

# Malta

*Andre Zerafa and Stephanie Farrugia  
Ganado Advocates  
Valletta, Malta*

## **Introduction**

### **In General**

Prominently located between Southern Europe and North Africa, the Maltese Islands, comprising Malta, Gozo, and Comino, occupy a total area of 122 square miles. Situated at a distance of 50 miles from Sicily and 190 miles from Tunis, Malta is only one hour's flying time from Libya, one and a half hours from Rome, and three hours from London, Amsterdam, and Paris. The proximity of Malta to these different economic and political centers increases its potential as a *plaque tournante* for the carrying on of international business. Malta is one hour ahead of GMT and six hours ahead of EST.

In July 2011, Malta had a total population of 425,384. Constantly exposed to different cultural influences, the Maltese have developed an instinctive flair for foreign languages. Besides English and Maltese, which are spoken fluently by virtually all the population, it is not at all uncommon to have dealings with professionals, businessmen, and clerical staff also speaking Italian and French.

The study of Arabic is constantly increasing, and the University of Malta has launched a specialized course leading to a diploma in business Arabic. A more recent introduction is that of a Certificate Course in Arabic for Business and Communication. All laws and official communications are issued in English and Maltese, and most commercial and banking documents are drawn up in English.

Malta has one international airport in Luqa, which regularly operates direct flights to nearly all the major destinations in Europe and the Mediterranean basin. Malta International Airport is increasingly popular as a stopover destination for flights coming in from North Africa and the Middle East.

The biggest port is the Grand Harbor, a natural harbor that is found in the northeastern part of the island, overlooking Sicily. The Grand Harbor is the major hub for shipping services, ranging from ship repairing and shipbuilding to dry-docking facilities. Moreover, the Malta Freeport was constructed in the late 1980s to cater to container ships in transit. Extensive conventional and roll-on/roll-off services by international shipping lines, among them the national shipping company Sea Malta, carry freight and cargo from Malta directly to

Mediterranean, Northern European, Middle Eastern, and Asian ports. All factories are located within 20 minutes of a harbor or an airport.

Malta became an independent country within the British Commonwealth in 1964 and became a republic in 1974. Malta became a full member of the European Union (EU) on 1 May 2004.

Malta joined the eurozone on 1 January 2008 and adopted the euro as its currency. This facilitates commercial transactions between the Island and other EU countries. Malta's major commercial activities are related to tourism, industry, agriculture, and services (maritime, financial, and others).

### **Legal System**

The Maltese legal system is a hybrid system containing elements of both the Continental Code Napoleon system as well as certain principles of English law. Maltese legislation is codified, and the supremacy of the Constitution prevails. The Maltese Civil Code is based on the Code Napoleon, while the Criminal Code draws heavily on the then Code of the two Sicilies.

English legal principles are very influential in public law and in commercial law, especially in shipping and company law. An important appeal court decision states that when the Maltese legal system is silent on public law matters, English public law principles should apply.

However, the system of judicial precedent does not apply: judges are not bound by previous case law, though much weight is attached to these decisions. Malta also has aligned its laws with the applicable rules of the EU in view of its accession to the EU on 1 May 2004.

### **Legislative Structure**

In 1988, a major step forward was taken through the introduction of specialized legislation, which curtailed many of the rather restrictive financial and regulatory rules that applied to non-residents wishing to do business in and through Malta. This was the Malta International Business Activities Act, coupled with the Offshore Trusts Act, and it had a reasonable level of success. It was constructed on an onshore/offshore divide between residents and non-residents.

There was a major policy shift in 1994. Malta had applied for EU membership in April 1992, and in 1994 an array of legislation was introduced with the two key purposes: upgrading the standard of Maltese regulatory rules and structures to EU standards and removing the onshore/offshore divide.

In 1994 and 1995, 15 pieces of major legislation were enacted by unanimous vote of the Maltese Parliament. These laws articulated the detail of a modern regulatory structure based on EU models, marking a shift from the catchall rules which existed previously. The 1994 legislative initiatives had the object of launching Malta as a financial center, rather than as an offshore center as it was previously known.

In the early 1990s, a capital market was set up with the establishment of the Malta Stock Exchange (MSE). A fully functioning money market was established in 1995.

From September 1998 to December 2002, Malta was involved in accession negotiations with the European Commission. During this time, Malta's legislative framework, including its financial services legislation, was 'screened' and brought in line with EU law. Malta became a full member of the EU on 1 May 2004. Malta also has an extensive network of international double-taxation treaties that may provide competitive tax advantages to investors.

Legislation is sector-specific, with the Civil Code,<sup>1</sup> the Commercial Code,<sup>2</sup> and the Companies Act<sup>3</sup> providing the underlying legal structure. Table 1 gives some of the various pieces of legislation which regulate each specific business sector.

Table 1: Sector-Specific Legislation

Activity	Principal Legislation	Regulations, Guidelines, Directives	Regulator
Shipping	Merchant Shipping Act (1973)	Merchant Shipping (Licensing of Shipping Organizations) Regulations (2004)	The Authority for Transport in Malta
Banking	Banking Act (1994)	Depositor Compensation Scheme Regulations (2003) European Passport Rights for Credit Institutions Regulations (2004) Credit Institutions (Re-Organization and Winding Up) Regulations (2004) MFSA Banking Directives	Malta Financial Services Authority (MFSA)
Financial institutions	Financial Institutions Act (1994)	MFSA Directives on Financial Institutions	MFSA
Insurance business	Insurance Business Act (1998) Insurance Intermediaries Act (2006)	Regulations and MFSA Directives on Insurance Business MFSA Directives to Insurance Intermediaries	MFSA
Investment services, funds	Investment Services Act (1994)	MFSA Rules for Investment Services Providers and related Guidance Notes MFSA Rules for Recognized Persons MFSA Rules for Professional Investor Funds MFSA Rules for Retail UCITS and Retail Non-UCITS Funds UCITS Regulations (2004) Investor Compensation Scheme Regulations (2004) European Passport Rights for Investment Firms Regulations (2004)	MFSA

