foundations (see the definition in the [glossary](#) developed for this project).

When a foundation is established for the public benefit, this must be stated expressly through the use of the words "*public benefit*", "*social purpose*" or "*public purpose*" in the constitutive instrument and in the statutes of the foundation.

The statutes are signed by the founders. Any person subscribing to the statutes after the foundation is established is deemed to have consented to all the provisions of the statutes and all rules which may have been validly promulgated by the foundation until a specified date, if any.

A foundation must be registered with the Registrar for Legal Persons<sup>7</sup>.

It is the obligation of the administrators to register the foundation in terms of the Second Schedule. The Second Schedule to the Civil Code establishes the documents which must be delivered and filed with the Registrar for Legal Persons and also establishes the time frames for registration.

These vary depending on the type of foundation and also depending on whether it was established by public deed or by will.

The following documents must be delivered to the Registrar for Legal Persons for registration:

1. *Form A*: Application for registration of an organisation established under the laws of Malta (Form 'A' of the Civil Code (Second Schedule)(Notifications and Forms) Regulations<sup>8</sup>).
2. *An authentic copy of the deed and statutes of the foundation.*
3. *Resolution of the administrators to register the foundation with the Registrar for Legal Persons.*
4. *Administrator consent form*: the written consent of the administrators consenting to act as such after the foundation is registered.
5. *Registration Fee*: The fee due to the Registrar for Legal Persons varies depending on the assets the foundation has on the date of registration. For example, if the assets of the foundation on the date of registration do not exceed €1,500, the initial registration fee will be €350. The fees due by foundations which are enrolled or are in the process of being enrolled with the Commissioner of Voluntary Organisations, are reduced to 10% of the sum due with a minimum of €35.
6. *Declaration regarding the value of the assets*: For the calculation by the Registrar for Legal Persons of the value of the assets which exist within the foundation at the date of registration, the administrators must submit a declaration in writing declaring such value. Such declaration must be based on the latest accounts of the foundation and may be adjusted by material events, which may be known to the administrators, which have affected the value of the assets held by the foundation at the relevant time. In the event that it is not possible to calculate the value of the assets of the foundation, the applicable fee shall be the maximum fee applicable<sup>9</sup>.
7. For the determination as to whether a foundation is enrolled, or is in the process of being enrolled, with the Commissioner for Voluntary Organisations, the Registrar for Legal Persons shall rely on a certified copy of the certificate of enrolment or, in its absence, a declaration by the administrators of the foundation.

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<sup>7</sup> Art. 31, Second Schedule to the Civil Code; Following amendments to the Second Schedule to the Civil Code, the functions of the Registrar for Legal Persons were transferred to the Registrar of Companies. Therefore, "Registrar for Legal Persons", for all intents and purposes of law, means the Registrar of Companies as defined in the Companies Act, Cap. 386, Laws of Malta.

<sup>8</sup> S.L. 16.08, Laws of Malta.

<sup>9</sup> S.L. 16.07, Laws of Malta.

The Registrar for Legal Persons may request additional documentation when the application for registration is filed.

In certain cases, the foundation is subject to mandatory enrolment with the Commissioner for Voluntary Organisations in terms of the Voluntary Organisations Act<sup>10</sup> and must submit documentation to such Commissioner as this is a separate register to that kept by the Registrar for Legal Persons.

Upon establishment, the foundation must also submit information about its beneficial owners through the appropriate form in terms of the Civil Code (Second Schedule)(Register of Beneficial Owners – Foundations) Regulations<sup>11</sup>.

#### 4. Is state approval required? (approval by a state supervisory authority with/without discretion)

- Approval by a state authority with discretion
- Approval by a state authority without discretion
- Approval by a court
- Notarisation by a notary public

#### 5. Are foundations required to register?

a) If foundations must register, in what kind of register?

- Company register
- Foundation register at national level
- Foundation register at the regional/county level
- Beneficial ownership register
- Any other public register (other than a foundation/charity one)

In certain instances, the foundation may be subject to mandatory enrolment with the Commissioner for Voluntary Organisations in terms of the Voluntary Organisations Act. A foundation may also opt to enrol.

b) If foundations are registered, what information is kept in the register?

The documents which are delivered to the Registrar for Legal Persons for the registration of a foundation, and which are indicated in point 3 above are kept at the registry. Other forms must be delivered to the Registrar for Legal Persons during the lifetime of the foundation. These are indicated in the Civil Code (Second Schedule)(Notifications and Forms) Regulations.<sup>12</sup> Such forms are also kept at the Registry.

The information which the foundation must submit about its beneficial owners in terms of the Civil Code (Second Schedule)(Register of Beneficial Owners – Foundations) Regulations<sup>13</sup> is kept at the Register of Beneficial Owners – Foundations.

If the foundation is enrolled with the Commissioner for Voluntary Organisations, the documentation it submits in terms of such enrolment is kept by the Commissioner in the Register of Voluntary Organisations.

<sup>10</sup> Cap. 492, Laws of Malta.

<sup>11</sup> S.L. 16.18, Laws of Malta.

<sup>12</sup> S.L. 16.08, Laws of Malta.

<sup>13</sup> S.L. 16.18, Laws of Malta.

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

Yes, all information publicly accessible

Yes, some information publicly accessible

Some information in the Register of Legal Persons is publicly accessible upon request.

Yes, accessible upon request

No

## 6. Is a minimum founding capital/endowment required?

No

Yes, amount: In the case of a public-benefit foundation, the minimum endowment required is €232.94.

## 7. Is the foundation required to maintain these assets or any other specified asset level throughout its lifetime? Are spend-down foundations allowed?

A foundation is not required to maintain these assets throughout its lifetime. However a foundation will not be able to operate if it has no assets.

Limits on holdings can be stated in the deed and statutes of the foundation, and these will bind the administrators as a fiduciary duty. Furthermore, an administrator should not enter into an obligation on behalf of the foundation if it does not have sufficient assets to perform it<sup>14</sup>.

## 8. What governance requirements are set out in the law? Is it a one-tier or two-tier foundation governance model?

a) Is it mandatory to have a:

Supervisory board

Governing board: As a general rule a foundation has a one-tier governance system, but a foundation may have a two-tier governance system if a supervisory council/protector is appointed (appointing a supervisory council/protector is not obligatory).

b) What are the requirements concerning board members? Is a minimum/maximum number of board members specified? Does the law regulate the appointment of board members and their resignation/removal, or can this be addressed in the statutes/bylaws?

Under Maltese Law, the equivalent term for board member is administrator.

Public-benefit foundations must have a minimum of three (3) administrators if they are individuals or a minimum of one (1) administrator if the administrator is a juridical person. A juridical person may be an administrator provided that this has at least three directors.

In terms of Article 29 of the Second Schedule to the Civil Code, the composition of the board of administration and the name, surname, identification, passport or registration number, as applicable, nationality and residential address of the administrators, if any, or when there are no administrators at the time of establishment or registration, the person who has the power to appoint the administrators, must be indicated by the founder in the deed of

<sup>14</sup> Art. 16(4), Second Schedule to the Civil Code.

foundation. The manner in which administrators are appointed and removed from office and the duration of their appointment, if any, are also to be stated in the deed. If the duration of the appointment of the administrators is not stated in the deed of foundation, administrators are deemed to have been appointed indefinitely until they retire or are removed<sup>15</sup>.

There is no rule setting out a maximum number of administrators, though in practice these are not usually more than 3 or at most 5.

The written consent of the administrators must be delivered to the Registrar for Legal Persons prior to the registration of any foundation. This is so unless they consent to act as administrators on the statute itself. If the administrators are not designated in the statutes of the foundation, their written consent must be submitted to the Registrar for the Legal Persons on the notification of their appointment<sup>16</sup>.

If the person nominated as an administrator in the constitutive deed or statutes is unwilling or unable to accept such responsibility, s/he must notify her/his intentions in writing to the Registrar for Legal Persons, the founder or her/his heirs and the persons named as succeeding, if any, and this, within a specified time limit. If such person takes possession of any assets of the foundation, however, there is implied acceptance to act as administrator. In this case, such person must confirm her/his acceptance in writing on demand of any interested person or the Registrar for Legal Persons. If s/he does not do so within 30 days from a written request, s/he shall be in breach of duty<sup>17</sup>.

Any person named or appointed to succeed in the administration of the foundation enters into the same obligations as if s/he were the person named in the first place. S/he must notify the Registrar for Legal Persons in writing upon taking up office. An administrator, upon taking up office, but not later than 30 days after, can notify the Registrar for Legal Persons and any interested parties, in writing, of any reservations s/he may have regarding anything relating to the foundation or the actions of the previous administrators. In this case, such administrator shall not be liable for any matters so reserved until such time as the reservations are operative<sup>18</sup>.

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<sup>19</sup>.

An administrator may resign from office by notice in writing to his/her co-administrators. If there is no other administrator, the administrator shall deliver this notice to the founder, beneficiaries (or, if impracticable, to at least one beneficiary). If there are none, this notice shall be delivered to the administrator's duly appointed successor. Resignation takes effect on the delivery of this notice<sup>20</sup>.

An administrator ceases to be an administrator in any of the following circumstances:

(a) On the lapse of the term for which the administrator was appointed.

<sup>15</sup> Art. 29(4), Second Schedule to the Civil Code.

<sup>16</sup> Art. 29(6), Second Schedule to the Civil Code.

<sup>17</sup> Art. 35(3), Second Schedule to the Civil Code.

<sup>18</sup> Art. 35(4), Second Schedule to the Civil Code.

<sup>19</sup> Art. 35(5), Second Schedule to the Civil Code.

<sup>20</sup> Art. 35(7), Second Schedule to the Civil Code.

(b) On his/her removal by any person or body having the power to do so in terms of the public deed of the foundation or by the Court on grounds stated in the deed of foundation or applicable law.

(c) On steps being taken for the winding up of the administrator when this is a legal person.

(d) When the administrator is a legal person, upon the retirement, resignation or removal of all administrators, including directors in a company acting as administrator, from their office in the said legal person or steps are taken for its winding up<sup>21</sup>.

An administrator may be appointed without any indication of her/his duration of office. In such case, if the administrator is the sole administrator, s/he shall require that the statutes cater for a substitute administrator or the manner in which a new administrator may be appointed upon her/his retirement, resignation or removal. In case of default, a new administrator may be appointed to substitute such administrator at any time. This is possible with the consent of the founder, of any person designated in the statutes or, in the absence of such persons, the Court<sup>22</sup>.

If an administrator is appointed without any indication of his duration of office and there is more than one administrator, it is implied that the other administrators shall have the power to remove the administrator at any time when they consider that he is unable to carry out his functions due to health or in cases of misconduct, failure to declare conflicts of interest, a breach of duty or failure to comply with the statutes or the provisions of the Second Schedule to the Civil Code<sup>23</sup>.

In the case of disagreement, the administrator who was appointed without any indication of his duration in office may apply to the Court so that the Court issues orders regarding her/his substitution, retirement, resignation or removal, as it considers appropriate, and this, after hearing the relevant persons.

However, a resignation given in order to facilitate a breach of duty, or which would result in there being no administrator for the foundation, has no effect. An administrator may however still resign from office even though this would result in there being no administrator for the foundation if, before the resignation takes effect, application is made to the Court for the appointment of a new administrator, and a new administrator is so appointed<sup>24</sup>.

An administrator who ceases to be an administrator must immediately deliver all property of the foundation which may be in his possession to the remaining or successor administrators and must take all such formal or other actions as may be necessary in the interests of the foundation<sup>25</sup>.

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

The **duties** of the administrators of a foundation include the following<sup>26</sup>:

- Registering the foundation (and maintaining such registration).

<sup>21</sup> Art. 35(9), Second Schedule to the Civil Code.

<sup>22</sup> Art. 35(9)(e), Second Schedule to the Civil Code.

<sup>23</sup> Ibid.

<sup>24</sup> Art. 35(8), Second Schedule to the Civil Code.

<sup>25</sup> Art. 35(10), Second Schedule to the Civil Code.

<sup>26</sup> Reference is to be made to the Second Schedule to the Civil Code, the Voluntary Organisations Act, Cap. 492, Laws of Malta, and applicable regulations including those on public collections.

