

A Guide to Trusts and to the Authorisation & Regulation of Trustees



Senglea, Malta

The Guide to Trusts and to the Authorisation and Regulation of Trustees has been designed to assist organisations considering trust structures to obtain an overview of the regulatory regime that applies in Malta.

This guide does not purport to provide more than an overview. Readers interested in obtaining more information about the establishment of trusts in Malta or about any related topic are invited to make contact with the Malta Financial Services Authority (MFSA).

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1. INTRODUCTION

The setting up of trusts in Malta is regulated by the Trusts and Trustees Act (hereinafter referred to as ‘the Act’). The Act provides for the creation of trusts and authorisation and supervision of trustees. In this regard, the MFSA is the competent authority for the purposes of the Act. The Act incorporates within its provisions the Hague Convention on the Law Applicable to Trusts and on their Recognition which Malta has ratified.

2. THE LEGAL FRAMEWORK FOR TRUSTS

A trust is an obligation which binds a person or persons (called the ‘trustees’) to deal with property over which they have control (called ‘the trust property’) for the benefit of persons (called the beneficiaries) or for a charitable purpose in accordance with the terms of the trust.

A trust can come into existence in any manner. A trust may come into existence by an instrument in writing including by a will. A unilateral declaration of trust is also possible. A unilateral declaration of trust is a declaration in writing made by a trustee stating that it is the trustee of a trust, containing all terms of the trust as well as the names or information enabling the identification of all beneficiaries.

A trust may also come into existence by oral declaration, with the exception of a unit trust which must be created by a written instrument. Also in the case of an inter vivos trust, the trust must be created by notarial trust deed. A trust may also come into existence by operation of law or by a judicial decision.

Where assets are held, acquired or received by a person for another on the basis of oral arrangements of a fiduciary nature, express or implied, there shall be presumed to be mandate or a deposit rather than a trust, unless there is evidence of the intention to create an oral trust.

A trust may continue until the 100th anniversary of the date on which it came into existence, and, unless sooner terminated, shall terminate. This limit does not apply to a trust for a charitable purpose or to a unit trust.

The legal effects of any transactions related to property under trust are regulated by the Trusts and Trustees Act and other laws that apply specifically to trusts. The formalities required with respect to such transactions are as a general rule regulated in the normal manner. Transactions relating to the transfer of ownership or other rights to or in property under trust shall therefore be carried out in the form and manner required by the law applicable to such transactions.

2.1. MAIN CHARACTERISTICS OF A TRUST

The Settlor

The settlor is the person placing the assets in the trust. This includes a person who provides trust property or makes a disposition on trust or to a trust. Once a trust has been created, the settlor ceases to have any active role in the trust.

The Trustee or Corporate Trustee

The trustee is the person or persons holding or in whom the property is vested on trust for the beneficiaries. Trustees are usually appointed by, or as provided in, the trust instrument and in such number as may be so provided. A trustee may be a natural person provided he is of full age and legal capacity and not under any legal impediment to so act. A trustee may also be a juridical person the objects of which include acting as trustee.

A corporate trustee can be defined as a trustee which is any legal person wherever incorporated.

The Beneficiaries

The beneficiary is the person entitled to benefit under the trust or in whose favour discretion to distribute property held in trust may be exercised. The rights of the beneficiary are personal to him. Thus a person shall not be entitled to benefit under a trust unless he is either identifiable by name, or ascertainable by reference to a class or to a relationship to some person. If there are no beneficiaries identifiable or ascertainable, the trust shall, unless the purpose is a charitable one, fail.

The Protector

The terms of the trust may provide for the office of protector of the trust. Normally the powers of the protector cover matters such as the appointment of a new or additional trustee, the removal of a trustee and obtaining information as to the way in which trustees are managing the trust. In the exercise of his office, the protector shall not be deemed to be a trustee.

The Trust Deed

The trust instrument is the instrument whereby the trust is created and includes any instrument varying the terms of the trust and also a unilateral declaration of trust.

2.2. CLASSIFICATION OF TRUSTS

There are three main types of trusts. These are express trusts, implied or resulting trusts and constructive trusts.

- *Express Trusts*

Express trusts are declared by the settlor. In an express trust, the intention to set up the trust is clearly and openly expressed.