1 Chapter 16 of the Laws of Malta.

2 Chapter 13 of the Laws of Malta.

3 Chapter 386 of the Laws of Malta.

		Investment Services Act (Marketing of Alternative Investment Funds) Regulations (2013) Investment Services Act (Alternative Investment Fund Managers) Regulations (2013) Investment Services Act (Alternative Investment Fund Manager) (Third Country) Regulations (2013)	
Investment exchanges and capital markets	Financial Markets Act (1990)	MFSA Listing Rules Malta Stock Exchange Bylaws OTC Derivatives, Central Counterparties and Trade Repositories Regulations (2013) Designated Financial Instruments Regulations (2012) Credit Rating Agencies Regulations (2010) Central Securities Depository (Control of Assets) Regulations (2009) Central Securities Depository (Authorization Requirements) Regulations (2009) European Rights for Regulated Market Regulations (2007) Transparency Regulations (2007) Off-Market Trading Regulations (2007) Transfer of Listed Financial Instruments Regulations (2006) Recognized Investment Exchange (Recognition Requirements) Regulations (2003)	MFSA (Listing Authority)
Pension funds	Special Funds (Regulation) Act (2002) Retirement Pensions Act (2011)	MFSA Directives under the Special Funds (Regulation) Act Special Funds (Regulation) Act (Retirement Schemes Exemption) Regulations (2009) Special Funds (Regulation) Act (Exemption) Regulations (2006) Special Funds (Regulation) Act (European Passport Rights For Institutions For Occupational Retirement Provisions) Regulations (2004) Special Funds (Registration Fees) Regulations (2004) Special Funds (Control Of Assets) Regulations (2004) Special Funds (Registration Of Retirement Fund Custodians) Regulations (2004)	MFSA
Trusts	Trusts and Trustees Act 1988	Creativity Trust (Exemption) Regulations (2013) University Research, Innovation And Development Trust (Exemption) Regulations (2010) Fees Regulations (2009) Exemption Regulations (2009)	MFSA
Gaming and betting operations	Lotteries and Other Games Act (2001)	Remote Gaming Regulations (2004)	Malta Gaming Authority

Manufacture, assembly of goods/ commodities (including computer software), R&D, freeport activities, tourism-oriented and other activities	Business Promotion Act (1988) Malta Enterprise Act (2003)		Malta Enterprise (ME)
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The enactment of these laws is complemented by other specialized pieces of legislation addressing certain legal matters that either apply across the board to all sectors or to most of them, such as prevention of money laundering,<sup>4</sup> data protection,<sup>5</sup> electronic commerce transactions,<sup>6</sup> prohibition of abuse of dominant position and concerted practices,<sup>7</sup> protection of intellectual property rights,<sup>8</sup> and employment and industrial relations.<sup>9</sup> These legislative enactments are fully in line with the EU directives and regulations relating to each area.

## Structures for Doing Business

### Limited-Liability Companies

The most common legal entity is the limited-liability company. A limited-liability company can be public or private, exempt or non-exempt. It also can be an investment company with variable share capital (SICAV) or an investment company with fixed share capital (INVCO).

A limited liability company is often the legal structure through which business is carried out. The governing law is the Companies Act, which was enacted in 1995, totally reviewing the earlier 1962 legislation on companies.

Any person authorized by the shareholders can register a company. The actual delivery and registration of the company documents can be made by one of the subscribers to the memorandum or the authorized agent of such subscriber. There are no restrictions (other than the general rules on legal capacity) as to who can act as the promoter of a company. It is usual for a company to be registered through lawyers or accountants.

4 Prevention of Money Laundering Act 1994 (Chapter 373 of the Laws of Malta).

5 Data Protection Act 2001 (Chapter 440 of the Laws of Malta).

6 Electronic Commerce Act of 2001 (Chapter 426 of the Laws of Malta).

7 Competition Act 1994 (Chapter 379 of the Laws of Malta).

8 Copyright Act 2000 (Chapter 415 of the Laws of Malta); Trade Marks Act 2000 (Chapter 416 of the Laws of Malta); Patent and Designs Act 2000 (Chapter 417 of the Laws of Malta).

9 Employment and Industrial Relations Act 2002 (Chapter 452 of the Laws of Malta).

The share capital of a company may be denominated in any convertible currency. The authorized share capital of a company must be:

- Not less than €46,587.47 subscribed by at least two persons in the case of a public company, and not less than 25 per cent of the nominal value of each share taken has to be paid up; or
- Not less than €1,164.69 subscribed by at least two persons in the case of a private company, and 20 per cent of the nominal value of each share has to be paid up.

Subject to a number of conditions, it also is possible to incorporate a single-member private company under Maltese law. A number of minor changes have recently been made to the Companies Act, one of the most significant changes being that a single-member company can be wholly-owned by bodies corporate. The share capital of a company may be divided into different classes of shares, which usually have distinguishing descriptions. Different rights may be carried by each class.

A Maltese company also must have a registered office in Malta where it must keep its corporate records and the register of officers and directors. The company's financial records should be kept in Malta for regulatory compliance reasons.

A company's memorandum and articles of association will be kept on the public file maintained by the Registrar of Companies. The names of the company's officers are available to the public. The register of shareholders of the company is not public, although any member or officer has access to the register of members.

### **Commercial Partnerships**

The principal characteristic of a partnership *en nom collectif* is the unlimited and joint and several liability of all the partners for all the obligations of the partnership with all their property, present and future, and not merely up to the amount of their contribution to the partnership. It may be formed by two or more partners, operates under a partnership name, and has its obligations guaranteed by the unlimited and joint and several liability of all the partners. The individual partners cannot, however, be sued before the property of the partnership is first discussed.

A limited partnership, which also is called a partnership *en commandite*, operates under a partnership name; its obligations are guaranteed by the unlimited and joint and several liability of one or more partners, called the 'general partners', and by the liability limited to the amount, if any, unpaid on the contribution of one or more partners, called the 'limited partners'. There has to be at least one general partner and one limited partner. The contributions of the partners in a limited partnership may either be indicated by a proportion of interest or else it may be divided into shares.

A characteristic of partnerships which has made them attractive to small and medium-sized entrepreneurs is that partnerships do not have to file any accounts or any annual returns at the Registry unless they are limited partnerships where the partners' contributions are divided into shares.

### **Civil Partnerships**

It is possible for two or more persons to create a partnership under the Civil Code.<sup>10</sup> The partners are not jointly and severally liable for the debts of the partnership, and one of the partners cannot bind the others unless he has been given power to that effect. The objective of the partnership must be lawful and in the common interest of the parties. It is not lawful to set up a general partnership with all the property of the partners. There is no registry of civil partnerships and no deed has to be registered at the Companies Registry in this respect, nor are there any disclosure requirements.