- Maintaining possession and control of the property of the foundation.
- Safeguarding such property.
- Ensuring compliance with the deed and statutes of the foundation, the provisions of the Second Schedule and any applicable special law.
- Acting in the interest of the foundation to achieve its designated purposes, representing the foundation in all matters, and entering into binding obligations on its behalf.
- Keeping records of all assets and liabilities and all income and expenditure of the foundation for annual financial periods.
- Declaring any possible or actual conflicts of interests to the Board of Administrators.
- Filing with the Registrar for Legal Persons, within three months from any grant, an inventory or descriptive note of the assets added to the foundation.
- Providing full and accurate information as to the state and amount of the foundation property, including the accounts of the foundation (upon a request being made in writing to that effect by the persons mentioned in the Schedule).
- Implement appropriate procedures relating to the prevention of money laundering and the funding of terrorism so as to ensure that the foundation is not used for such purpose<sup>27</sup>.
- 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.
- Following any applicable rules on public collections<sup>28</sup>.
- Administrators are also bound by fiduciary obligations: They must carry out their obligations with utmost good faith and act honestly in all cases. Administrators must, inter alia, exercise the diligence of a bonus paterfamilias when performing their functions, avoid conflicts of interest, act impartially when fiduciary duties are owed to more than one person, keep the property of the foundation segregated from their personal property and generally observe the law regulating the foundation.

The rights of administrators include the following. They may<sup>29</sup>:

- Enter into binding obligations on behalf of the foundation to the extent of the powers vested in them by law, the deed of foundation and any by-laws.
- Delegate their powers of legal and judicial representation in favour of any third parties.
- Add a person as a beneficiary at their discretion (however, when the administrator is granted the power to add a beneficiary at her/his discretion, sufficient indication is to be given in the deed of foundation or in the beneficiary statement as to the class of which the beneficiary forms part. In the absence of such indication the power is null and void).

<sup>27</sup> Art. 22B(1), Voluntary Organisations Act.

<sup>28</sup> Voluntary Organisations (Public Collections) Regulations, 2020, L.N. 371 of 2020.

<sup>29</sup> Reference is to be made to the Second Schedule to the Civil Code.

- Be granted the power 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 or advancement of property of the foundation.
  - Apply to the Court for directives concerning the manner in which they may or should act in connection with any matter concerning the foundation.
  - Seek directions from the Court as to whether the actual or proposed activity of the foundation constitutes regular or continuing trading activity.
  - Apply to the Court for authorisation to amend or add to the deed of a purpose foundation including its purpose by means of an additional public deed (this is possible after the death of the founder).
  - Make specific proposals to the Court for authorisation to use or dispose of the assets of the foundation (when the purpose is achieved, exhausted or becomes impossible and no indication is made in the deed of foundation regarding how the assets are to be applied in such cases).
  - Be remunerated from the income or capital of the foundation unless the deed of foundation provides otherwise.
  - Have the right to resign from office.
- d) What are the rights of founders during the lifetime of the foundation? Can fundamental decisions, such as change of purpose, be made at the discretion of the founder? What are the legal requirements in such circumstances?

Article 36 of the Second Schedule to the Civil Code provides that the founder may, inter alia:

- Exercise supervision over the foundation's administration.
- Obtain a copy of the accounts held by the administrators and a copy of the inventory or descriptive notes of property.
- Intervene in the matter of appointment of administrators or in the disposal of the assets, when these issues are being dealt with by the Court.
- Be vested with powers to appoint, add or remove any administrators, protectors or beneficiaries and powers to appoint an investment adviser or investment manager.
- Be an administrator or a protector of a foundation.
- Be the beneficiary of a beneficiary foundation during her/his lifetime. However, when the founder is a beneficiary, such founder may not at the same time act as the sole administrator of the foundation.
- Give non-binding written guidance to the administrators on how to exercise the powers or discretions vested in them in the deed of foundation or the beneficiary statement and to substitute, modify or withdraw such guidance from time to time as the founder sees fit.

A founder may take fundamental decisions if s/he reserves this right in the deed and statutes of the foundation or if this is permitted by applicable law.

*Can the board or the founder amend the statutes including the purpose of the foundation? If yes, please indicate any particularities. What is the relationship between the powers of the founders, the statutes of the foundation and the power of the board members?*

In terms of Article 32 of the Second Schedule, the founder may amend or add to the deed of a purpose foundation (including its purpose), by means of an amendment to the statutes in

accordance with the provisions of the statutes if any, and, or any applicable law. The statutes may expressly allow any other body or person, including the board of administrators, to amend the statutes in the manner and subject to the conditions as may be stated. A public-benefit foundation may not have its purpose changed or extended to other purposes which are not also social or public purposes.

After the death of the founder, unless the statutes provide for the manner in which amendments may be made, the Court may authorise such amendment or addition to the purpose of the foundation on the application of, inter alia, any administrator, the Supervisory Council or any other interested party or the Attorney General.

It is the duty of the administrators of a foundation to notify the Registrar for Legal Persons within 14 days from the date of any amendment made to the statutes of the foundation<sup>30</sup>. Where the statutes are amended, the persons amending the statutes must also approve a consolidated version of the statutes, 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<sup>31</sup>.

The Statutes of the Foundation regulate the foundation, its founders and its administrators.

The administrators manage and administer the foundation. Article 7(1) of the Second Schedule to the Civil Code, Chapter 16 of the Laws of Malta states that: *“Every organisation shall be managed by one or more administrators who shall be responsible for maintaining possession and control of the property of the organisation, safeguarding such property and ensuring compliance with the constitutive instrument and statute of the organisation, the provisions of this Schedule and any special law applicable to its particular legal form, purpose or category.”* Subject to the terms under which they are engaged, administrators are bound by fiduciary obligations as stated in Article 1124A of the Civil Code, Chapter 16 of the Laws of Malta.<sup>32</sup>

The founder is the person who sets up and creates the foundation, and he may have power over the administrators of the foundation. Article 36(1) of the Second Schedule to the Civil Code states that the founder may exercise supervision over the administration of a foundation, obtain a copy of the accounts held by the administrators, a copy of the inventory or descriptive notes of property, and may intervene in the matter of appointment of administrators or in the disposal of the assets, when these issues are being dealt with by the Court. The founder may also be vested with powers to appoint, add or remove any administrators, protectors or beneficiaries and powers to appoint an investment adviser or investment manager and where a power mentioned in this sub-article has been reserved or exercised by the founder, an administrator who acts in accordance with any directions issued pursuant to the founder’s power as aforesaid shall not be considered to be acting in breach of his fiduciary duties.<sup>33</sup> It is also interesting to note that a founder may be an administrator or a protector of a foundation.<sup>34</sup> The founder may also be the beneficiary of a beneficiary foundation during his lifetime: but when the founder is a beneficiary, such founder may not at the same time act as the sole administrator of such a foundation.<sup>35</sup>

It shall be lawful for a founder to give non-binding written guidance to the administrators on how to exercise the powers or discretions vested in them in the deed of foundation or the

<sup>30</sup> S.L. 16.08, Laws of Malta.

<sup>31</sup> Ibid.

<sup>32</sup> Article 7(4), Second Schedule to the Civil Code.

<sup>33</sup> Article 36(1), Second Schedule to the Civil Code.

<sup>34</sup> Article 36(2), Second Schedule to the Civil Code.

<sup>35</sup> Article 36(3), Second Schedule to the Civil Code.

beneficiary statement and to substitute, modify or withdraw such guidance from time to time as the founder sees fit.<sup>36</sup>

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

Third parties have a right to access publicly available information in the Register for Legal Persons.

An interested party also has the rights specified in the Second Schedule to the Civil Code. In terms of such Schedule, an interested party means *a person who is given rights capable of economic valuation, present or future, actual or contingent, in the constitutive instrument or statute of an organisation or who is given powers or functions therein and shall not include other persons unless the context otherwise requires, and this, without prejudice to the right of any person to pursue any civil right or remedy he may have*<sup>37</sup>.

This appears to be a rule which excludes heirs, spouses or creditors of the founder or of the beneficiaries, or even of the administrators, from being “interested parties” unless of course they are designated as beneficiaries themselves. Of course, such persons still enjoy civil rights and of course they may exercise them in the ordinary manner against persons who may owe them duties. In particular, the reserved portion under civil law will not be affected and to the extent that there are rights of clawback against donees, this may apply even against a foundation if an endowment has been made to it and a breach eventually occurs against a spouse or an heir entitled to a reserved portion. The same may apply to fraudulent dispositions to foundations in breach of creditor rights for which there exists the *actio pauliana* under the Civil Code.

Third parties may have, in some circumstances, a right to make claims against a foundation in the cases specified in applicable law.

In case of a registered foundation, the founders, the donors or the beneficiaries shall not be liable for the obligations of such an organisation, except to the extent that they expressly agree to be so liable.<sup>38</sup> The liability of such persons towards third parties for the obligations of the organisation shall be determined in accordance with any rules which may be applicable to the legal form of the organisation in terms of any special law or, in the absence of any special law, the provisions of the Second Schedule to the Civil Code.<sup>39</sup> In the case of a registered foundation, the founders, the donors or the beneficiaries, are liable towards the legal person for anything they have bound themselves to contribute to it in writing, unless otherwise provided by law.<sup>40</sup> In case of unlawful acts, a Court may, on the application of any interested party, declare the founders, promoters, administrators, beneficiaries or members 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.<sup>41</sup>

The administrator of a registered organisation shall be personally liable for the obligations of the foundation to third parties if:

(i) S/he is guilty of fraud or bad faith in entering into any obligations.

<sup>36</sup> Article 36(4), Second Schedule to the Civil Code.

<sup>37</sup> Art. 1(12)(d), Second Schedule to the Civil Code.

<sup>38</sup> Article 16(1), Second Schedule to the Civil Code.

<sup>39</sup> Article 16(1), Second Schedule to the Civil Code.

<sup>40</sup> Article 16(2), Second Schedule to the Civil Code.

<sup>41</sup> Article 16(3), Second Schedule to the Civil Code.

(ii) S/he has entered into obligations in favour of third parties at a time when s/he knew or ought to have known that there was no reasonable prospect that the foundation would avoid being wound up due to insolvency.<sup>42</sup>

Any member, donor, or beneficiary involved in any unregistered public-benefit organisation shall be liable for the obligations of the organisation if these were entered into by her/him in the name of the organisation in favour of third parties at a time when s/he knew or ought to have known that there was no reasonable prospect that the organisation would avoid being wound up due to insolvency.<sup>43</sup>

The liability of members and administrators of an unregistered organisation having a particular legal form, towards third parties, for the obligations of the unregistered organisation shall be determined in accordance with any rules which may be applicable to the legal form of the organisation under any special law or, in the absence of any special law, the provisions of this article.<sup>44</sup>

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

Administrators are bound by fiduciary obligations and must avoid any conflict of interest. If there is any conflict of interest, they are under an obligation to declare it. Administrators may be held liable to<sup>45</sup>:

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

There is no definition of "conflict of interest" in the Second Schedule to the Civil Code but there are specific provisions in Article 1124A of the Civil Code expanding on conflicts of interest. In terms of Article 2(1) of the Trusts and Trustees Act, Cap. 331 of the Laws of Malta, a "conflict of interest" means *any situation in which the trustee's personal interest or the interests which the trustee owes to any other person, can lead to or can be perceived as leading to a situation where such interests conflict with the fiduciary duties which the trustee owes to the beneficiary.*

Fiduciary obligations under Maltese Law ensure that there is no self-dealing. The administrator, as a fiduciary, inter alia<sup>46</sup>:

- Owes a duty to protect the interests of another person.
- Holds and exercises control or powers of disposition over property for the benefit of other persons.
- Is bound to avoid any conflict of interest or any conflict of trust or fiduciary obligations.

<sup>42</sup> Article 16(4)(a), Second Schedule to the Civil Code.

<sup>43</sup> Article 17(1)(b), Second Schedule to the Civil Code.

<sup>44</sup> Article 17(4), Second Schedule to the Civil Code.

<sup>45</sup> Art. 16, Second Schedule to the Civil Code.

<sup>46</sup> Art. 1124A, Civil Code, Cap. 16, Laws of Malta.