- *Implied Trusts*

Implied trusts are trusts arising from the unexpressed but presumed intention of the settlor, which intention is presumed from his words or actions. Implied trusts are also resulting trusts since the property will return to the person setting up the trust.

- *Constructive Trusts*

Constructive trusts arise by operation of law and are in no way dependent on the intention of the settlor. They are imposed by operation of law in situations where not to do so would mean one party's unjust enrichment.

3. TRUSTEES

3.1. AUTHORISATION

Persons may carry on the activities as trustees either in a professional or in a private capacity.

Any person, whether an individual resident or operating in Malta, or a corporate trustee, registered or operating in Malta, who receives property upon trust or accepts to act as a trustee or co-trustee of a trust and who:

- receives or is entitled to remuneration for so acting, or
- does so on a regular and habitual basis, or
- holds himself out to be a trustee;

shall require authorisation by the MFSA in terms of the Act irrespective of the proper law of the trusts they hold and whether or not at all or part of the trust property is in Malta.

Any person, whether individual or a company may apply in writing to the Authority to be authorised as a professional trustee. The Authority may grant authorisation upon being satisfied that the conditions laid down at law have been met. Such authorisation may be general or may be restricted to particular specified activities.

An application for authorisation shall be made in the form and manner required by the MFSA and shall furthermore:

- contain or be accompanied by such information and particulars, in addition to those required by law, as the Authority may require as may be prescribed;
- be verified in the manner and to the extent required by the MFSA, or as may be prescribed;
- contain the address in Malta for service on the applicant of any notice or other document required or authorised to be served on him by or under the Act;
- be accompanied by such fee as may be prescribed in respect of the authorisation applied for.

The Trusts and Trustees Act also provides that without prejudice to the nature of the legal relationship in any particular case, any person who either acts as a mandatory in the holding of property for another person; or acts as an administrator, a trustee, director or similar functionary, exercising control over the assets, by whatever name he may be called, of a private foundation, shall, require authorisation in terms of article 43 of the Act irrespective of the extent of his activities, whether remuneration is payable therefor or whether he holds himself out as providing such services or not. In such case, the term "private foundation" is to be understood as being a foundation established or operating in Malta for the benefit of a private interest or purpose which is not charitable.

For further information on the authorisation of trustees see Appendix 2. The application form for authorisation of trustees can be downloaded from the MFSA website on <http://www.mfsa.com.mt>.

3.2. DUTIES OF TRUSTEES

The duties of trustees can be particularly onerous. As a matter of fact, trustees shall in the execution of their duties and the exercise of their powers and discretions act with prudence, diligence and shall observe the utmost good faith. Trustees should treat the interests of beneficiaries as paramount subject to their legal obligations to other persons or bodies. Trustees are also bound:

- to carry out and administer the trust according to its terms;
- to safeguard the trust property from loss or damage;
- to keep accurate accounts and records of the trusteeship and shall, upon request by any beneficiary, disclose such accounts and records to such beneficiary and provide copies thereof;
- to provide full and accurate information as to the state and amount of the trust property.

- to keep the trust property distinct and separate from their own property as well as from any other property held by them under any other trust or title, and separately identifiable therefrom;
- to act jointly in the performance of their duties and powers in the case of co-trustees;
- to act impartially in the interests of all the beneficiaries;
- not to delegate powers unless permitted to do so by law, by the terms of the trust or by the court;
- inform third parties with whom it is dealing that it is acting as trustee.

Trustees shall not without the authority of the court:

- directly or indirectly profit from the trusteeship; or
- cause or permit any person to profit directly or indirectly from the trusteeship; or
- on his own account enter into any transaction related to the trust property; or
- delegate his powers.

Trustees do not enjoy any benefits under any trust of which they are sole trustees without the prior authority of the MFSA (where the trustee is authorised by the MFSA) or the Court (in any other case). Furthermore unless authorised by the terms of the trust, or by the consent in writing of all beneficiaries or by any order of the court, a trustee is not entitled to remuneration for services rendered. A trustee may reimburse himself or pay out of the trust all expenses properly incurred by him in connection with the trust.

Trustees are bound to follow the Code of Conduct issued by the MFSA. This can be downloaded from the MFSA website on <http://www.mfsa.com.mt>.