A partnership may be either a general partnership of profits or a particular partnership. A general partnership of profits includes all that the parties acquire by their skill during the partnership and the use of the movable or immovable property intended for the exercise of the trade or profession of the partner possessing such property. A particular partnership may have as its objective certain specified things or the exercise of some trade or profession.

### **Associations 'en Participation'**

The Companies Act makes provision for associations *en participation*, which are contracts constituted in writing by which a person assigns to another, for valuable consideration, a portion of the profits and losses of a business or of one or more commercial transactions. The liability of the associate is limited to his contribution, while the association itself does not have a legal personality distinct from its members.

### **European Economic Interest Groupings**

The Companies Act (European Economic Interest Grouping) Regulations of 2003 came into force on 1 May 2004, pursuant to the terms of the Companies Act, in order to give effect to Council Regulation Number 2137/85.<sup>11</sup> A European Economic Interest Grouping (EEIG) may be formed by groups or associations consisting of not less than two and not more than 20 persons for the purpose of facilitating or developing the economic activities of its members, or to improve or increase the profits or benefits of such activities. The activities of an EEIG must be related solely to the economic activities of its members and must only be ancillary to those activities.

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<sup>10</sup> Chapter 16 of the Laws of Malta.

<sup>11</sup> Council Regulation (EEC) Number 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG).

An EEIG has a legal personality distinct from that of its members. On registration, it becomes the subject of rights and obligations, is capable of making contracts or other legal acts, and of suing and being sued.

### **Societas Europaea**

As a pan-European corporate vehicle, the *Societas Europaea* (SE) has its legal standing in the European Company Statute (ECS). The SE is undoubtedly deemed to be legally effective at Community level and therefore directly applicable within the Member States. The ECS places the SE above other already existing company structures.

The ECS is autonomous only up to a certain extent. It runs parallel to the law on public limited companies of each individual EU Member State and sometimes overlaps. Instead of a harmonized European company, it seems as though there are 30 new ways for the formation of a SE, given that Member States are given much latitude when implementing the regulations. The SE is a public limited liability company that has a distinct and separate legal personality from that of its members.

### **Overseas Branches**

The Companies Act also regulates branches of foreign companies. A foreign company can set up a branch in Malta by establishing a place of business in Malta. The Malta branch does not acquire a legal personality separate from its foreign counterpart. It is not 're-incorporated' in Malta, and the criteria for its establishment in Malta depend on having a place of business in Malta. The closure of the branch is speedily done by simply informing the Registrar of Companies that the local office has been closed.

### **Re-Domiciliation of Foreign Companies**

Under the Continuation of Companies Regulations 2002,<sup>12</sup> which came into force in 2002, foreign-registered companies can be re-domiciled to Malta by pursuing a procedure outlined in the law. It also is possible for Maltese companies to choose to re-domicile out of Malta.

### **Trusts**

The relevant Maltese laws in the area of trusts is the Trust and Trustees Act 2004 (TTA),<sup>13</sup> which is largely based on the Jersey law on trusts, and the Recognition of Trusts Act 1994,<sup>14</sup> which gave force of law to most of the provisions of the Hague Convention on the Law Applicable to Trusts and on their Recognition.

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12 Legal Notice 344 of 2002, as amended by Legal Notices 352 of 2003, 181 and 186 of 2006, and 425 of 2007.

13 Chapter 331 of the Laws of Malta.

14 Chapter 374 of the Laws of Malta.



Trusts whose proper law is the law of Malta are regulated by the TTA. Non-Maltese trusts will be regulated by their proper law as determined in accordance with the provisions of the Hague Convention. The TTA distinguishes between professional and private trustees, which are both regulated by the Malta Financial Services Authority (MFSA).

Private trustees do not need authorization to act as trustee, but are bound to follow the strict notarial procedure laid down in the law. Professional trustees that are resident or operating in Malta must obtain authorization from the MFSA, irrespective of the proper law of the trusts they are administering and whether or not all or part of the trust property is in Malta.

Authorization will only be granted as long as certain conditions are satisfied. For example, if the applicant is a company, its objects must include acting as trustee and carrying on activities ancillary or incidental to its trusteeship, and its actual activities must be compatible and connected with the services of a trustee. The company also must have a board of directors composed of at least three individuals of good repute and possessing experience and qualifications in financial, fiduciary, accounting, or legal services and whom the MFSA considers to be fit and proper to carry out the duties of a trustee.

Another condition for the MFSA to grant authorization is that an applicant company must have adequate systems for maintaining proper records of the identity and residence of beneficiaries, of the dealings and the assets of the trusts to be administered, and of compliance with applicable law. Furthermore, the name of the company must not be inconsistent with its trustee activity and, when the company is not registered in Malta, it must be constituted or incorporated in what the MFSA considers to be an approved jurisdiction.

The duration of a Maltese trust cannot exceed 125 years or such shorter period as is established in the trust deed, unless the trust is a charitable one, in which case there is no limitation on its duration.

Upon termination of a trust, the assets must be distributed by the trustee within a reasonable time, in accordance with the trust deed. The trust may be terminated by the beneficiaries when all the beneficiaries are in existence and have been ascertained and none of them are interdicts or minors. In this case, the beneficiaries may require the trustee to distribute the property to them.

## **Foundations**

### *In General*

Provisions regulating foundations in Malta were enacted in 2007, as a Second Schedule to the Civil Code. A Maltese foundation is an organization that enjoys separate legal personality. It is constituted in writing by a founder or founders, including by means of a will.

It consists of a universality of things (its patrimony) which are entrusted to the administration of a designated person or persons (the administrators). The

patrimony (assets and liabilities) of the foundation is kept distinct from those of the founders, administrators, and beneficiaries.

### *Establishment*

Under Maltese law, a foundation may only be constituted by means of a public deed, a living trust (*inter vivos*), or by means of a will, which is required to be drawn up, received, and published by a notary public. The deed constituting the foundation must, on pain of nullity, contain the following information relating to the foundation:

- Name;
- Registered address (which must be located in Malta);
- Purposes or objectives;
- Constitutive assets;
- Composition of its board of administrators;
- Legal representation;
- The term for which it is established, if any;
- In the case of a foundation the administrators of which are non-residents of Malta, the name and address of a person resident in Malta who has been appointed to act as the local representative of the foundation in Malta; and
- In the case of a private foundation, the names of the beneficiaries (which need not form part of the deed, but may be indicated in a separate beneficiary statement).