- Must not receive undisclosed or unauthorised profit from her/his position or functions.
- Keeps any property as may be acquired or held as a fiduciary segregated from her/his personal property and that of other persons towards whom s/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<sup>47</sup>. This avoids the situation in which the founder, as administrator, would owe fiduciary duties to themselves, as beneficiary.

It is important to note that where a 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 and this in terms of the Voluntary Organisations Act<sup>48</sup>, as that would amount to a “private interest” or “benefit” which is prohibited by law in such cases.

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

Generally, however, such decisions are taken by the administrators as it is their responsibility to maintain possession and control of the property of the organisation, to safeguard such property and ensure compliance with the statutes of the foundation, the provisions of the Second Schedule to the Civil Code and any applicable special law. The administrators may delegate the powers of legal and judicial representation by means of a written resolution or written power of attorney in favour of any third parties.<sup>49</sup> It also appears that a clause may be included in the deed of foundation giving members of staff the power to take certain decisions.<sup>50</sup>

**9. What is the liability of the foundation and its organs? What is the general standard of diligence for board members? (e.g. duty of obedience, duty of care/prudence, duty of loyalty)? In what type of rule are these criteria established: fiscal, administrative, civil, commercial? Is there a solid case law, if any, regarding the duty of due diligence? Does your country differentiate between voluntary (unpaid) and paid board members? Who is allowed to bring a complaint about breaches of such duties: the other members of the board, the founder/s, the public authorities? If a complaint is brought, which authority has competence in such cases: administrative, tax authority, only the judiciary power (attorney general) or beneficiaries/general public?**

*What is the general standard of diligence for board members? (e. g. duty of obedience, duty of care/prudence, duty of loyalty)? In what type of rule are these criteria established: fiscal, administrative, civil, commercial? Is there a solid case law, if any, regarding the duty of due diligence?*

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

<sup>47</sup> Art. 36(3), Second Schedule to the Civil Code.

<sup>48</sup> Cap. 492, Laws of Malta.

<sup>49</sup> Article 4(5), Second Schedule to the Civil Code.

<sup>50</sup> Article 4(5)(b), Second Schedule to the Civil Code.

personality and is separate and distinct from its founders, administrators and beneficiaries. Any acts entered into by the foundation bind no one but the foundation itself. It is liable for the fulfilment of acts which it has bound itself to perform with all its present and future assets, and its liability is kept distinct from that of its promoters, founders, administrators and members.

In fact, the founders, the donors or the beneficiaries are not liable for the obligations of the foundation, except to the extent they expressly agree to be so liable or as expressly stated in the Second Schedule or any special law<sup>51</sup>. The founders, the donors or the beneficiaries are liable towards the foundation for anything they have bound themselves to contribute to it in writing, unless otherwise provided by law<sup>52</sup>. In the case of unlawful acts, the Court may declare the founders, promoters, administrators or beneficiaries who consented to such act (or knowingly took part in the unlawful act to the detriment of the foundation) as personally liable for any damage suffered by the foundation<sup>53</sup>.

If the foundation is registered, the general rule is that the administrator shall not be personally liable for the obligations of the organisation except in the following cases<sup>54</sup>:

- *To third parties for the obligations of the organisation* if s/he is guilty of fraud or bad faith in entering into any obligations; s/he has entered into obligations in favour of third parties at a time when s/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 s/he has entered into on its behalf, without being entitled to the benefits, and for any benefit which accrues to her/him personally, if s/he has failed to declare a personal interest or a conflict of interest.
- *To the organisation* to account for any loss if s/he has acted in breach of duty as stated in the statutes or in bad faith as stated in the Second Schedule or has been negligent in the carrying out of her/his duties.
- *To the beneficiaries of the organisation or the Attorney General on their behalf*, if s/he has acted as stated in the preceding paragraph or in a situation where there is a conflict of interest.
- *To the Registrar* for the payment of any fees which may be due by the foundation upon failure by the organisation to pay the same within three months of the date on which they are due.

It must be noted that the administrator shall not be liable more than once for the same act.

If a foundation has more than one administrator, their responsibility is joint and several, although if a particular duty was entrusted solely to one administrator, only s/he shall be liable for the breach<sup>55</sup>. The other administrators will not be liable if they prove that:

- They were not aware of the breach when it occurred and, upon becoming aware, they stated that they did not agree in writing, and this, without any delay; and

<sup>51</sup> Art. 16(1), Second Schedule to the Civil Code.

<sup>52</sup> Art. 16(2), Second Schedule to the Civil Code.

<sup>53</sup> Art. 16(3), Second Schedule to the Civil Code.

<sup>54</sup> Art. 16(4), Second Schedule to the Civil Code.

<sup>55</sup> Art. 16(5), Second Schedule to the Civil Code.

- They took all reasonable measures to either stop the breach from continuing or, knowing of the intended breach, they took all reasonable measures to avoid it from occurring<sup>56</sup>.

An administrator may not be exonerated from liability for wilful misconduct, gross negligence or breach of duty. Any provision to this effect is null and void<sup>57</sup>.

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

- To keep the property of the unregistered foundation identified as such and distinct from their own personal property and other property they may be administering.
- For the preservation of any property received.
- For the use of assets to the fulfilment of the purposes expressly stated in the statutes of the foundation; and
- To ensure, as far as possible, considering their functions, observance of the law applicable to the unregistered organisation and its activities<sup>58</sup>.

Administrators are considered to be fiduciaries and are subject to high standards of obligations. The duties to act honestly and with utmost good faith are absolute. Other duties may be subject to agreement and may be varied<sup>59</sup>. There is the duty to act diligently, and this cannot be removed under public policy rules applied by the Courts in Malta and reflected in legislation. As fiduciaries, administrators are liable for breaches of duties unless certain obligations are expressly or implicitly waived. With reference to diligence, the courts do apply a high standard in cases which are regularly brought before them.

The articles of law regulating the general standard of diligence for board members form part of the Civil Code and the Second Schedule to the Civil Code. There are numerous judgements relating to fiduciary obligations.

*Does your country differentiate between voluntary (unpaid) and paid board members?*

Malta does not differentiate between voluntary (unpaid) and paid board members. All administrators, irrespective of whether they are remunerated or not, are subject to fiduciary obligations and must carry out their obligations with utmost good faith and must act honestly in all cases. They must all exercise the diligence of a *bonus paterfamilias* in the performance of their obligations<sup>60</sup>.

*Who can claim responsibility for breaches of such duties: the other members of the board, the founder/s, the public authorities. In which case who: administrative, tax-authority, only the judiciary power (Attorney General) or beneficiaries/general public?*

If the foundation is registered, the administrator shall be personally liable for the obligations of the organisation in the following cases<sup>61</sup>:

- *To third parties for the obligations of the organisation* if s/he is guilty of fraud or bad faith in entering into any obligations; s/he has entered into obligations in favour of third parties at a time when s/he knew or ought to have known that there was no reasonable prospect that the organisation would avoid being wound up due to insolvency.

<sup>56</sup> Art. 16(6), Second Schedule to the Civil Code.

<sup>57</sup> Art. 16(7), Second Schedule to the Civil Code.

<sup>58</sup> Art. 17(2), Second Schedule to the Civil Code.

<sup>59</sup> Art. 1124A, Civil Code, Laws of Malta.

<sup>60</sup> Art. 1124A(4), Civil Code.

<sup>61</sup> Art. 16(4), Second Schedule to the Civil Code.

- *To the organisation* for the performance of the obligations that s/he has entered into on its behalf, without being entitled to the benefits, and for any benefit which accrues to her/him personally, if s/he has failed to declare a personal interest or a conflict of interest.
- *To the organisation* to account for any loss if s/he has acted in breach of duty as stated in the statute or in bad faith as stated in the Second Schedule or has been negligent in the carrying out of her/his duties.
- *To the beneficiaries of the organisation or the Attorney General on their behalf*, if s/he has acted as stated in the preceding paragraph or in a situation where there is a conflict of interest.
- *To the Registrar* for the payment of any fees which may be due by the foundation upon failure by the organisation to pay the same within three months of the date on which they are due.

Each person may pursue her/his own rights and powers, by accessing the Court which then has full powers to provide for any remedies which may be necessary. The only state institution which features in the law is the Attorney General for particular contexts where the beneficiaries are very weak and there is a conflict of interest which impedes any remedy. The same will apply in the case of purpose foundations where there are no beneficiaries.

#### **10. Who can represent a foundation towards third parties? Is this specified in law or is it up to the statutes of the organisation? Do the director and officers have powers of representation based on legislation?**

Legal persons act through their organs, such as a board of administrators<sup>62</sup>. In the case of foundations, the general rule is that the administrators have the power to represent the foundation.

In terms of the Second Schedule to the Civil Code, the legal and judicial representation of a foundation is vested:

- In all cases, in any one or more of the administrators, jointly and severally, in the manner stated in the statutes or the applicable law.
- Without limiting the powers of representation of the administrators, in other persons named in the statutes<sup>63</sup>.

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<sup>64</sup>. This power of delegation may also be given to any other person in the statutes of the foundation.

The administrators bind the foundation to the extent of the powers vested in them by law, the statutes and any bylaws or as otherwise stated in the Second Schedule to the Civil Code or any applicable special law. However, any limitation in the powers of the administrators shall not be relied upon against third parties in good faith. This is so irrespective of whether such limitation arises from the statutes of the foundation or from any internal decision,

<sup>62</sup> Art. 4(4), Second Schedule to the Civil Code.

<sup>63</sup> Art. 4(5), Second Schedule to the Civil Code.

<sup>64</sup> Ibid.

unless it is proved that such third party was aware that the act was in breach of the limitation<sup>65</sup>.

Moreover, if, for any reason, there is no clause regulating legal representation in the statutes of the foundation, the administrators of the foundation are to be vested with its legal representation<sup>66</sup>.

In a foundation, the directors are the administrators and therefore they have the powers of representation referred to above. If an officer is not an administrator such power may be granted to him/her in the statutes of the foundation or delegated to him/her by the administrators.

## **11. Are purpose-related/unrelated economic activities allowed? If so, are there other types of limitations on economic activities (related/unrelated)?**

Public-benefit foundations and trading activities are regulated by Art. 32A of the Second Schedule to the Civil Code. This article establishes that a foundation must not be established to carry out acts of trade or trading activities on a regular or continuing basis nor may it do so in practice, except as permitted by the Second Schedule to the Civil Code and when the proceeds of such trading activities are attributable to a social or public purpose (in which case there are particular rules which apply). Reference must also be made to Art. 38(2) of the Voluntary Organisations Act<sup>67</sup>. When the trading is permitted in the statutes and is not pursuant to the purposes of the voluntary organisation, then the organisation is required to set up a separate legal entity to ensure a level playing field with other commercial organisations.

Notwithstanding this, a foundation may own, acquire or be endowed with shares or other interests in another legal organisation and may generally:

(a) Carry out any specific actions with shares it may hold as may be designated in the statutes of the foundation for the achievement of its main purposes and objectives.

(b) Be subject to such authorisations as may be necessary under applicable laws, issue tokens and carry out any trading activity resulting from such foundations owning, administering or otherwise operating an innovative technology arrangement as defined in the Malta Digital Innovation Authority Act<sup>68</sup>; and

(c) Seek the achievement of designated social purposes which may include health and education.

However, the purposes of the holding, acquisition or endowment of shares or other interests must not be to enable the foundation to speculate with such assets. Limitations also exist when the foundation qualifies as a voluntary organisation and owns shares or other interests in another legal organisation established in terms of the Voluntary Organisations Act<sup>69</sup>.

Moreover, the administrators or a person designated in the statutes, any public-benefit beneficiary, the State Advocate (in the case of a public-benefit foundation) and the Commissioner for Voluntary Organisations (in the case of voluntary organisations which are enrolled in terms of the Voluntary Organisations Act) may seek directions from the Court as to whether the actual or proposed activity of the foundation constitutes regular or continuing trading activity beyond what is permitted at law (the foundation may carry out

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Art. 32A(1), Second Schedule to the Civil Code.

<sup>68</sup> Cap. 591, Laws of Malta.

<sup>69</sup> Cap. 492, Laws of Malta.

acts of trade in the ordinary course of carrying out its principal purposes and objectives). The Court issues directives to the foundation and may even request that it amends its purposes and objectives. Such an order shall not affect or invalidate acts already lawfully carried out or interrupt lawful acts in progress<sup>70</sup>.

