

Malta Foundations

The use of foundations is not new to Malta, having been recognised for many years, even as early as Roman times. Prior to the Second Schedule to the Civil Code, foundations lacked a clearly defined legal framework within which to function, and it was with the inception of the Second Schedule that foundations were legislatively defined.

The term 'foundation' includes all organisations, institutes or similarly titled patrimonies which are set up through a bequest, endowment or appropriation of assets, but do not include trusts. In terms of Maltese law, two main types of foundations may be set up:

Private foundations

Private foundations are set up for the benefit of a named person or class of persons called beneficiaries. Due to its separate legal personality, the foundation's patrimony is owned by the foundation itself, and is administered by designated persons, known as 'administrators' for the benefit of the same beneficiaries.

Purpose foundations

Purpose foundations have no ascertained beneficiaries but are set up exclusively for:

- A non-profit making organisation
- Any charitable, philanthropic or other social purpose
- Any other lawful purpose

As with private foundations, the foundation's patrimony is also owned by the foundation itself and administered by the administrators for the fulfilment of the purpose for which the foundation was established.

Foundation formation

Under Maltese law, a foundation is endowed with separate legal personality. Nevertheless, registration of the foundation with the Registrar for Legal Persons within the Public Registry in Malta is a mandatory requirement for the foundation to be granted separate legal personality. Even though, the administration of the foundation is entrusted to the administrators upon registration, the same assets are not owned by its administrators, nor the founder or beneficiaries, but are owned by the foundation itself.

In accordance with Maltese law, it is possible for a founder to maintain a certain degree of control over the foundation as compared with the concerns that this would typically raise within a trust context. It is also interesting to point out that the founder of a foundation may also be a beneficiary, as long as he is not the sole administrator.

Foundations act through their board of administrators, who, as fiduciaries, are bound to carry out their duties with utmost good faith and must act honestly in all cases. In addition, there are other anti-abuse and regulatory statutory safeguards which exist in Malta.

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As with several other jurisdictions, the administrators of foundations may also be legal entities, provided that, as per Maltese law, such entities have at least three directors. A recent development is that administrators of private foundations require the authorisation of the Malta Financial Services Authority to act as such.

The creation of a foundation under Maltese law requires a minimum amount as an initial endowment, in the form of money or property of at least €1164.69. It is noteworthy that the law creates an exception in the case of a foundation established exclusively for a social purpose or as non-profit making, in which instance the endowment must be at least €232.94. Furthermore, a Maltese foundation may only be constituted by virtue of a public deed inter vivos or a will.

Under Maltese law, the statute of a private foundation may state that it is revocable, as long as acts which have been lawfully carried out are not invalidated or interrupted whilst still in progress. In addition, a private foundation may be terminated upon request of all the beneficiaries of the foundation. Nevertheless, if the founder is still alive, his consent is required. On the other hand, a purpose foundation may only be set up in an irrevocable manner and may not be subsequently revoked.

Segregation of cells

Maltese law also allows the setting up of segregated cells within a foundation so that particular purposes can be achieved with particular assets. The ensuing result is that:

- The assets as well as the liabilities of the cell shall form a distinct patrimony from all other assets and liabilities of the organisation, including other cells which may be established
- The assets of the cell shall be available for the realisation of any obligations pertaining to that cell (but not with respect to any obligations contracted by the organisation for itself or in respect of other cells)
- The assets of an organisation shall not be available for the realisation of the obligations undertaken in relation to that cell
- No individual can attempt to use any assets attributable to any cell to satisfy a liability which is not attributable to that cell

Can foundations be converted into other organisations?

A unique aspect of Maltese law is that it allows for the possibility of converting a foundation into another type of organisation, including a trust. Therefore, one can appreciate the great amount of flexibility in structuring one's affairs and adapting to changing circumstances. It is also possible to amalgamate two or more organisations and to divide an organisation into two or more organisations.

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Comparing foundations to trusts

Similarities

- Both have the possibility of appointing a protector to supervise the acts of the administrators or trustees
- Duration for both foundations and trusts is limited to a maximum period of 100 years.
- Both private foundations and trusts are created for the benefit of beneficiaries who are identifiable and ascertainable

Differences

- The extent to which the settlor and founder may be involved in the trust distinguishes these two institutes in a significant manner. The amount of control given to the founder exceeds that given to the settlor. This is due to the fact that whilst the trustee must at all times act in accordance with the terms of the trust, the founder is able to exercise supervision over the administration of a foundation.
- Whilst a settlor may only amend the trust instrument if the terms of the trust provide as such, with private foundations founders can amend the foundation deed and add or remove beneficiaries (always subject to the terms of the deed of foundation).
- In the case of a trust, the beneficiaries may require the trustee to terminate the trust and distribute the trust property, and this notwithstanding the terms of the trust. On the other hand, the beneficiaries of a private foundation can only make such a request if the founder has not expressly excluded the right to revoke the foundation. In addition, if the founder has not done so and is still alive, this right is subject to the founder's consent. This clearly provides added protection for the founder and ensures that the beneficiaries benefit from the foundation in accordance with the wishes of the foundation.
- A further area where the control highlighted by the founder is manifested pertains to the addition of property to the original trust or foundation. Whilst in the case trusts a trustee may accept additional property only subject to the same terms of the trust, the founder may add to the assets of the foundation by additional endowments at any time.
- The most significant difference between a trust and a foundation arises from the fact that, unlike a trust, a foundation is a juridical person enjoying separate legal personality. Therefore, whilst the trustee holds the trust property in his own name or under his control, an administrator has control over the foundation property but would not hold the same in his own name.

Advantages of foundations over trusts

- Maltese foundations are able to offer much more in terms of scope, and in fact more purposes may be considered and attained when using a foundation as compared to a trust.
- It is significant to note that with respect to the duty of information owed by both the administrator of a foundation and the trustee, the founder is placed in a more advantageous position as this duty is always present. However, the settlor only enjoys this right subject to the terms of the trust.
- The foundation enjoys all the advantages that arise from it being a juridical person, distinct from its founders, administrators and beneficiaries, and effectively binds no one but itself.



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