### *Registration Procedure*

Under Maltese law, the registration of a foundation with the Registrar for Legal Persons within the Maltese Public Registry is an *ad validitatem* requirement for the foundation to be granted separate legal personality. Once registered, the foundation is issued with a certificate of registration, which is conclusive evidence that the requirements for registration have been met and that the foundation is duly registered. This registration requirement thus offers third parties dealing with the foundation additional reassurance regarding the actual existence of the foundation.

The obligation to register the foundation lies with its administrators. The Second Schedule to the Civil Code also contains detailed rules regarding the registration procedure, the availability of registered documents, and the consequences of non-registration.

### *Purpose Foundations and Private Foundations*

The Second Schedule to the Civil Code provides for both foundations established for a social or other purpose (purpose foundations) and foundations established for the private benefit of individuals (private foundations).

Purpose foundations do not make provision for beneficiaries, but are established for a particular purpose that needs to be indicated in clear terms. The deed of a purpose foundation must indicate the way in which the property of the foundation is to be applied in order to achieve its purpose. When no such indication is made, the administrators will exercise their discretion in applying the assets of the foundation in such a way that its purpose is achieved. Furthermore, the deed of foundation also may indicate how the property is to be applied once the purpose has been achieved.

Private foundations are established for the benefit of one or more persons or for a class of persons, provided that when the dominant purpose of a foundation is to support a class of persons that constitute a sector within the community, the indication of such a class or of one or more members of such a class does not render the foundation a private foundation. The beneficiaries of a private foundation have legally enforceable rights against the foundation as stated by the terms of the foundation and the Second Schedule to the Civil Code.

Although the deed (excluding the beneficiary statement) of a private foundation is registered with the Registrar for Legal Persons, the Second Schedule contains detailed provisions regarding the accessibility of the deed establishing the foundation. These provisions ensure that access to such documentation is only given to the founder, the administrators, those acting under the authority of any court, persons having a legitimate interest, and such other persons as are permitted access by the deed itself or by applicable law. This preserves the privacy and confidentiality of private foundations.

Unless it is evident from the statute that a foundation is a purpose foundation, Maltese law deems a foundation to be established for the private benefit of beneficiaries.

## **Shipping**

### **Registration of Ships**

The registration of ships is made under the Merchant Shipping Act 1973.<sup>15</sup> This statute was initially based on the legislation of the United Kingdom, but there have been several amendments to this Act since 1973. The Maltese system, for example, permits the registration of a ship in the ownership of an international owner (a non-Maltese company), provided a resident agent is appointed to act on its behalf.

Ships intending to fly the Maltese flag must be registered with the Shipping Registry in the Merchant Shipping Directorate of Transport Malta. Registration takes place in two stages. The vessel is first provisionally registered and upon, satisfaction of certain requirements, it is registered permanently. Maltese law also allows for bareboat charter registrations on the register.

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<sup>15</sup> Chapter 234 of the Laws of Malta.

## **Taxation and Duty**

### *Exemptions*

Vessels of 1,000 net tons and higher tonnage can be exempt from income tax and from duty on transfers, assignments, or donation and from succession duty provided that they satisfy certain requirements and perform activities which afford such vessels these incentives.

Exemption from income tax also applies to dividends paid to shareholders. Vessels less than 1,000 net tons (with the exception of pleasure yachts) can also qualify for the same exemptions, although such exemptions are only granted provided the shareholders are not Maltese nationals or resident in Malta, in accordance with current policy and after the filing of an appropriate application.

### *Additional Benefits*

No exchange control authorizations are required for the purpose of incorporating or operating a shipping company. This provision also applies to the taking of security for loans or other facilities over Maltese-registered vessels owned by companies registered locally.

Further advantages and benefits accrue to users of the Malta flag. Malta is a member of the EU, a member of the Paris Memorandum of Understanding on Port State Control (Paris MoU), and is well placed on the White List of the Paris MoU as well as the Toyko MOU.

It is possible to register vessels which do not fall within the strict definition of ships, such as oilrigs, floating docks, pontoons, and barges. There are no restrictions on the nationality of the master, officers, and crew serving on board Malta-flagged vessels. There also are no restrictions on the nationality of shareholders and directors of shipping companies. No trading restrictions are imposed on vessels registered under the Malta flag.

Moreover, company incorporation costs are low and the registration fees highly competitive. Procedures for the registration or deletion of vessels as well as for the registration and discharge of mortgages are user-friendly and uncomplicated.

It is possible to have immediate access to decision makers within the administration, backed by a qualified and efficient team of technical officers, available for urgent matters on a 24-hour basis. A global network of consular offices offer constant support to ship operators.

A number of double-taxation and bilateral maritime agreements with other maritime nations are in force. In addition, Malta is a politically stable democracy that guards against arbitrary changes to applicable laws and regulations and has been a member of the EU since 2004.

## Ship Mortgages

Maltese law on ship mortgages is modeled closely on the Merchant Shipping Acts of the United Kingdom. Consequently, practitioners in Anglo-Saxon jurisdictions find much common ground, especially as far as enforcement remedies are concerned. Practically all the leading international ship finance banks and credit institutions have utilized Maltese mortgage security at some time or another, while a significant proportion do so on a regular basis.

All mortgages over Maltese ships must be registered with the Registrar of Maltese Ships. The priority of a mortgage over a ship is determined by the date and time of its recording in the register, but it is possible to create a mortgage that prevents the creation of further mortgages without the consent of the mortgagee. When there are outstanding mortgages, a vessel may not be sold without the consent of the mortgagees.

Mortgages constitute executive titles and may be enforced immediately upon default (yet after notification is served on the defaulting debtor), without the need for a prior court judgment or order to that effect. Claims secured by a mortgage enjoy a relatively high ranking, and this has instilled confidence among mortgagees in the Maltese mortgage enforcement system.

Foreign mortgages over non-Malta-flag vessels are recognized for all intents and purposes of law insofar as the mortgages are verifiably recorded in a public register and have a generally equivalent legal and preferential status as a Maltese mortgage.