A public-benefit foundation regulated by European Union law may carry out acts of trade or trading activities if permitted to do so under such law. These acts or activities, however, must be carried out solely to achieve and promote the principal purposes and objectives of the foundation<sup>71</sup>.

The provisions of the Voluntary Organisations Act<sup>72</sup> must also be taken into consideration as these apply to foundations which qualify as voluntary organisations in terms of such Act. Voluntary organisations must not be established principally for trading purposes, nor may they regularly engage in acts of trade. However, they are permitted to carry out certain identified acts of trade if they are established for public purposes which can only be achieved through identified acts of trade: Voluntary organisations may regularly carry out such acts of trade which are considered to be related and ancillary to the principal purpose and objectives of the foundation in order to achieve their public purposes<sup>73</sup>. The following activities are presumed to be permitted:

- (a) The operations and activities carried out by schools, training centres and other educational institutes and the charging of fees for educational services.
- (b) Income generated from the sale of goods and/or the provision of services, by a voluntary organisation when such goods and/or services are themselves donated to the voluntary organisation.
- (c) Income generated from the sale of goods and/or the provision of services only to members, supporters, sponsors or contributors of the voluntary organisation or the group of organisations of which it forms a part.
- (d) Income generated from the sale of goods and/or the provision of services on sites administered by the voluntary organisation and offered to bona fide visitors by the organisation itself through volunteers or employees. (This does not apply to shops, bars, restaurants or other outlets on such sites, or the sites themselves when these operate under lease agreements, management agreements, licences or otherwise by third parties for profit).
- (e) The operations and activities of art galleries, exhibitions, museums and other organisations established for the advancement of culture, arts and national heritage and the charging of fees for the admission at theatrical, musical or other such activities.
- (f) Participation fees in competitions.
- (g) Payment for residential accommodation, care and other philanthropic support provided on a cost or subsidised basis.
- (h) Such other activities intended to raise funds for the achievement of the principal purpose and objectives of the organisation resulting in:
  - (i) Income from the grant on lease or a management contract of land or buildings or other commercial property to a third party, where no services are provided by the voluntary organisation.

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<sup>70</sup> Art. 32A(4), Second Schedule to the Civil Code.

<sup>71</sup> Art. 32A(7), Second Schedule to the Civil Code.

<sup>72</sup> Cap. 492, Laws of Malta.

<sup>73</sup> Art. 38(1), Voluntary Organisations Act, Cap. 492, Laws of Malta.

(ii) Income from the investment of the assets of a voluntary organisation, including the holding of shares or other interests in another legal organisation.

(iii) Income which may be made payable to voluntary organisations which own, administer or otherwise operate an innovative technology arrangement in terms of the Malta Digital Innovation Authority Act<sup>74</sup>.

Any other trading activities which only provide marginal income (not more than 10% of the income generated by the voluntary organisation in any one year) may also be carried out by the voluntary organisation itself. In other cases, the voluntary organisation is to establish a limited liability company to carry out acts of trade, and the administrators of the voluntary organisation are to ensure that such establishment shall not burden the human and financial resources of the voluntary organisation beyond its means<sup>75</sup>

**12. Is there any legal/fiscal framework for grantmakers to be able to fund legal entities that are conducting economic activities in addition to their public-utility activities? If any, what are the limitations for funding those kinds of legal entities?**

There is legislation which imposes limitations on the funding of foundations which are enrolled and compliant voluntary organisations, namely, the Voluntary Organisations (Public Collections) Regulations, 2020 (Legal Notice 371 of 2020), but such limitations are not connected to the fact that a legal entity may be carrying out economic activities, for example, regulation 25(8) provides that: *"All generated revenue and other income raised through the crowd funding shall be recorded by means of bank statements, where the crowd funding is easily distinguished and traceable. Donations exceeding twenty euro (€20) each day made by the same donor shall not be permissible."*

**13. Are foundations permitted to be major shareholders in a company? Are there any limitations to voting rights? Is this considered as an economic activity?**

In terms of Article 32A(2) of the Second Schedule to the Civil Code, a foundation may own, acquire or be endowed with shares or other interests in another legal organisation. However, their purpose shall not be to enable the foundation to speculate with such assets. In this regard, the foundation may:

- (a) Carry out any specific actions with shares it may hold as may be designated in the statutes of the foundation for the achievement of its main purposes and objectives.
- (b) Subject to such authorisations as may be necessary under applicable laws, issue tokens and carry out any trading activity resulting from such foundations owning, administering or otherwise operating an innovative technology arrangement; and
- (c) Seek the achievement of designated social purposes which may include health and education.

When the foundation owns a shareholding in an organisation established to trade, the trading organisation is not restricted in its activities by the purposes of the foundation in any manner, unless otherwise stated in the statutes of such organisation<sup>76</sup>.

<sup>74</sup> Cap. 591, Laws of Malta.

<sup>75</sup> Art. 38(3), Voluntary Organisations Act.

<sup>76</sup> Art. 32A(2), Second Schedule to the Civil Code.

A foundation which is a voluntary organisation may hold shares in another legal organisation and the holding of such shares is classified as an exempt/permitted trading activity in terms of Article 38(2)(h)(ii) of the Voluntary Organisations Act.<sup>77</sup>

Moreover, when the foundation qualifies as a voluntary organisation and owns shares or other interests in a limited liability company established to carry out acts of trade which may not be carried out by a voluntary organisation directly, such limited liability company:

(a) May carry out acts of trade which are related or ancillary to the principal purpose and objectives of the voluntary organisation or, if expressly permitted in the statutes of such voluntary organisation, subject to the discretion and satisfaction of the Commissioner for Voluntary Organisations.

(b) Must be non-profit making in terms of the Voluntary Organisations Act.

(c) Must have directors who do not receive any remuneration for their services except as permitted by the Voluntary Organisations Act and, or the statutes of the voluntary organisation; and

(d) Shall not permit the evasion of the limitations imposed on voluntary organisations by the Voluntary Organisations Act by any person in the voluntary organisation or the limited liability company. The same limitations shall also apply to the limited liability company in the same way<sup>78</sup>.

**14. Are there any rules/limitations in civil and/or tax law regarding foundations' asset management (only secure investments/bonds/investments with a certain return)? What, if any, types of investment are prohibited? Are there any limitations on mission-related investments?**

As seen above, and in terms of Article 32A(2) of the Second Schedule to the Civil Code, a foundation may own, acquire or be endowed with shares or other interests in another legal organisation: However, the purpose shall not be to enable the foundation to speculate with such assets. The foundation may carry out specific actions with shares it may hold as may be designated in the statutes of the foundation for the achievement of its main purposes and objectives.

There are no rules limiting the type of investments a foundation may have as part of the management of its own assets. Article 31B(3) of the Second Schedule permits a private foundation to hold assets as an investment portfolio and to do all such acts ordinarily carried out in such context. The law expects foundations to act as passive owners of assets and requires that foundations engage qualified third parties to manage their assets.

Article 31B(4) of the Second Schedule states that foundations shall act as the passive owner of such assets, the administration of which is delegated to a third party, including another legal organisation with its own board of directors or a third party under a fiduciary agreement or temporary title; and the carrying out of acts of trade of any kind by the delegate with assets belonging to the foundation shall not imply that the foundation is itself carrying out such activities. For the purpose of the law "passive" means that the foundation is not involved in the day-to-day operations of the relevant activity but shall not imply limitations on the foundation or its administrators from exercising or protecting the rights of the foundation in relation to any of its purposes or assets.

<sup>77</sup> Please also refer to Article 38(1) of the Voluntary Organisations Act.

<sup>78</sup> Art. 38(4), Voluntary Organisations Act.

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

Foundations may carry out any activities in order to fulfil their purposes and objects in the manner permitted by applicable law. In all cases, administrators are bound by fiduciary obligations and therefore must act as *bonus pater familias*, with utmost good faith and honesty. There are some implied limitations when the foundation is a voluntary organisation in that making grants to others on low or no interest loans implies a private benefit and is therefore prohibited. So, one has to be careful on the type of purpose the foundation has before applying limitations. In any case, all are limited by restrictions in the statutes which are expressly stated.

**16. Are there any limitations (in civil law/tax law) to political party related or general lobby/advocacy activities?**

Political parties are regulated by a special law which is the Financing of Political Parties Act, Chapter 544 of the Laws of Malta. Article 3 of the Financing of Political Parties Act states that political parties may be formed in order to attain free democratic order in the formation of the people's political will, according to the Constitution, and the State shall, as a matter of public interest, favour the formation and operation of such political parties, but such formation and operation of political parties shall be within the parameters established by law.

Article 4 of the Financing of Political Parties Act states that: *“Political parties shall have a legitimate aim and shall conform to the Constitution and the laws of the State: Provided that political parties may lawfully have, as their aim, amendments to the Constitution and to the laws of Malta: Provided further that all amendments shall be brought about by legal means.”*

The said Act imposes a number of rules and restrictions in relation to the granting of donations and sponsorships.

Political purposes are, however, excluded from the Voluntary Organisations Act and this serves the purpose of keeping the Commissioner of Voluntary Organisations free from supervisory functions in regard to organisations with political purposes. Political purpose is defined<sup>79</sup> as the promotion of the interests of a political party or a political candidate, whether at local, national or international level. A political party is defined as including any other organisation, of whatever legal form, which is controlled by, related or affiliated to the political party, and the terms "political candidate" and "political organisation" shall be construed accordingly.

**17. What are the requirements for an amendment of statutes/amendment of foundations' purpose?**

In terms of Article 32 of the Second Schedule to the Civil Code, the founder may amend or add to the deed of a purpose foundation, by means of an amendment to the statutes made in accordance with the provisions of the statutes, if any, and, or applicable law. The statutes may expressly permit any other body or person to amend the statutes in the manner and subject to the conditions as may be therein stated.

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<sup>79</sup> See Article 2 of the Voluntary Organisations Act, Cap 492, Laws of Malta.

After the death of the founder, unless the statutes provide for the manner in which amendments may be made, the Court may authorise an amendment or addition to the deed of a purpose foundation, on the application of: (a) any administrator; (b) the supervisory council; (c) any interested party, or (d) in the case of a public-benefit foundation, the Attorney General.

A public-benefit foundation may not have its purpose changed or extended to other purposes which are not also social or public purposes<sup>80</sup>.

Amendments to the statutes of a registered foundation shall be made as follows:

(a) If a form has been prescribed, by the filing of such form. In this case, the particular amendment does not require a public deed or enrolment in the records of a Notary Public, and this, irrespective of what is stated in the statutes of the foundation.

(b) If a form has not been prescribed, amendments are to be made by resolution, private writing or notarial deed in accordance with the statutes. However, unless such amendments are made by notarial deed, the resolution or private writing is to be enrolled in the records of a Notary Public. In such case, the Notary Public publishing or enrolling the deed is to present it to the Registrar for Legal Persons within 14 days from the date of publication of the deed or its enrolment in her/his records, as the case may be.<sup>81</sup>

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

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

- Annual financial report/financial accounts (if the public-benefit foundation is enrolled with the Commissioner for Voluntary Organisations)
- Annual activity report (if the public-benefit foundation is enrolled with the Commissioner for Voluntary Organisations)
- Public-benefit/activity report (if the public-benefit foundation is applying for enrolment with the Commissioner for Voluntary Organisations)
- Tax report/tax return
- Other reports e.g. on 1% schemes - Statement of Public Collections (if the public-benefit foundation is enrolled with the Commissioner for Voluntary Organisations)
- Reports on governance changes (e.g. new board members)
- Report on conflict of interest (self-dealing and conflict of interest breach cases)

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

Some of the reports must be submitted to supervisory authorities (Registrar for Legal Persons maintaining the Register of Legal Persons and the Register of Beneficial Owners - Foundations, Commissioner for Voluntary Organisations, Tax Authorities).

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

(a) An organisational chart.

(b) The list of the administrators as on the last day of the respective financial year.

<sup>80</sup> Art. 32, Second Schedule to the Civil Code.

<sup>81</sup> Art. 31A, Second Schedule to the Civil Code.

- (c) The list of the current administrators.
- (d) The documents amending the statutes.
- (e) A copy of the annual report which shall be authenticated by at least two administrators.
- (f) A copy of the annual accounts which shall be authenticated by at least two administrators.
- (g) In the case of public collections, a statement of account relative to any event organised and/or an activity performed to make public collections.

