

# FOUNDATIONS IN MALTA



Fenech & Fenech  
Advocates

## Background

In the past few years the Maltese legislature has been active in the sector of fiduciary obligations, particularly those resulting from the creation of trusts and foundations. Foundations in Malta have traditionally been regulated by customary law as no legislation on foundations existed until April 1 2008, when the Second Schedule to the Civil Code was enacted. This Schedule dedicates an entire sub-title to foundations.

## Law on Foundations & their Uses

Although the law on foundations adopts principles from the Companies Act, it is largely based on Italian and French civil code provisions. It is possible to set up both a private and a public foundation in Malta.

A **private foundation** is set up by the founder for the private benefit of one or more persons, or a defined class of persons in which the beneficiaries must be certain. Private foundations have various uses, including in the context of an estate planning and/or tax planning exercise carried out by the founder and his family.

On the other hand, a **public foundation** may be set up for a particular purpose, provided that it is a lawful purpose. Maltese public foundations, when registered as a voluntary organisation, constitute a very attractive and tax efficient vehicle that clients may wish to consider with respect to their Corporate Social Responsibility programmes.

The law provides that a foundation must be constituted in writing, via public deed *inter vivos* or a public or secret will. The deed of foundation must also

be registered with the Office of the Registrar of Legal Persons, which is an *ad hoc* office set up for the specific purpose of undertaking the registration of legal persons in general. The foundation deed must, amongst others, include detailed provisions containing the powers, form of resolutions and signing authority of the foundation. Clearly this feature is more akin to companies than to trusts. In a country such as Malta that operates on civil law principles, the formalities of the foundation may be perceived as reassuring when contrasted with the seemingly casual nature of the setting up of a trust.

Once a foundation is established, a new legal person is created. Therefore, the foundation itself becomes the owner of the foundation property. This is a significant variation from the trust concept as a trust does not constitute a separate legal person. As a result, with foundations, unlike with trusts, there is no need to be concerned about the segregation of foundation property from property belonging to the administrators of the foundation.

## Board of Administrators

The foundation board of administrators has powers of administration, representation and disposition vested in it by law, the deed of constitution or the beneficiary statement. The board of administrators is accountable for the management of the foundation.

## Rights of Founder

The founder may have a considerable amount of discretion in the administration of its foundation, since the law allows for the founder to be an administrator itself. This is not generally true of a trust, as it is the

trustee which controls and administers the trust assets; the settlor plays no part in the day-to-day administration of the trust assets.

## Beneficiaries

It is the foundation that owns the foundation property; however the beneficiaries have enforcement rights against the administrators. The benefit under a foundation is personal to the beneficiary, as in the case of a trust.

## Segregated Cells

The law in Malta provides for the creation of segregated cells within a foundation. Segregated cells allow assets and liabilities of an organization to be hived off and insulated from other assets and liabilities of the same organization. Though segregated cells are not vested with legal personality and do not constitute distinct persons at law, each segregated cell constitutes a distinct patrimony from all other assets and liabilities of the organisation or any other cells which may be established.

The assets of a segregated cell will be available for the fulfilment of any obligations undertaken by the organisation in relation to that cell but not for any other liabilities entered into by the organisation for itself or in respect of other cells.

A segregated cell may be created within an organisation when certain conditions are observed:

- a) The organisation must be authorised by its statute to establish segregated cells for the achievement of one or more defined purposes which are consistent with the main purposes of the organisation;



- b) The administrators of the organisation resolve in writing to establish such cell; and advise and guide clients (and their advisors) wishing to set up a foundation.
- c) A notice relating to the establishment of a segregated cell is delivered to the Registrar for registration. Together with the Fenlex Group (a corporate and trust services group closely affiliated to the firm), our organisation may provide the full range of services relative to the creation and ongoing administration of both public and private foundations as well as of any underlying companies or other entities. Services provided include: foundation administrator (through our licensed trustee company Fenlex Holdings & Services Ltd.), registered address, fiduciary shareholder, directorship services, company secretarial services, corporate and trust maintenance and administration services, accountancy services, banking support, income tax and VAT compliance, amongst others.

### Taxation of Foundations

Public foundations that are registered as voluntary organisations may, subject to certain conditions, benefit from a tax exemption locally.

The tax regime for private foundations (to be promulgated shortly) is widely expected to mirror that for trusts that provides for a tax transparent regime with no Malta tax implications where non-resident settlors (founders, in the case of foundations), beneficiaries and assets are involved.

Similarly a foundation may be a tax efficient vehicle for clients wishing to hold shares in Maltese or non-resident resident companies or other entities.

The firm's Tax Department is available to advise clients with respect to particular structures they may wish to put into place for estate / tax planning or other purposes.

Three teams of professionals, organised into the Corporate Services Department, the Accounts Department and the Operations Department, have been servicing international business clients for over 25 years and accordingly our organisation has the necessary experience and expertise required to provide clients with a 'one-stop shop' service, together with any legal advice and assistance that the client may require in relation to its local operations

### FENECH & FENECH ADVOCATES

Fenech & Fenech Advocates is one of Malta's largest and longest established law firms with a predominantly international clientele.

The firm's Trusts & Foundations Group, composed of partners and associates, assists clients in relation to the creation and administration of foundations. Accordingly, this team is available to

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