The mortgage narrative is drawn up in English, while the other security documents may be drawn up in any language. The security documents regulating the financing (e.g., loan or guarantee agreement, deed of covenants, assignments of earnings and insurances, and pledge(s) of account(s)) are ordinarily governed by non-Maltese law, though the deed of covenants collateral to the mortgage is typically regulated by a Maltese choice-of-law clause. The mortgage *qua* security is governed by Maltese law.

An existing registered mortgage may, with the signed consent of the existing mortgagee and other holders of mortgages (if any) over the vessel, be amended in the widest possible manner by the execution and registration of an amendment mortgage amending the original mortgage instrument. The mortgage, as amended, would retain its existing priority.

Malta has often proved to be an effective and expeditious forum for the arrest and judicial sale of vessels subject to mortgages, whether local or foreign. Malta also offers alternative mechanisms for enforcements and sales of vessels, such as the relatively new procedure of the Court-approved private sale, which is also proving to be an efficient and successful product.

## **Incentives for Foreign Investment**

### **Incentives under Malta Enterprise Act**

#### *In General*

The incentives previously found under the Business Promotion Act (BPA)<sup>16</sup> have been largely absorbed into the Malta Enterprise Act (MEA)<sup>17</sup> and the subsidiary legislation enacted under it. Upon joining the World Trade Organization (WTO), Malta made the commitment that the incentives would no longer be export-oriented, but would instead be tied to the level of investment and job creation.

Indeed, the incentives under the MEA (similarly to those under the BPA) focus on attracting new investment projects that have a high added value or those that have a high employment potential. The MEA also promotes the expansion and diversification of existing enterprises. Following Malta's membership in the EU, the incentive schemes also have been aligned to the guidelines for state aid issued by the EU.

#### *Investment Tax Credits*

The major incentives under the MEA consist of tax credits. These are calculated either as a percentage of the capital investment (typically utilized by capital-intensive enterprises) or by reference to the value of wages for a particular period covering new jobs created as a result of an investment project.

Different percentages apply, depending on the size of the enterprise. Tax credits are set off against the income tax due by the enterprise for the particular year. Any unutilized credits may be carried forward and offset against income tax for the following years, in which case the investment tax credit is increased by such reference rate as established by guidelines issued under the MEA.

#### *Qualifying Activities*

The investment tax credits are available for a wide-ranging list of qualifying activities carried on or intended to be carried out by an undertaking in Malta.

The incentives and benefits for some of the qualifying activities may only be obtained by a company after the approval of the project by Malta Enterprise (ME), which is the national agency responsible for promoting trade and industrial development in the country. In granting approval, the ME may impose such conditions as it may deem fit.

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<sup>16</sup> Chapter 325 of the Laws of Malta.

<sup>17</sup> Chapter 463 of the Laws of Malta.

*Other Tax Credits*

The MEA also provides for tax credits in respect of eligible costs incurred by an enterprise in running industrial research projects and experimental development projects. Enterprises have to seek approval for any research and development (R&D) project prior to commencement. Tax credits may only be provided on allowable expenditure that is pre-approved.

Additionally, small and medium-sized enterprises may benefit from tax credits in relation to costs incurred for registering intellectual property resulting from industrial research.

*Other Non-Tax Incentives*

The MEA also caters to a number of non-tax incentives which are available to qualifying companies, including:

- Soft loans;
- Loan interest-rate subsidies;
- Loan guarantees;
- Incentives for job creation;
- Training grants, which are administered by the Employment and Training Corporation (ETC); and
- Factory space at competitive prices.

**Gaming and Betting Companies**

Malta offers the e-gaming industry an investment incentive package that few other jurisdictions can equal. Remote gaming and betting is regulated in Malta by the Remote Gaming Regulations 2004.

These Regulations have been in force since the end of April 2004 and, from the time of issuance, they have generated substantial interest from a number of online betting and gaming operators of international caliber.

The local regulator of online betting and gaming is the Malta Gaming Authority (MGA). The MGA is flexible in its approach toward the processing of applications. Each application is handled on a case-by-case basis in order to ensure the rapid processing of applications for the benefit of the applicant.

Although the MGA usually issues an 'in principle' approval of a license application within approximately four weeks from submission of the relevant application forms, the final operational licenses are normally issued by the MGA within eight weeks from the submission of complete and correct information by the applicant. All licenses are issued by the board of the MGA, which meets once a month. Four categories of licenses are catered by the Regulations:

- A Class 1 license applies to remote gaming of all types of games of chance and games of skill. This category includes games for money, whose results

could be either totally accidental and/or dependent on the skill of the player. These would typically be casino-type games such as blackjack, roulette, and poker.

- A Class 2 license applies to operators wishing to operate through a remote betting office or through an online betting exchange office. This license applies to operators intending to offer betting games to players such as fixed-odds betting, pool betting, and spread betting.
- A Class 3 license would authorize an operator to promote and/or abet remote gaming from Malta. This license applies to operators of peer-to-peer networks, poker networks, betting exchanges, and game portals.
- A Class 4 license is required by operators intending to offer hosting platform and management services to other gaming operators.

Licenses are issued for periods of five years, renewable for further periods of five years each at the discretion of the MGA. The MGA will only refuse to extend a license period if it has just cause for doing so.

An MGA license authorizes the operator to offer its gaming or betting services through any means of distance communications, which may take the form of unaddressed or addressed printed matter, press advertising with an order form, telephone with or without human intervention, radio, videophone, videotext with keyboard or touch-screen, electronic mail, fax, television, and any other means of communication, transmission, conveyance, and receipt of information by wire, radio, optical means, electromagnetic means, or by any other electronic means.

## **Providers of Investment Services**

### **Regulatory Framework**

The Investment Services Act<sup>18</sup> provides for a regulatory regime for investment services providers. The Act sets the parameters for a licensing regime for persons acting from or in Malta as principals or agents managing investments by acting as trustees, custodians, or nominees or providing investment advice in relation to:

- Any ‘investment instrument’, including securities, units in collective investment schemes (CISs),<sup>19</sup> options, warrants, futures, and contracts of differences;
- Any scheme or arrangement involving an investment instrument; or
- Any CIS, whether of a retail nature or otherwise.

License applications are considered on a case-by-case basis by the MFSA, which is the regulator for all financial services business and also is responsible for investment services regulation and the regulation of CISs.

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<sup>18</sup> Chapter 370 of the Laws of Malta.

<sup>19</sup> A ‘CIS’ is the term used by Maltese law for an investment fund.