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

All foundations must submit a declaration relating to beneficial ownership which addresses transparency concerns and are now regulated by the 5<sup>th</sup> AMLD Directive (Prevention of Money Laundering and Terrorist Financing).

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

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

Yes, reports may be checked/reviewed by the Registrar for Legal Persons maintaining the Register of Legal Persons and the Register of Beneficial Owners - Foundations, the Commissioner for Voluntary Organisations or the Tax Authorities depending on the particular report.

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

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

Registered documents are presumed to be accessible to the public and most documents relating to foundations are indeed available to the public. There are a few exceptions such as information about beneficiaries in private foundations which need not be publicly registered, and it is only recently through the Register of Beneficial Owners that this has changed. Such information is still not necessarily public.

Some reports which are submitted to the supervisory authorities are publicly available:

- (a) Certain documentation and forms submitted to the Commissioner for Voluntary Organisations are available upon request<sup>82</sup>.
- (b) Certain documentation and forms submitted to the Registrar for Legal Persons in relation to public-benefit foundations (Register of Legal Persons) are available upon request.

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<sup>82</sup> Article 40(1), Voluntary Organisations Act.

(c) Documentation submitted to the Registrar for Legal Persons in terms of the Civil Code (Second Schedule)(Register of Beneficial Owners – Foundations) Regulations<sup>83</sup> are available strictly in accordance with such regulations.

(d) Documentation submitted to tax authorities is not available.

d) Is external audit required by law for all foundations?

Administrators are to keep records of all assets and liabilities and all income and expenditure of the foundation for annual financial periods<sup>84</sup>. Administrators shall 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 and shall be published and/or filed as may be prescribed or as may be required by applicable law<sup>85</sup>.

Until such time as: (a) the form and content of accounts and reports; and b) the rules on review, publication and, or filing are prescribed, for legal organisations, the form of which is not regulated by a special law, in which case the special law shall apply, the following rules shall apply, unless the legal organisation opts that accounts are drawn up, prepared, reviewed and published for each financial period in accordance with generally accepted accounting principles and practice, as defined in the Accountancy Profession Act, or subject to the advice of a certified public accountant and auditor, by some other principles and practices, as may be chosen from time to time by the administrators:

- In the case of organisations established exclusively for public benefit, the provisions applicable to enrolled voluntary organisations shall apply, irrespective of whether such organisations are enrolled or not<sup>86</sup>.
- Category 3 voluntary organisations, specifically voluntary organisations whose generated revenue and income exceeds €250,000, must keep their accounting records under the accrual basis and prepare financial statements in conformity with the requirements of IFRS. The financial statements must be verified and signed by an auditor<sup>87</sup>.

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

In foundations with a commercial purpose as allowed by law, the rules require more transparency, and the rules requiring audits under company law will apply to foundations as well.

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

Foundations which are Category 3 voluntary organisations must keep their accounting records under the accrual basis and prepare financial statements in conformity with the

<sup>83</sup> S.L. 16.18, Laws of Malta.

<sup>84</sup> Art. 10(1), Second Schedule to the Civil Code.

<sup>85</sup> Art. 10(2), Second Schedule to the Civil Code.

<sup>86</sup> Art. 10(3), Second Schedule to the Civil Code.

<sup>87</sup> Schedule III of the Voluntary Organisations (Annual Returns and Annual Accounts) Regulations, 2020 (Legal Notice 317 of 2020).

requirements of IFRS. The financial statements of Category 3 voluntary organisations must be duly verified and signed by an auditor.

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

## 19. Supervision: Which authority, what measures?

a) What type of body is the supervisory authority? (multiple answers possible)

- A public administrative body
- A public independent body
- A combination of a governmental body and a court
- A court
- A public administrative body and an independent body
- A tax authority
- Other

b) Does the supervisory body review reports?

- Yes
- No

c) Are foundations subject to inspection?

- Yes
- No

d) Is approval from the authority required for certain decisions of the governing board?

- Yes, formal approval is needed
- Yes, needs just to be informed
- No

If yes, please specify which type of decisions:

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

- Yes
- No
- Can a government official be appointed to the governing board by a state authority, if so please mention:

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

In the case of an application for the registration of a foundation with the Registrar for Legal Persons, persons who, having a duty to submit the registration documents, do not do so within the stipulated time frames, are liable to a penalty of €232.94 each<sup>88</sup>.

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

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

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

However certain conditions apply<sup>89</sup>.

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

## 20. When and how does a foundation dissolve?

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

- *A request is made by the foundation itself.* A foundation may request the termination of its registration by means of a written request signed by all its administrators or as otherwise required by its statutes. The foundation must also present a statement of accounts, declaring what the assets and liabilities of the foundation are, and must state how such assets and liabilities are to be dealt with on the termination of registration.
- *A request is made by any interested party or any competent authority.* These may apply to the Court for termination of registration and/or the cessation of the foundation. If a request is made for the termination of the registration of a foundation on grounds which imply that the foundation may no longer operate, the Court order stating that the registration must be terminated will also include an order requiring the cessation of such foundation as a foundation, and as a legal person.

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

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<sup>88</sup> Art. 31 Second Schedule to the Civil Code.

<sup>89</sup> Art. 22, Voluntary Organisations Act.

Voluntary Winding Up: Unless otherwise stated in the foundation deed, the winding up of a foundation must be agreed to by a majority of all administrators. The administrators must follow the procedures laid down in the statutes of the organisation and must prepare a scheme of distribution of the remaining assets of the foundation. An organisation may be wound up voluntarily only if its assets exceed its liabilities or its assets have been exhausted, and all its debts have been paid.

The administrators must also obtain the approval of the founder or the beneficiaries before implementing the scheme of distribution. In their absence, the approval of the Registrar for Legal Persons must be obtained. This scheme of distribution must in all cases be notified to the Registrar and all interested parties. Once the scheme of distribution is approved, the administrators proceed to pay out the remaining assets of the organisation in accordance with such scheme of distribution.

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

In the case of the dissolution and winding up of private foundations, if there is no indication in the foundation 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 keeping in view the intentions of the founder. The Court will only order that the assets be paid to the beneficiaries if it is satisfied that the founder intended such assets to be available to them. If the Court is not satisfied, the assets will be paid to the founder or his heirs at law.

There are some situations in which the administrators of the foundation must dissolve and wind up the foundation. A foundation terminates when its term elapses, which can be a maximum of 125 years in the case of a private foundation. A foundation also terminates if it has achieved its purpose or the purpose has become impossible. The founder may amend the statutes at any time to remove the reason for dissolution.

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

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

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

- Outline the reasons for its decision;
- Outline the steps which are to be taken in relation to the assets of any relevant foundation; and
- Order the appointment of a liquidator for the foundation.

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

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

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

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

**21. Is there a maximum that can be spent on office/administration costs in civil law and/or tax law? If yes, what is the amount?**

There is no maximum that can be spent on office/administration costs, but these must not hinder the achievement of the purposes of the organisation. The Voluntary Organisations Act has strict rules on the remuneration of administrators of voluntary organisations. Subject to an express prohibition in the statutes of a voluntary organisation, an administrator may only be remunerated by an organisation when he is engaged or is an employee of the organisation under a written contract. Such remuneration must not prejudice the achievement of the principal and sustainable purposes and objectives of the organisation. A voluntary organisation may reimburse the administrator (reasonable refund) of any costs incurred by her/him, if this is directly related to her/his work as administrator.

No voluntary organisation may:

- Grant the administrator a remuneration that is higher than standard market levels or market conditions (although the organisation may be exempted from this rule by the Commissioner if s/he is satisfied that the administrator has specific skills which meet the needs of the organisation).
- Remunerate any person with a salary, wage or a fee that is higher than market levels (unless the Commissioner is satisfied in that particular case that specific conditions apply).

Paragraph VI, section 14 of the First Schedule to the Voluntary Organisations Act states that: *Any administrator, donor, promoter, founder, member, volunteer, or any other person supporting the purposes and objectives of the organisation may receive a reasonable refund for expenses incurred by him on behalf of the organisation.*

**22. Does civil and/or tax law require a foundation to spend a certain percentage of its overall assets within a certain period of time (e.g. within the next financial year)? In particular, can a foundation accumulate these expenses over a period of time (and if so, what kind of authorisation is required to do so)?**

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

**23. Under what conditions does the civil law in your country recognise a foreign foundation? Do they have to register? Does your law recognise the concept of trusts?**

In terms of Article 2(1) of the Second Schedule to the Civil Code, foreign organisations which have legal personality under the laws by which they are established or, if they are registered

overseas, under the laws of the place of registration, are recognised as legal persons for all purposes of law, and this, with the characteristics of the legal form they take under applicable law<sup>90</sup>.

In the case of foreign organisations which have legal personality, the laws by which they are established or, if they are registered overseas, the laws of the place of registration, apply to all matters regarding such foreign organisations, including their form, their existence, the setting-up and effects of their statutes, constitutive instrument or public deed and their administration, the liability of persons who control or manage or are otherwise involved in such organisations and their dissolution<sup>91</sup>.

A foreign organisation which does not have legal personality is recognised as a legal organisation and all matters regarding such foreign organisation, including its form, its existence, the construction and effects of its constitutive instrument or statutes, the liability or otherwise of its promoters, members or its administrators, its administration and its dissolution are governed by the proper law applicable to its constitutive instrument or statutes, either express or according to applicable law<sup>92</sup>.

However, in the case of the liability of foreign public-benefit organisations which either; (a) operate in Malta, including if they raise funds in Malta; or (b) provide services available to the public within Malta, as well as that of their administrators, these are subject to the provisions of the Second Schedule to the Civil Code in so far as their activity in Malta is concerned (subject to any applicable special law)<sup>93</sup>.

Limitations to trading and commercial activities established under Article 32A of the Second Schedule apply to the activities of foreign foundations in Malta<sup>94</sup>.

A foreign foundation, irrespective of whether it has 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. A regular activity is one which has a duration of more than three months, or which is carried out through a permanent establishment in Malta (this includes a place of business, office or branch through which an activity is carried out on a stable and continuous basis). Foreign religious organisations are not under an obligation to register<sup>95</sup>.

Where a foreign organisation does not carry out regular activities in Malta but needs to prove its recognition for the purpose of applicability of the laws of Malta, the organisation may register by means of a notice in the prescribed form<sup>96</sup>.

Whenever the purposes or activities of a foreign foundation are the subject of laws regulating credit institutions, insurance undertakings, investment services or funds or the provision of trustee, fiduciary, or corporate services or other licensable or regulated activities, such foundation may only be registered with the prior written consent of the Malta Financial Services Authority. This is the case when this is required by applicable law and where the Malta Financial Services Authority is the competent authority under such law (unless the

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<sup>90</sup> Art. 2(1), Second Schedule to the Civil Code.

<sup>91</sup> Art. 2(3), Second Schedule to the Civil Code.

<sup>92</sup> Art. 2(4), Second Schedule to the Civil Code.

<sup>93</sup> Art. 19(8), Second Schedule to the Civil Code.

<sup>94</sup> Art. 2(5), Second Schedule to the Civil Code.

<sup>95</sup> Art. 2(6), Second Schedule to the Civil Code.

<sup>96</sup> Art. 2(7), Second Schedule to the Civil Code.

foreign organisation is expressly exempted from obtaining authorisation under Maltese law)<sup>97</sup>.

Maltese law does recognise trusts, and these are regulated by the Trusts and Trustees Act, Cap. 331, Laws of Malta.

**24. Does the law in your country allow a foundation to conduct (some or all) activities (grantmaking, operating, asset administration, fundraising) abroad? Is there any limitation?**

Maltese law does not prohibit a foundation from conducting activities abroad and we are not aware of any limitation imposed by Maltese law except as stated above in relation to asset administration and investments.

**25. Does the law in your country impose any restrictions on ability to receive donations from abroad? If so, please describe.**

We are not aware of any restriction in this respect. Administrators of foundations that are enrolled voluntary organisations will be required to comply with the due diligence requirements laid down in Article 22B (duties of administrators in relation to anti-money laundering and the funding of terrorism) of the Voluntary Organisations Act which apply to all donations given irrespective of whether they are received in Malta or abroad.