3.3. POWERS OF TRUSTEES

A trustee shall, in relation to the trust property, have all the powers of a natural person having the absolute title to such property. The trustee shall exercise his powers in the interest of the beneficiaries and according to the terms of the trust.

4. TRUST SERVICES

Companies that provide services related to trusts may be incorporated and managed in Malta in compliance with Maltese statutory requirements. These companies usually provide administrative services in relation to trusts. The MFSA may issue rules to establish which activities constitute administrative services in relation to trusts and to establish the criteria for the conduct of these activities.

Where such companies carry out or intend to carry out trustee services along with routine administrative services, they would have to obtain prior authorisation to act as corporate professional trustees from the MFSA.

4.1. RE-DOMICILIATION OF COMPANIES

Re-domiciliation of trustee companies is allowed. The Continuation of Companies Regulations apply in that it is possible for foreign trustee companies to relocate to Malta and effectively to continue their operations from Malta without having to wind up their operations in the original country as long as such foreign companies are established in an approved jurisdiction.

5. FEE STRUCTURE

The fee structure applicable to trustees can be found in Appendix 1.

APPENDIX I**FEES**

| Fees | Euros |
|---|---|
| Trustees - Application | |
| Application and processing fee | 250 |
| One-time fee | 100 |
| Annual authorisation fee | 2,500 |
| Company Registration Fee (<i>one off</i>) | 245 - 2,250 (depending on the company's authorised share capital) |

APPENDIX II

AUTHORISATION OF TRUSTEES

The law distinguishes between the ‘professional trustee’ who is bound to obtain authorisation from MFSA as opposed to the “private trustee” who must follow strict notarial procedures. Both professional and private trustees are regulated by the MFSA.

• Professional Trustees

Any professional trustee, whether an individual resident or operating in Malta, or a corporate trustee, either registered in Malta or operating in Malta, is bound to obtain authorisation from the MFSA, irrespective of the proper law of the trusts they hold, or the location of the property held on trust.

The MFSA may grant authorisation upon being satisfied that the following conditions have been met:

1. where the applicant is a company:-
 - its objects include acting as trustee and carrying on activities ancillary or incidental thereto; and
 - its activities are compatible and connected with trustee services; and
 - the directors of the company are not less than three in number and are individuals who are approved persons¹; and
 - the company has established adequate systems for maintaining proper records of the identity and residence of beneficiaries, the dealings and the assets in connection with trusts and compliance with the applicable law; and
 - every person who has a direct or indirect interest in the company is an approved person; and
 - the name of the company is not inconsistent with its trustee activity; and
 - where the company is not registered in Malta, that company must be constituted or incorporated in an approved jurisdiction.

2. where the applicant is an individual, such individual:
 - is resident in Malta or operating in Malta; and
 - is an approved person; and
 - has established adequate systems for maintaining proper records of the identity and residence of beneficiaries and of the dealings and assets of trusts and compliance with applicable law.

This authorisation may be general or may be restricted to particular activities. The MFSA may at any time cancel or suspend the authorisation in accordance with the provisions of the Act.

A trustee is bound to notify the MFSA of any change in circumstance which would have a bearing upon his status as an authorised person and in case of a corporate trustee, of any change in its charter, statute, memorandum or articles of association or other instrument constituting the company, directors or members. In case of companies registered in Malta, these changes shall not be registered unless and until they have been notified and approved by the MFSA.

The Act also lays down exemptions from authorisation by the MFSA, based on who the operator is. Thus the following are not required to obtain authorisation:

¹ The Act defines an ‘approved person’ as being a person of good reputation possessing experience and qualifications in financial, fiduciary, accounting or legal services and approved by the Authority as being fit and proper to carry out the duties of a trustee.

- (i) persons licenced in terms of the Banking Act; or
- (ii) persons licenced under the Investment Services Act; or
- (iii) persons licenced under the Insurance Business Act or enrolled in the Brokers List under the Insurance Brokers and Other Intermediaries Act to hold clients' monies or assets; or
- (iv) a foreign person with an equivalent licence to above issued by the relevant regulatory authority in an approved jurisdiction; or
- (v) a person approved by the Malta Maritime Authority to act as a trustee of a shipping trust or a shipping foundation as defined under the Merchant Shipping Act.