The MFSA has issued extensive Investment Services Rules that, *inter alia*, provide details on the application procedure to be followed by applicants for investment services licenses and establish the requirements for own funds and liquidity for license holders. Depending on which license category is applicable to the particular applicant, the Investment Service Rules also provide for detailed conduct of business rules to be complied with by license holders, who also must comply with a number of other ongoing obligations.

According to the Investment Service Rules and the Investment Services Act, the MFSA enjoys extensive rights to request information from license holders and to carry out inspections and compliance visits at the premises where the investment service is being offered by the particular license holder.

The MFSA will have to be satisfied that the prospective license holder is a ‘fit and proper person’ to provide the particular investment services for which it is seeking a license, and that the applicant will have the systems in place in order to comply with and observe the appropriate rules and regulations. In this context, the MFSA also will require information on the applicant’s track record.

The Investment Services Rules mention three criteria that should be met before the ‘fit and proper test’ can be satisfied: integrity, competence, and solvency. To meet the criterion of integrity, the applicant and its employees must act honestly and in a trustworthy manner in relation to their clients and third parties. To meet the criterion of competence, the persons carrying out the activities of the applicant must act in a knowledgeable, professional, and efficient manner, in compliance with regulations. The MFSA will examine the procedures, controls, and record-keeping facilities of the applicant. Meeting the third criterion of solvency entails that the business is subject to proper financial control and management and that the applicant satisfies financial resources requirements.

A presence in Malta is mandatory, and no license will be issued unless there is an active presence in Malta. Furthermore, the ‘four eyes principle’ necessitates at least two officers of the company to be permanently present in Malta. These individuals need not be directors of the company, but must have a certain amount of managerial responsibility. The company must appoint one of these individuals as compliance officer and another as money laundering reporting officer.

Unless an exemption applies,<sup>20</sup> an investment services license is required regardless of whether the investment service is being provided in Malta or overseas.

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20 A number of exemptions arise from the Investment Services Act (Exemption Regulations (SL 370.02), the European Passport Right for Investment Firms Regulations (SL 370.10), and the Investment Services Act (UCITS Management Company Passport) Regulations (SL 370.20).

The investment services license holder may be set up pursuant to the rules which implement the MiFID Directive, the rules which implement the UCITS Directive, or the rules which implement the Alternative Investment Fund Managers Directive (the ‘AIFMD’).

Under the European Passport Right for Investment Firms Regulations (the Passport Regulations), a European investment firm (EIF) seeking to establish a branch in Malta or to provide services in Malta, in the exercise of a European right — essentially, the right to freedom of establishment and free movement of services as enshrined in the Treaty of Rome and consolidated in the Treaty on the Functioning of the European Union — must satisfy the establishment requirements or the service conditions (as the case may be) listed in the Passport Regulations. Such an EIF will be exempt from the requirement submitting an application to the MFSA for a license to provide such services in or from within Malta. An EIF passporting its services into Malta by establishing a branch in Malta is still bound to comply with the MFSA Conduct of Business Rules as part of the investment service.

Furthermore, an investment services firm that is licensed in Malta by the MFSA may avail itself of its passporting rights under both the Investment Services Act and the Passport Regulations and offer its services in other EU Member States. Following the implementation of the UCITS IV Directive,<sup>21</sup> Maltese UCITS management companies licensed by the MFSA can provide services to UCITS funds established in other Member States.

The main legislative and regulatory development in the investment services space in the past years was the implementation of the AIFMD, which is intended to create a regulatory and supervisory framework for alternative investment fund managers (“AIFMs”) in the EU. Maltese AIFMs may also provide services to alternative investment funds established in other Member States pursuant to the AIFMD.

In September 2012, the MFSA had launched a consultation exercise, and issued a number of consultation papers until June 2013. The AIFMD was implemented through new subsidiary legislation and Investment Services Rules issued by the MFSA, and amendments to existing legislation and rules. These legislative instruments came into full force and effect on 22 July 2013.

### **Investment Funds**

According to the Investment Services Act, no CIS is permitted to issue or create any units or carry on any activity in or from within Malta unless it is licensed by the MFSA. For an investment fund to be licensed as a CIS by the MFSA, it

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<sup>21</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations, and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast).

would have to fall within the definition of a CIS as set out in the Investment Services Act. Under the Investment Services Act, an investment fund must satisfy specific criteria to qualify as a CIS. The scheme or arrangement must:

- Have as its objective, or as one of its objectives, the collective investment of capital acquired by means of an offer of units for subscription, sale, or exchange;
- Operate according to the principle of spreading risk; and
- Possess one among the three characteristics of pooling of investments, unit holders that are able to request the fund for redemption of their units, or units that will be issued continuously or in blocks at short intervals.

Funds can be established as companies (SICAVs or INVCOs), contractual funds, unit trusts, or limited partnerships. Funds may either be open-ended or closed-ended.

CISs are issued with a CIS license by the MFSA. CISs also are extensively regulated by the Investment Services Rules. Different rule books apply to the different types of CISs that can be established. Hedge funds, private equity funds, real estate funds, and other alternative investment funds would fall within professional investor funds and alternative investment funds categories. These rule books were amended as part of the implementation of the AIFMD. UCITS funds and non-UCITS retail funds are subject to different sets of rules. The rules applicable to UCITS funds reflect EU-harmonized directives and regulations.

The recognized incorporated cell company (RICC) was introduced in Malta in 2012, to directly target fund platform providers. Maltese law permits the creation of (or conversion into) an incorporated cell company type vehicle where the core or RICC's activities would be limited to providing, in exchange for payment of a platform fee, certain administrative services to its incorporated cells. RICCs are required to apply for a recognition certificate in terms of the Investment Services Act, 1994. In this respect, the MFSA has issued a new subset of rules outlining the recognition requirements and application and documentation required as well as setting out the ongoing requirements for RICCs.

The most popular form of Maltese investment vehicle is a corporate variable capital fund (SICAV), usually established as an open-ended fund. SICAVs also can be established as umbrella funds. A SICAV that is established as an umbrella fund is required to have segregation of the assets and liabilities of each of its sub-funds.

The objects of a SICAV are limited to the collective investment of its funds in movable or immovable property, with the aim of spreading risk and giving the shareholders the benefit of management of its funds. The variability of a SICAV's capital allows for significant flexibility in shareholder operations.