**26. Does the civil law in your country allow the transfer of the seat of a foundation (in the EU) and/or cross-border mergers?**

In terms of Art. 22(6) of the Second Schedule to the Civil Code, a foundation registered in terms of such Schedule may continue (migrate) in any state within the European Union or the European Economic Area when it is authorised to do so by its constitutive instrument or statutes. In such case, and after the relevant procedures are followed, the Registrar shall proceed to terminate the registration of the foundation in the Maltese Register for Legal Persons, on such basis.

It is lawful to amalgamate two or more organisations into one and, unless otherwise provided by regulations, the provisions of the Companies Act<sup>98</sup> apply mutatis mutandis. In the case of foundations, the functions of the general meeting are carried out by the administrators and any persons whose consent is required for material decisions to be taken by the administrators<sup>99</sup>.

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<sup>97</sup> Art. 2(8), Second Schedule to the Civil Code.

<sup>98</sup> Cap. 386, Laws of Malta.

<sup>99</sup> Art. 22, Second Schedule to the Civil Code.

## II. Tax treatment of foundations

### 1. What are the requirements to receive tax exemptions?

- Pursuing public-benefit purposes
- Non-distribution constraint
- Being resident in the country
- Other

As from 1 January 2020, any foundation which is enrolled with the Commissioner for Voluntary Organisations and whose turnover does not exceed €10,000 benefits from a tax exemption provided that it is compliant with the provisions of the Voluntary Organisations Act<sup>100</sup>. More recently the Government has proposed to extend the turnover threshold to €50,000, but legislation to this effect is yet to be enacted.

Where a foundation does not qualify for such exemption because it exceeds the relevant turnover threshold or if it does not exceed the threshold, is not enrolled with the Commissioner for Voluntary Organisations or is not compliant with the provisions of the Act, it may still benefit from a tax exemption in terms of the Income Tax Act if its income is of a public character and is engaged in philanthropic work. In such instance, the foundation is required to be named by the Minister responsible for Finance as a foundation engaged in philanthropic work and remains so named to continue benefitting from the exemption. Some entities like religious organisations, political parties and philharmonic societies do enjoy particular exemptions under the Income Tax Act, although, apart from religious organisations, these are rarely foundations but are rather associations of persons. This has created some controversy as some organisations which are not enrolled appear in the Minister's list of exempted philanthropic organisations. For example, some religious organisations cannot enrol as voluntary organisations due to them not being autonomous; but they still enjoy legal privileges under tax law. The conditions in the Voluntary Organisations Act cannot apply to them as they cannot enrol, but many of them are philanthropic and are listed in the Minister's exempted status list.

Where a foundation is treated as a company for income tax purposes (the general rule), any exemptions applicable to Malta companies would also be applicable to the foundation (such as the exemption applicable to any income / gains derived from a participating holding).

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

The new rules applicable to voluntary organisations<sup>101</sup> provide that a voluntary organisation shall be exempt from tax for any year of assessment in respect of which it satisfies all of the following conditions:

- (a) It is an enrolled organisation.
- (b) Its turnover for the year immediately preceding the year of assessment does not exceed €10,000 (which will be extended to €50,000, but legislation to this effect is yet to be enacted).
- (c) It is compliant with all the provisions of the Voluntary Organisations Act.

<sup>100</sup> See Subsidiary Legislation 123.190 - Enrolled Voluntary Organisations (Tax Exemption) Rules, 2020.

<sup>101</sup> Subsidiary Legislation 123.190 Enrolled Voluntary Organisations (Tax Exemption) Rules, 2020.

For a voluntary organisation to benefit from such exemption it must be enrolled in the Register of Voluntary Organisations and satisfy the turnover threshold together with the other provisions of the Voluntary Organisations Act. Furthermore, for the organisation to benefit from the tax exemption the Commissioner for Voluntary Organisations must issue a certificate confirming that the organisation has satisfied the conditions of the exemption and such certificate must be delivered to the Commissioner for Revenue. For such purposes the Commissioner for Voluntary Organisations would require a copy of the foundation's statutes and its annual accounts confirming the amount of annual turnover generated by the organisation.

Any other foundation which does not qualify for the above exemption may still benefit from a tax exemption if it:

- 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).

The foundation is required to submit to the authorities a copy of the foundation's certificate issued by the Commissioner for Voluntary Organisations, a copy of its statutes, and a copy of its annual accounts showing how the funds of the foundation have been utilised for the Minister for finance to assess whether the funds of the foundation are being used for a philanthropic purpose.

### **3. Is specific reporting required for the use of public funds (grants received from public bodies/state/municipality/etc.)?**

Each grantor has its own terms and conditions which must be satisfied by the grantee. There are rules and guidelines on general public collections for enrolled voluntary organisations<sup>102</sup>, and when not enrolled there is a Public Collections Act<sup>103</sup> which applies its own conditions with specific regulations<sup>104</sup> on the subject.

Solely with regards to tax treatment, a foundation benefitting from the tax exemption must file an annual return with the Maltese tax authorities together with its annual accounts showing how the funds of the foundation have been used by the foundation during the relevant year.

### **4. Is there an obligation to report to public authorities on donors and beneficiaries? If so, to which authority and what type of information?**

In terms of Article 34 of the Second Schedule to the Civil Code, the administrators must file with the Registrar for Legal Persons, within three months from any grant, an inventory or descriptive note of the assets added to a foundation. In the event that endowments are received by such foundation in a regular manner in terms of a scheme which is registered with the Registrar for Legal Persons, it shall not be required that the administrators file a descriptive note on each occasion that a new or additional endowment is made but they shall file a schedule of endowments on an annual basis.

<sup>102</sup> Subsidiary Legislation 492.03 - Voluntary Organisations (Public Collections) Regulations.

<sup>103</sup> Cap 279, Laws of Malta.

<sup>104</sup> Subsidiary Legislation 279.01public Collections Regulations.

In the case of enrolled voluntary organisations, the Commissioner for Voluntary Organisations will obtain such information from the Statement of Accounts for Public Collections and other documentation submitted to the Commissioner.

Other than the obligations relating to beneficial ownership for avoidance of money laundering purposes, there does not appear to be a specific obligation to declare the names and details of the donors of funds, though the authorities have the necessary powers to demand information from organisations under several laws.

**5. Is there a statutory definition of what a public-benefit purpose (charitable purpose) is in the civil law (foundation law, trust law) of your country? If yes, please give us the definition. If so, is the determining definition that subsequently links to tax benefits?**

In terms of the Second Schedule to the Civil Code, "public purpose", "public benefit" and similar phrases mean a social purpose and any other purpose or benefit which promotes or serves the general public or general interest or a sector of the general public and does not promote or serve any private benefit except as permitted by the Voluntary Organisations Act and the Second Schedule to the Civil Code.

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

In Case 23 of 1960, the Board of Special Commissioners (Taxation) 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.<sup>105106</sup>

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

- (a) The advancement of education, including physical education and sports
- (b) The advancement of religion
- (c) The advancement of health
- (d) Social and community advancement, including the promotion of the ethical, educational and social aspects of a particular profession or trade, but which does not include the promotion of any private economic interest
- (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

<sup>105</sup> Case 8 of 1974.

<sup>106</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 public-benefit organisations, including federations of such organisations

(i) The carrying out of activities intended to raise funds to support other public-benefit, non-profit or voluntary organisations or to generally support the voluntary sector as a whole or in part through the application, grant, transfer or otherwise making available of funds so raised to them or for their benefit

(j) Any other purpose as may be prescribed by the Minister by means of regulations made by virtue of this Act

(k) Shall not include a political purpose

Under the Trusts and Trustees Act, Chapter 331 of the Laws of Malta, "charitable purpose" means any charitable, social or philanthropic purpose, and without prejudice to the generality of the aforesaid, includes in particular:

(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

(i) Any other purpose as may be prescribed by the Minister by means of regulations made by virtue of this Act; but does not include a political purpose. For the purposes of this definition "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.

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

See above.

**7. Please indicate whether the following purposes would or would not be accepted for tax privileges in your country (noting that the tax status often depends on additional requirements):**

Public-benefit purpose	Accepted in tax law (for tax privileges)			
	Yes	Probably yes	Probably no	No
Arts, culture or historical preservation	X			
Environmental protection				X

Civil or human rights				X
Elimination of discrimination based on gender, race, ethnicity, religion, disability, sexual orientation or any other legally prescribed form of discrimination				X
Social welfare, including prevention or relief of poverty	X			
Humanitarian or disaster relief				X
Development aid and development cooperation				X
Assistance to refugees or immigrants				X
Protection of, and support for, children, youth or elderly	X			
Assistance to, or protection of, people with disabilities	X			
Protection of animals	X			
Science, research and innovation	X			
Education and training	X			
European and international understanding (e.g. exchange programmes/ other activities aimed at building bridges between nations)				X
Health, well- being and medical care	X			
Consumer protection				X
Assistance to, or protection of, vulnerable and	X			

disadvantaged persons				
Amateur sports	X			
Infrastructure support for public-benefit purpose organisations				X
Party political activity	X			
Advocacy				X
Advancement of religion				
<i>Other – please list other purposes accepted in tax law for tax privileges in your country</i>	X Philharmonic society			

It should be noted however that now an exemption is based on a threshold of €10,000 of income combined with enrolment with the Commissioner for Voluntary Organisations which basically necessarily implies that there exists a public benefit and/or a social benefit. The eligibility to enrol is very wide as indicated above and so many of the replies above for Tax law stating NO will be YES for enrolled organisations under the new tax exemption regulations.

## 8. Support of “the public at large”

- a) Do the activities of a foundation with public-benefit status for tax purposes generally have to benefit “the public at large”?

Generally that is the concept but specifically that is not strictly necessary. 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 and this is reflected in the definition provided in the Voluntary Organisations Act. However, in order for the exemption to apply the foundation must either meet the basis test of enrolment on its own, subject to the turnover threshold, or:

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

- b) If yes, can a foundation with public-benefit status for tax purposes support a closed circle in a sense that beneficiaries can be identified based on legal or family affiliations?

It is unlikely to be considered to be public benefit if the beneficiaries are linked to one family rather than a class of persons suffering from a particular disadvantage such as a disability. Education is a public purpose but a foundation for the education of one’s children is clearly a private benefit and will not be treated as meeting the requirements of being for the benefit of the community as a whole or a specific part of it. In such a case, the Commissioner may refuse enrolment for lack of public benefit. It is also a basis for participants in a limited circle foundation to argue that the rules on mandatory enrolment do not apply to this kind of foundation.

This will mean that such a foundation will not be able to make public collections or enjoy legal privileges under tax law or other positive discrimination situations.

## 9. Non-distribution constraint

- a) Does a foundation with public-benefit status for tax purposes 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 currently qualify for a tax exemption under Maltese law is a foundation of a public character which is engaged in philanthropic work. Very recently we now have enrolled foundations as well. 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 and this applies equally to enrolled foundations where private benefits are prohibited on a similar basis. 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. Indeed, the Voluntary Organisations Act states expressly that administrators cannot be remunerated. Unfortunately Maltese tax law and tax case-law do not go into detail on this matter, so we are unable to clarify this, and the Voluntary Organisations Act is much wider than tax law. These two laws are not very well synchronised, but the end result is that they are both beneficial, each on its own basis.

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

- b) What happens with the foundation’s assets in case of dissolution? Can the assets revert to private ownership, or do they have to stay in the public-benefit sphere?

No, this is prohibited and assets must be applied to a similar public purpose or an organisation with similar purposes, unless the administrators can amend the public purpose to another public purpose or the Court approves the proposal.

## 10. “Altruistic” element

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

Unless the deed of foundation provides otherwise, administrators may be remunerated from the income or capital of the foundation. Such remuneration shall be in such amounts and in such manner as may be stated in the deed of foundation or in any agreement between the founder and the administrator or in accordance with applicable law. Remuneration may also be established by the Court on application of the administrator or any interested party.<sup>107</sup>

Any voluntary organisation may not grant the administrator a remuneration that is higher than standard market levels or market conditions (although the organisation may be exempted from this rule by the Commissioner if s/he is satisfied that the administrator has specific skills which meet the needs of the organisation). “Market conditions and market levels” are defined in the Voluntary Organisations Act.