The Act also lays down ten further exemptions based on the type of transaction in which the trust is used:

- (i) trustees for trusts created for the purpose of holding security in relation to any financial transaction for the benefit of the lenders or creditors in such transaction;
- (ii) a person when acting as trustee of any movable property held as security for the benefit of persons whose entitlement is conditional or determinable in terms of the trust or the contract in relation to which the holding was created;
- (iii) liquidators, curators in bankruptcy or court appointed administrators;
- (iv) advocates, notaries public, legal procurators or certified public accountants only if acting as trustees is limited to what is necessary and incidental in the course of carrying out their profession;
- (v) trustees of a unit trusts;
- (vi) trustees of charitable trusts;
- (vii) a co-trustee when the other trustee is authorised in terms of the Act;
- (viii) companies or other legal entities, established in an approved jurisdiction, the directors of which must be approved persons, and which are wholly owned, including as trustees, and controlled by authorised trustees in terms of the Act and which are established solely for the purpose of holding trust property and ancillary acts;
- (ix) parties to a contract who agree to receive property as trustees in the context of the performance of such contracts.
- (x) persons holding shares in companies registered in Malta when such shares do not have any special voting rights and their individual nominal value does not exceed one Maltese Lira.

A person may apply to the MFSA and the MFSA shall authorise:

- (i) a person with a licence or authorisation in terms of the Banking Act, Investment Services Act or Insurance Business Act/Insurance Brokers and Other Intermediaries Act issued by the MFSA or the relevant regulatory authority in an approved jurisdiction and who will be acting as trustee not in the ordinary course of the business for which he is licenced;
- (ii) a person having a licence or authorisation to act as trustee issued by the relevant regulatory authority in an approved jurisdiction.

Such persons must notify the MFSA in writing of its intention to act as trustee in Malta at least 45 days prior to commencing activities in Malta. Furthermore the MFSA must confirm that it does not object thereto. The notification to the MFSA must outline the proposed activities and shall be accompanied by such information as may be required by the MFSA from time to time.

- **Private Trustee**

An individual may act as private trustee if:

- (a) he is related to the settlor, by consanguinity or affinity in the direct line up to any degree, or in the collateral line up to the fourth degree inclusively, or
- (b) he has known the settlor for at least 10 years.

In all cases, private trustees:

- (i) must not remunerated even indirectly, except as permitted by any rules issued by MFSA;
- (ii) does not hold himself out as trustee to the public; and
- (iii) does not act habitually as trustee in any case in relation to more than five settlors at any time,

A private trustee may only act as such under the following conditions:

- (i) in the case of **testamentary trust**, within 6 months of accepting to act as trustee, he shall draw up an inventory by notarial deed and shall declare in the deed that the inventory includes all the property under trust and an extract of the will containing all the terms of said trust shall be annexed to said deed;
- (ii) in the case of **inter vivos trust**, the trust must be created by notarial trust deed;
- (iii) where the settlor or any other person adds property, other than immovable property, to the trust, such addition shall be recorded by a notarial trust deed on delivery of the additional property to the trustee, if possible within 14 working days of receipt of such property. Where immovable property is added to the trust, the addition of such property shall be carried out by a notarial act, an authenticated copy of which shall be delivered to the depositary notary for safekeeping and registration with the trust documents within such time;
- (iv) the trustee shall render in writing records of meetings with beneficiaries, advisors or protectors, the exercise of discretion in appointing or removing a beneficiary, in reducing, distributing or advancing trust property, in the termination of the trust for any reason or other material events, together with annual accounts and Court decrees, orders, declarations or directions which may be issued in relation to trust property and shall deliver said records to the depositary notary;
- (v) in all cases, the trustee shall declare the facts applicable to himself to show that he does not require authorisation to act as trustee and is not disqualified in terms of the Act, after the notary has warned him as to the importance of the truthfulness of such declarations;
- (vi) in the case of trust relating to immovable property, the depositary notary shall ascertain that the provisions prescribed by the Act are observed by the trustee.

Where the trustee is a private trustee, the notary public who publishes a will containing a **testamentary trust** or receives a notarial **trust deed inter vivos** shall be the sole depositary of all acts and the notary shall be known as the depositary notary. If this notary is appointed as a trustee in the trust deed and accepts to act as such, the notary shall ensure that the trust deed names another notary to carry out the functions of depositary notary.

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