The Companies Act allows SICAVs to issue fractional shares and provides for full flexibility in relation to the redemption of units by their holders,

as long as the redemption procedure is provided for in the SICAV's articles of association.

The Companies Act has been amended to allow a SICAV to issue shares for a cash consideration that is subject to full payment by a settlement date, provided that the SICAV is authorized to issue shares in such manner by its Memorandum and Articles of Association, the settlement date and terms of payment are clearly disclosed in the offering documents issued by the SICAV, and the person acquiring the shares undertakes in writing to pay the full subscription price no later than the settlement date.

The Companies Act regulates SICAVs by restating certain rules that are normally applicable in the context of a limited liability corporate structure (in particular, those relating to share capital and distribution of profits) in order to render such rules more appropriate for investment vehicles. SICAVs are generally incorporated in the form of an umbrella or multi-fund structure. In this structure, each sub-fund represents a distinct class or classes of shares in the company, with each class capable of being designated with a different currency. SICAVs established as multi-fund or umbrella companies enjoy the benefit of the segregation of assets and liabilities of each of their sub-funds, each to be treated as a patrimony separate from the others.

When the SICAV or one of its sub-funds is constituted with multiple classes of shares, each class of shares is devised with a particular set of rights and scheme of distribution, allowing the promoter to segregate one group of investors from another according to the needs of the fund and the investors.

A SICAV's memorandum and articles of association will be kept on the public file maintained by the Companies Registry. The names of the SICAV's officers are available to the public. The register of shareholders of the company is not public, although members and officers have access to it. The prospectus/offering memorandum of a SICAV has to be lodged with the Companies Registry (and will therefore be available to the public), but only if the units of the SICAV are offered to the public for subscription.

The directors of a SICAV must ensure that records, accounts, statements, and any other documents belonging to a particular sub-fund are maintained separately, on an ongoing basis, from those belonging to other sub-funds. This segregation of documentation must be such as to clearly identify the assets and liabilities of one sub-fund as separate and distinct from those of another sub-fund.

When a Maltese umbrella fund has opted for segregation of its various sub-funds, it will nonetheless still be possible for its articles or offering memorandum to provide for certain expenses of the umbrella fund to be attributable and borne by all the various sub-funds. Typically, these would include such expenses as directors' fees and audit fees that are charged to the SICAV as a whole. It is up to the promoters to determine how these expenses are to be attributed, whether on a proportional basis to the net asset value of each sub-fund or otherwise.

Maltese law clearly states that creditors of a particular sub-fund will have no 'claim or right of action' against any other assets which may belong to the SICAV or to other segregated classes of that SICAV.

As part of the implementation of the AIFMD, the MFSA has issued rules applicable to alternative investment funds ("AIFs"). The Rules provide that an AIF may be managed by an external manager, which must be an AIFM, or may opt to be a self-managed AIF. A self-managed AIF must have an initial capital of at least €300,000, which must be increased once the portfolio of the AIF exceeds €250 million. A self-managed fund is also subject to a number of additional rules that are similar to those applicable to AIFMs.

### **Unit Trusts**

A CIS also can take the form of a unit trust that is governed by Maltese law or the laws of any other jurisdiction. A unit trust is a contractual agreement entered into between the management company and the trustee.

The trust deed sets out, *inter alia*, the unit holders' rights; the duties, appointment, and removal of the manager and trustee; investment and borrowing powers and restrictions; and the methods of administration, termination, and winding up of the affairs of the trust. Unit trusts must seek MFSA licensing as CISs.

### **Limited Partnerships**

A fund also can be set up as a limited partnership, known as a partnership *en commandite*. The legislation governing Maltese limited partnerships is contained in the Tenth Schedule to the Companies Act, as a result of which limited partnerships benefit from more structural and operational flexibility.

A limited partnership consists of one or more general partners and one or more limited partners. The general partners are jointly and severally liable for all the debts of the partnership without limitation, and each of the partners must satisfy the MFSA that he is a fit and proper person to carry out the activities or functions of the partnership. On entering the partnership, the limited partners contribute or agree to contribute a specified sum to the capital and, save for the unpaid portion of their contribution to the partnership, will not be liable for any debts of the partnership.

A limited partnership must have a legal personality separate and distinct from that of its partners. The administration and representation of the partnership will vest in the general partners and, unless the deed of partnership provides otherwise, such administration and representation will vest in each of the general partners severally. A limited partner may not participate in the conduct or management of any business of the partnership and may not transact the business of the partnership, nor may he sign or execute documents on behalf of the partnership.

The partnership agreement must state the nature of the business to be carried out by the partnership. The partnership must maintain a registered office in Malta where it must, among other things, keep a register of the limited partners.

Limited partnerships that are divided into shares and are open-ended are generally subject to the same rules that apply to SICAVs. The major difference is that such a limited partnership must have at least one general partner instead of a board of directors.

A limited partnership also may be constituted as a multi-class or multi-fund partnership with the written approval of the MFSA. Multi-fund partnerships may elect to segregate the assets and liabilities of separate funds.

### **Investment Company with Fixed Share Capital**

The general information relating to any company incorporation also will apply to closed-ended funds. An INVCO is a closed-ended fund to which particular rules on distribution and capitalization of profits apply. INVCOs are required to invest in securities, distribute 85 per cent of their income, and are listed on a recognized investment exchange.

### **Contractual Funds**

Contractual funds, also known as mutual funds, are CISs that are set up by a deed of constitution (entered into by the fund manager and the custodian of the fund) and consequently do not have legal personality. In response to a renewed interest in the establishment of these types of funds, the enactment of the Investment Services Act (Contractual Funds) Regulations 2011 has set out a more functional framework.

A contractual fund is licensed and regulated by the MFSA as a CIS under the Investment Services Act, and it may be an open-ended or closed-ended scheme. The liabilities of a unit holder are limited to the amount agreed to be contributed by the unit holder for the subscription of units in the contractual fund.

Investors holding units in contractual funds participate and share in the property of the fund. The property of the contractual fund (and any sub-funds constituted under it) constitutes a patrimony which is separate and distinct from the property of the unit holders, the manager, and the custodian.

Consequently, a creditor of a unit holder, of the manager, or of the custodian cannot enforce any rights over the property held by the fund. The deed of constitution of the contractual fund also may stipulate that sub-funds will be considered a patrimony that is separate from the main fund and from the other sub-funds under the same scheme.