These rules are a combination of civil law and tax law, but mainly civil law.

- b) Does **tax law** allow a donor/funder to receive some type of benefit in return for a donation? (e.g. postcards, free tickets for a concert)

No capital gains tax is paid by the donor when the donation of immovable property or share in a company is made to philanthropic institutions named by the Minister for Finance as being engaged in philanthropic work.

Under the Voluntary Organisations Act, a Donor may reserve rights when making a donation and it is even possible to reserve rights to income and use (a usufruct) and even capital in case of need emerging after a donation. That will not be considered to be a private interest or benefit and so will be lawful.

This may not be part of a donation for philanthropic purposes and so the first exemption will not apply, but the purpose may be within the defined public benefit or social purpose and so may involve an enrolled organisation. The exemption based on enrolment will apply, however.

Again we see that the tax law and the VOA are not dovetailing well on these specific details.

- c) 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? Please indicate which of the following types of expenditures would/would not be considered as “administration costs”:

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

There are no specific rules setting limits on expenditure, unless they are stated in the statutes of a foundation. However there is the general rule that the administrators must

<sup>107</sup> Art. 35(2), Second Schedule to the Civil Code.

ensure that the purposes of the foundation are achieved. That implies they must monitor expenditure to ensure that the costs do not hinder the achievement of purposes.

### 11. Hybrid structures (elements of private benefit in public-benefit foundations)

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

	Yes	Probably yes	Unclear	Probably no	No
The founder restricts the use of the endowment by specifying that the foundation is required to maintain the founder, their spouse and descendants.	x				
The founder retains a beneficial reversionary interest in the capital of a property or other asset for their own continuing use.		x			
The gift consists only of 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 their family) as tenant.	x				
A foundation distributes a (small) part of its income to the founder or their family.		x			

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

	Yes	Probably yes	Unclear	Probably no	No
The founder restricts the use of the endowment by specifying that the foundation is required to maintain the founder, their spouse and descendants.					x
The founder retains a beneficial <i>reversionary</i> interest in the capital of a property or other asset to retain for their own continuing use.			x		
The gift consists only of 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 their family) as tenant.	x				
A foundation distributes a (small) part of its income to the founder or their family.					x

## 12. Distributions and timely disbursement

a) Are foundations allowed to spend down their endowment?

Yes.

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

Foundations may be set up for a limited period of time. There is no minimum period.

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

No.

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

Example: Does the **civil law** of your country require the following 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				

Example: Does the **tax law** of your country require the following 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				

## 13. Are activities abroad in another country compatible with the public-benefit tax status?

Yes, activities outside Malta do not prejudice the tax exemption available to a foundation engaged in activities abroad as long as the foundation is engaged in philanthropic work and is named by the Minister for finance for such purpose.

## 14. Can public-benefit organisations with a tax-exempt status also support/give grants to for-profit organisations (such as a small green start-up)?

For a foundation to continue benefitting from the tax exemption it must show that the funds are being utilised for philanthropic purpose. Under Maltese law we have the concept of “public benefit beneficiaries” which are a general class of beneficiaries which can benefit

under charitable purposes. These include other enrolled voluntary organisations, religious organisations and state organisations which are non-profit themselves. This was introduced to allow the formation, use and regulation of grantmaking foundations which are endowed or raise funds only to distribute them to other organisations.

**15. Corporate income tax treatment. How are the following types of income treated for corporate income tax purposes? Are they taxable or exempt?**

Recently a new tax exemption was established for small enrolled and compliant voluntary organisations with an annual turnover of up to €10,000 (which will be increasing to €50,000). Where an organisation does not qualify for such exemption, it may still be exempt from tax if the foundation is of a public character which is engaged in philanthropic work and is named by the Minister of Finance for the purposes of the said exemption.

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

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

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

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

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

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

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

a) Grants and donations

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

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

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

Tax may be payable by the donor on any capital gain derived on the transfer of the asset or on the market value of the asset if the asset consists of immovable property situated in Malta, in cases where:

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

In these cases, the applicable tax rate is between:

- 5% - 10% of the market value of any immovable property situated in Malta; or
- 0% to 35% on any capital gain made in case of all chargeable assets.

b) Investment income (asset administration)

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

There are some schemes under which heritage organisations, for example, are supported through donations up to, say, €1000, being deductible for the *donor*.

#### Bonds

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

#### Equities

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

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

#### Leasing of property

Income derived from the leasing of property should not be considered to be income derived from activities organised and operated for social welfare, civic improvement, pleasure or recreation, and thus if the aim of the leasing of the property is to make a profit, or such income would be available for the personal benefit of any proprietor, it should not fall under the income tax exemption referred to above. In such cases, any rental income derived should be taxable at the normal rates of income tax if (a) the organisation is established in Malta; or (b) if not established in Malta, when such income arises in Malta, or is remitted to Malta if the organisation is resident in Malta. Tax on rental income may benefit from a reduced rate of tax of 15% on the gross rental proceeds, or be taxed at the normal corporate tax rate of 35% after allowing for certain deductible expenses.

c) Economic activities (related/unrelated)

- Income from running a hospital/museum/opera

Tax is charged at the rate of 35% (progressive in certain cases) unless the income of a public-benefit organisation can benefit from a specific exemption.

A tax exemption applies to any income derived by an institution, trust, bequest, foundation, and any other similar organisation or body of persons which is of a public character, and which is engaged in philanthropic work so long as it is approved and named by the Minister of Finance.

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

- The income of a club or similar institution which the Commissioner for Revenue is satisfied is organised and operated exclusively for social welfare, civic improvement, pleasure or recreation, or for any other purpose except profit, no part of the income of which is payable to, or is otherwise available for the personal benefit of, any proprietor, member or shareholder, so long as such club or similar institution is not deemed to carry out business for the purposes of the Income Tax Acts.
- The income of a club or similar institution which the Commissioner is satisfied constitutes a *bona fide* sports club, provided that no part of the income of which is payable to, or is otherwise available for the personal benefit of, any proprietor, member or shareholder, and provided also on winding up of such club or institution, no funds are distributed or available to such proprietor, member or shareholder.

Unless the income of a public-benefit organisation falls under one of the above exemptions (or any other exemption applicable in terms of other provision of the law), tax will be due on any income or gains derived by the organisation at the corporate tax rate of 35%.

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

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

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

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

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

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

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

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

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

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

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

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

- e) Is major shareholding in a business undertaking considered as an economic activity and taxed accordingly?
- f) Any holding in another undertaking would be taxable according to the normal rules of taxation and the taxation would depend on whether the foundation is being treated as a company or as a trust.

In cases where the foundation is treated as a company for tax purposes, a tax exemption applies on any dividends and gains derived by the foundation from a participating holding. In terms of Maltese law a participating holding is considered to exist inter alia where the company 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 another company/partnership.

For the tax exemption to apply to dividends derived from a participating holding, any one of the safe harbour provisions are to be satisfied, one of which refers to cases where the holding is in an entity which is incorporated or resident in the EU.

**16. Are capital gains subject to tax? If so, are they liable to corporate income tax or to a separate tax?**

Unless one of the above-mentioned exemptions apply, tax is charged on any capital gain derived on the transfer of certain chargeable assets. The chargeable assets include marketable securities, immovable property, intellectual property, and goodwill.

Malta does not have a separate capital gains tax, and the taxability of the chargeable assets falls within the ambit of the Income Tax Act. The applicable tax rate on the transfer of chargeable assets is 35% (progressive in certain instances) on any capital gain derived from the transfer of the chargeable asset. However, with respect to immovable property situated in Malta, a Property Transfer Tax of 8% - 10% applies on the market value of the immovable property in lieu of tax on capital gains. In limited situations, a person may opt out of the Property Transfer Tax and be taxable on the capital gain derived on the transfer of the immovable property.

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

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

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

No.

**19. Are there taxes on the transfer/sale of assets by foundations?**

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

- Immovable property
- Securities
- Business
- Goodwill

- Business permits
- Copyright
- Patents, Trademarks and trade names, and other intellectual property.

Furthermore, Property Transfer Tax may be applicable to any transfer of immovable property situated in Malta made by the foundation.

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

There are no other taxes applicable to public-benefit foundations.

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

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

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

The law caters for registration of branches of foreign organisations and foundations can do so under the Second Schedule. The documents referred to above are required for registration of a branch. This registration can be made for purposes of tax compliance or other interface with the local legal system even in the absence of a branch which renders the activity regular and continuous on a local basis, which would then result in tax liabilities based on presence as above explained.

**22. Does your country have signed bi-lateral tax treaties, which provide for reciprocal tax treatment of public-benefit organisations? If so, with which countries?**

We are not aware of bi-lateral tax treaties providing for such reciprocal tax treatment. The issue of whether a foundation is a treaty subject person 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 debatable and typically depends on the interpretation adopted by the source country.

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

Any income derived by a local foundation from local investments is subject to tax at the level of the foundation. With respect to local bank interest and other certain types of investment income, the local foundation may benefit from a reduced tax of 15% if it elects to be taxed at source by way of withholding by the payer.

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

### III. Tax treatment of donors

#### 1. Is there a system of tax credit or tax deduction or other mechanisms such as tax allocation systems or matching grants?

The Income Tax Act establishes rules providing for a deductible expense to the donor in respect of certain donations made as follows:

- Cash donations made to athletes; sports regulatory bodies participating in certain approved events and to bona fide artists (up to €60,000) (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)
- Cash or asset donations made to the University Research, Innovation and Development Trust (up to €50,000), or the Creativity Trust (up to €100,000)

#### 2. Tax treatment of individual donors

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

See (1) above.

b) Which assets qualify for tax deductibility (e.g. cash, real estate, in kind or other)?

See (1) above.

#### 3. Tax treatment of corporate donors

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

See (1) above.

b) Which assets qualify for tax deductibility (e.g. cash, real estate, in kind, or other)?

See (1) above.

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

No.

#### 5. Other frameworks such as percentage law systems, whereby the donating taxpayer may assign part of the tax due to a public-benefit organisation?

None.

#### 6. What are the requirements that the donor must fulfil and/or what is the information they must provide in order to claim tax benefits? What information must donors provide to their tax authority in order to receive tax incentives for their donation (e.g. submitting details on the organisation they support: statutes, annual financial report, documents providing evidence for certain tax law requirements, for instance to show that income was actually spent for public-benefit purposes)?

A signed certificate must be submitted with the income tax return of the donor for the relevant year attesting inter alia, the purpose for which the donation has been made, the value and date of the donation and that the donation complies with other requirements of law.

Furthermore, with respect to donations made to national heritage organisations, the donor must prove that a donation of not less than €2,320 has been made to any one of the following:

- The Superintendent of Cultural Heritage
- Heritage Malta
- Fondazzjoni Patrimonju Malti
- Non-government cultural heritage organisations

**7. Are there any different or additional requirements to be fulfilled when a donor is giving to a foreign-based foundation? What information must donors to foreign-based organisations provide in order to receive tax incentives for their donation (e.g. statutes, annual financial report, documents providing evidence for certain tax law requirements, for instance to show that income was actually spent for public-benefit purposes)? Are translations of documents required?**

No.

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

Same implications as domestic organisations apply.

**8. Do donors get tax incentives when donations are done via specific tools such as:**

- Requesting money in public (street, door-to-door)
- Via TV and radio campaigns
- Via sms
- Crowdfunding

Do they have to follow any kind of particular process? If so, which one?

No.

*Do they have to follow any kind of particular process, if so which one?*

Public collections (as defined) are prohibited in the absence of a police authorisation. They are then subject to regulations on compliance matters.

When a voluntary organisation is enrolled it is by law exempt from the requirement of a licence to make public collections. If it is not enrolled the public collection will trigger mandatory enrolment. Each are then subject to regulations on public collections, accounts, compliance and supervision.

Crowdfunding is a form of public collection and may be included in the above. The concept is increasingly coming under regulatory concerns but so far there do not seem to be any rules for the public-benefit sector using such method.

## IV. Tax treatment of beneficiaries

*(i.e. those receiving a grant or other benefit from a foundation)*

**1. Individuals: Are individual beneficiaries of grants required to pay taxes or are the grants tax exempt?**

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

**2. Legal entities: Is there any legal/fiscal framework for beneficiaries conducting economic activities so that they can be eligible for foundation funding? Are there any limitations on the economic activities of the beneficiaries?**

No.

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

No.

General Note: recent amendments to the Voluntary Organisations Act have introduced new obligations upon organisations and their administrators to assess money laundering and terrorist financing risks, and this applies in relation to donations received.

## V. Gift and inheritance tax

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

Yes, Malta has a duty chargeable on documents and transfers applicable to donations to public-benefit organisations in relation to some kind of assets such as immovable property situated in Malta and marketable securities.

Duty on donations *inter vivos* or dispositions *causa mortis* is payable upon the transfer *inter vivos* or the transmission *causa mortis* unless the transaction has been specifically exempted from Duty under Ministerial discretion.

The duty is payable by the donee or legatee/heir but very often, in *inter vivos* donations, the donor carries the burden to avoid a problem for the donee.

### 2. What are the tax rates? Is there a preferential system for public-benefit organisations (PBOs)? Which PBOs qualify? Is there a difference according to the region or the legal status of the PBO?

In case of immovable property the rate of stamp duty is 5%. In case of marketable securities the duty is 2% (which may be increased to 5% where the securities are in immovable property companies). Some schemes exist whereby the rates are varied based on circumstances e.g. The type of property or its location.

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

No, though some schemes do exempt the initial stated amounts on transfers in some circumstances.

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

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

This right is a credit and not a share of the property belonging to the deceased at time of death, or when previously donated, at time of donation. That credit can claw back property from the heirs and legatees through reduction of the dispositions and can also claw back even against past donees. This will apply even to non-profit and public-benefit foundations which will have to repay the sums due. Endowments, trusts and donations are all subject to reversal in reverse order of date with the most recent being reduced or repaid first.

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

Same tax treatment as resident public-benefit foundations applies.

## VI. Trends and developments

- 1. Are there current discussions about the question of whether cross-border activities of foundations or other non-profit organisations and their donors are protected by the fundamental freedoms of the EC Treaty? Have there been any changes to your country's legislation, resulting from the [Persche](#), [Stauffer](#), [Missionswerk](#) or other relevant ECJ judgments, or are changes being discussed? Any changes being discussed with regard to the free movement of trust structures resulting from the [Panayi Trust](#) and [Olsen and Others](#) cases?**

Yes, some rules have been introduced in the Second Schedule to allow for cross-border migration of legal organisations in the EU.

Article 22A gives this right in the context of continuation rules relating to organisations. Sub-Article (1) states:

*"An organisation formed and incorporated or registered under the laws of a state within the European Union or the European Economic Area other than Malta which is similar in nature to an organisation –*

*(a) governed by this Schedule; or*

*(b) governed by any special law which does not, itself or by virtue of regulations, provide for continuation, may, if it is authorised to do so by its constitutive instrument or statute, or by the applicable law in its state of registration, request the Registrar to be registered as being continued in Malta."*

There follow many detailed rules on the process.

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

- Set up a public-benefit foundation
- Obtain permission to transfer funds across borders
- If able to transfer of funds across borders, has the process become more burdensome administratively
- Open a new bank account
- Maintain a bank account
- Fund certain activities
- Fund certain regions/countries
- Fund certain organisations (please explain the reason - foreign funding restriction?)
- Report to authorities/deal with administration
- Other

- 3. Does the national law consider foundations as obliged entities as defined by the Anti-Money Laundering Directive?**

Foundations are not subject persons: However, the administrators of foundations which are enrolled voluntary organisations have the duty to conduct due diligence checks in terms of Article 22B of the Voluntary Organisations Act:

Sub-article (1) provides that it shall be the duty of all the administrators of a voluntary organisation to implement appropriate procedures relating to the prevention of money laundering and the funding of terrorism so as to ensure that their organisation is not used for such purposes. Such duties shall include but shall not be limited to:

(a) Confirming the identity, credentials and good standing of the persons or organisations which the voluntary organisations support and obtaining evidence of the identity of the persons who control such organisations.

(b) Confirming the identity, credentials and good standing of other voluntary organisations, in Malta or overseas, as well as other persons with whom the administrators associate in carrying out activities to fulfil the purposes of their organisation.

(c) Identifying significant donors of the voluntary organisation, being individuals or other organisations, and, while respecting donor confidentiality, obtaining evidence of identity of the relevant individuals or the persons who control such other organisations.

(d) Obtaining information on the source of funds which are donated to the organisation.

(e) Verifying that the assets of the organisation are used lawfully and in a manner which is consistent with its purposes and objects.

For the purpose of this article:

(a) The administrators shall carry out their duties on a best efforts basis;

(b) The administrators shall pay attention to the context and the potential risk to money laundering or the funding of terrorism; and

(c) "Significant" shall mean any donations of €15,000 or more, whether carried out in a single operation or in several operations which appear to be linked.<sup>108</sup>

In the case of voluntary organisations, the administrators of which are not ordinarily resident in Malta, the duties mentioned in the previous sub-article shall be carried out by the local representative of the organisation.<sup>109</sup>

The administrators or the local representative of the voluntary organisation, as the case may be, shall:

(a) Keep adequate records regarding the receipt and use of all funds by the voluntary organisation, which records shall be sufficiently detailed to verify that the funds have originated from lawful activity and have been used lawfully and in a manner consistent with the purpose and objects of the organisation.

(b) Ensure that the voluntary organisation has adequate financial controls and financial management which are essential to protect it against money laundering and the funding of terrorism.

(c) Ensure that there are appropriate internal procedures in place within the voluntary organisation to encourage staff and volunteers to report any vulnerability of the organisation to the risk of money laundering and the funding of terrorism to the administrators or the local representative so that remedial action may be taken by the organisation; and

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<sup>108</sup> Article 22B(2), Voluntary Organisations Act.

<sup>109</sup> Article 22B(3), Voluntary Organisations Act.

(d) Provide adequate training to staff and volunteers to ensure they are familiar with the voluntary organisation's reporting procedures and financial controls and know what actions to take if they suspect money laundering and the funding of terrorism.<sup>110</sup>

#### 4. Does the national law define/specify who is considered as a beneficial owner (BO) of a foundation?

Yes. The Civil Code (Second Schedule)(Register of Beneficial Owners – Foundations) Regulations, S.L. 16.18, Laws of Malta defines “beneficial owner” as follows:

*"Beneficial owner" shall have the same meaning assigned to it under the Prevention of Money Laundering and Funding of Terrorism Regulations<sup>111</sup>, as specifically applicable to foundations and for the purposes of these regulations shall be specifically applicable to the following:*

*(a) the founder;*

*(b) the administrator(s);*

*(c) the protector or members of a supervisory council, if any;*

*(d) the beneficiaries where identified in the relevant foundation instruments, subject to regulation 4(1)(d)<sup>112</sup>, or where the individuals benefiting from the foundation have yet to be determined, the class of persons in whose main interest the foundation is set up or operates; and when the beneficiary is a legal entity, then this term shall also include the ultimate beneficial owner of such legal entity; and*

*(e) any other natural person exercising ultimate and effective control over the foundation by means of direct or indirect ownership or by other means including any person (other than those already referred to in paragraphs (a) to (d) above) whose consent is to be obtained, or whose direction is binding, in terms of the statute of the foundation or any other instrument in writing, for material actions to be taken within the foundation;*

*and "beneficial ownership" shall be construed accordingly;<sup>113</sup> "*

#### 5. Does your country have a specific register for BO of legal entities/foundations or does the foundation/company/association register serve as a BO register?

Malta has a specific register for the beneficial owners of foundations: the Register of Beneficial Owners – Foundations regulated by the Civil Code (Second Schedule)(Register of Beneficial Owners – Foundations) Regulations, S.L. 16.18, Laws of Malta.

<sup>110</sup> Article 22B(4), Voluntary Organisations Act.

<sup>111</sup> S.L. 373.01, Laws of Malta.

<sup>112</sup> Regulation 4(1) of the Civil Code (Second Schedule)(Register of Beneficial Owners – Foundations) Regulations, S.L. 16.18, Laws of Malta: *Every foundation shall take all reasonable steps to obtain and at all times hold adequate, accurate and up-to-date information in respect of its beneficial owners, including the details of the beneficial interests held, which shall at least include the following particulars: (d) the case of a beneficiary as defined in paragraph(d) of the definition "beneficial owner" in regulation 2(1), the nature and extent of the beneficial interest held by such beneficiary and any changes thereto, including the effective date on which his beneficial interest in the foundation has increased or been reduced if such changes take place, as well as, when applicable, an indication as to whether the foundation statute or any other instrument in writing include any suspension of the administrator's duty to inform such beneficiary of his benefit under the foundation or that he forms part of a class of beneficiaries which may so benefit, and in such case, such person shall not be considered to be a beneficiary until such time as he is informed of such benefit or receives actual benefit.*

<sup>113</sup> Art. 2(1), Civil Code (Second Schedule) (Register of Beneficial Owners – Foundations) Regulations, S.L. 16.18, Laws of Malta.

**6. Are there any other recent trends or developments affecting the legal and fiscal environment for public-benefit foundations in your country such as one or more of the following?**

a) Law revision in the pipeline

The Second Schedule to the Civil Code may be amended in the future to further pursue recommendations from Moneyval to increase transparency and supervision of foundations.

b) Discussion about the role of supervisory authorities (civil law, charity regulator, tax authority) and collaboration among them? Decentralisation or centralisation of supervisory structures? Use of watchdog/rating agencies?

No.

c) Tendency towards more transparency requirements?

Yes.

d) Tendency towards more self-regulation? Self-regulation replacing hard law regulation?

No.

e) Tendency to use alternative forms to classic public-benefit foundations

Yes. Associations and trusts, though trusts have even more serious impacts as they are less transparent due to the fact that they are not registered in a public register.

f) Other?

**7. Public fundraising: Are there any specific laws that regulate fundraising, and do they affect foundations?**

Yes. Fundraising is regulated by the Public Collections Act,<sup>114</sup> and its regulations, the Voluntary Organisations Act and the Voluntary Organisations (Public Collections) Regulations.<sup>115</sup>

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<sup>114</sup> Cap. 279, Laws of Malta.

<sup>115</sup> L.N. 371 of 2020.

## VII. Further information

### Useful contacts

**Max Ganado, Rebecca Micallef, Amanda Attard and Christine Borg, [GANADO Advocates](#),  
171 Old Bakery Street, Valletta, VLT 1455, Malta**

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- Muscat Andrew (Profs.), *Principles of Maltese Company Law*, (Malta University Press, 2019)
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### Selected law texts online

- [Relevant national laws](#)

## VIII. About

### About Philea

Our vision is for philanthropy to use its full potential to co-shape and support a pluralistic, just and resilient society that centres people and planet. To achieve this, our mission is to enable, encourage and empower the philanthropic community to build a better today and tomorrow.

We nurture a diverse and inclusive ecosystem of foundations, philanthropic organisations and networks in over 30 countries that work for the common good. With individual and national-level infrastructure organisations as members, we unite over 7,500 public-benefit foundations that seek to improve life for people and communities in Europe and around the world.

We galvanise collective action and amplify the voice of European philanthropy. Together we:

- **Co-create knowledge and learn** from effective practices
- **Collaborate** around current and emerging issues
- **Promote enabling environments** for doing good

In all we do, we are committed to enhancing trust, collaboration, transparency, innovation, inclusion and diversity.

[philea.eu](http://philea.eu)

### Policy and advocacy at Philea

Philea champions the interests of its members vis-à-vis the EU and multilateral organisations. Through [our policy and advocacy work](#), we strive towards an enabling operating environment for European philanthropy by monitoring and analysing policy and regulatory trends at national, European, and international level, and engaging around this agenda with policymakers and other stakeholders. We position philanthropy as a key actor on societal issues and facilitate strategic engagement and collaboration opportunities, including public-private partnerships.

### About this project

This country profile is part of a [larger analysis project](#), ongoing since 2002, which includes regularly updated profiles on the legal and fiscal landscape for philanthropy in some 40 countries across the wider Europe; and a comparative overview of the profiles compiled in our “Comparative Highlights of Foundation Laws”.

### Legal Affairs Committee

Philea’s [Legal Affairs Committee](#) consists of legal and public affairs experts from Philea members, composed of both national associations and foundations, across Europe. The members of the LAC advise on Philea’s policy and advocacy work.

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