Contractual funds also may set up a special investment vehicle (in the form of a limited liability company) for the purpose of investing and holding assets on behalf of the fund and in accordance with the fund's deed of constitution and

prospectus. A special investment vehicle will be regulated under and as part of the same CIS license granted to the contractual fund. Contractual funds may opt for listing on the Malta Stock Exchange and also can benefit from the EU passporting rules.

### **Listing of Funds**

Investment funds licensed in Malta can seek a listing on the Malta Stock Exchange. A fund that is licensed in Malta also is permitted to be listed on an investment exchange overseas. The promoters of the particular fund would have to go through a listing application process with the Listing Authority (which also is the MFSA). This process is not very extensive and does not usually involve major expense.

### **Undertakings for Collective Investment in Transferable Securities**

#### *Passporting into Malta*

The Investment Services Act (Marketing of UCITS) Regulations (UCITS Regulations) came into force on 1 July 2011, following local transposition of the UCITS Directive. Under the UCITS Regulations, a UCITS fund which is licensed as such by its home state regulator in a Member State of the EU or the European Economic Area (EEA) may market its units in Malta without obtaining a license in Malta.

#### *Funds Licensed in Malta*

The promoters of a fund are able to submit an application to the MFSA for their fund to be licensed in Malta as a UCITS fund (Maltese UCITS). Such a fund would be able to benefit from the passporting provisions of the UCITS Directive.

A Maltese UCITS must go through the same application process as that applicable to non-UCITS funds (discussed in detail in the following subsection). A written notification of the UCITS fund's intention to market itself in the EU or EEA must be submitted to the MFSA together with the appropriate documentation and information on the arrangements made for the marketing of its units abroad.

#### *All Other Funds*

A non-UCITS fund is subject to the licensing regime of the Investment Services Act. All funds which are not UCITS funds are non-UCITS funds (including professional investor funds and alternative investment funds, which are discussed next). However, non-UCITS funds that are intended to be made available to a retail investor without any limitation (or a low limitation) on the minimum investment which the investor can make are subject to more detailed regulation by the MFSA under the Investment Service Rules, particularly with respect to the fund's investment objectives, policies, and restrictions.

A non-UCITS fund (whether made available to the retail market or to professional investors) cannot benefit from the passporting rights under the UCITS Directives. A non-UCITS fund which qualifies as an alternative investment fund may make use of passporting rights under the AIFMD. The MFSA will only issue a CIS license to a non-UCITS retail fund if it is satisfied that the fund will comply with the relevant regulations and that its directors and officers — or, in the case of a trust, its trustees — are fit and proper persons to carry out the functions required of them under the Investment Services Act.

The MFSA will consider the nature of the fund and the kind of investors to whom it will be marketed. It also will look into the experience and track record of all parties who will be involved with the fund. Such service providers should be of good standing and should be competent to perform the services for which they will be retained by the fund.

In the case of an overseas-based scheme that is already supervised by a primary regulator who is deemed to be competent and reliable, the MFSA adopts a less intrusive stance. A significant degree of reliance is placed on the fact that the applicant is already supervised by a competent and experienced primary regulator.

The application process takes approximately three months to complete, depending on the standing and repute of the fund promoters and the service providers and the financial instruments in which the fund intends to invest. At the end of this period, the MFSA will issue the necessary licenses to the fund and, in case of an umbrella fund, all its sub-funds.

As a general rule, the custodian of a non-UCITS retail fund must be established in Malta, but alternative custodial arrangements may be considered by the MFSA, as long as those arrangements provide appropriate protection for unit holders and for the fund's assets.

Preferably, the fund management company of a non-UCITS retail fund should have an established place of business in Malta. The MFSA has the power to exempt an overseas fund management company of sufficient standing and repute from the licensing requirements.

### **Professional Investor Fund and Alternative Investment Fund**

The professional investor fund (PIF) structure was designed for fast-track regulatory approval of funds aimed at investors sophisticated enough to do their own due diligence. A PIF is a non-retail fund that can be private or public in nature. Since PIFs are considered to be too risky for the public at large, only certain types of investors qualify to invest in them. PIFs also qualify as alternative investment funds.

Malta's EU membership in May 2004 generated substantial interest from fund promoters interested in using Malta as the domicile of choice for their funds. The promoters of the PIFs licensed so far by the MFSA originate from a number of jurisdictions, such as Canada, the Czech Republic, Egypt, Greece,



Guernsey, Italy, Liechtenstein, Norway, South Africa, Switzerland, Turkey, the United Kingdom, and the United States. The investment strategies of these PIFs range from investing in the foreign exchange markets, investing in traditional instruments such as equities and debt securities, to investing in commodities, real estate, private equity, and insurance policies. Other PIFs are funds of funds or invest through a number of managed accounts or selected trading advisors.

Certain funds achieve their investment strategies by investing through trading companies incorporated outside Malta. A number of these funds have appointed a fund administrator in Malta, while others have opted to engage an administrator based overseas.

The MFSA has introduced the concept of cross sub-fund investment for professional investor funds targeting qualifying or extraordinary investors. A sub-fund of a professional investor fund may invest up to 50 per cent of its assets in units of one or more sub-funds within the same professional investor fund, subject to this being permitted in the offering document of the professional investor fund. The memorandum of association of the SICAV must elect to have assets and liabilities of each sub-fund comprised in that SICAV treated as a patrimony separate from the assets and liabilities of each other sub-fund in the SICAV. The target sub-fund may not itself invest in the sub-fund that is to invest in the target sub-fund. Where the manager of the sub-fund is the same as, or an affiliate of, the manager of the target sub-fund, only one set of management, performance, redemption, and subscription requirements would apply. For purposes of compliance with capital requirements, cross-investments are counted once. Furthermore, any voting rights acquired by the sub-fund in the target sub-fund would be disappplied.

PIFs licensed prior to 22 July 2013 have the option to remain classified as professional investor funds and subject to the professional investor fund regime only if they are managed by an investment manager that falls within the *de minimis* exemption of the AIFMD, or are self-managed funds availing themselves of the *de minimis* exemption.

The MFSA has recently declared that as from 1 June, 2015, an EU AIFM may not set up a professional investor fund but may only set up an AIF. A *de minimis* EU AIFM can only establish a PIF; however, if the fund manager transitions to an EU AIFM, the fund will have to be converted to an AIF. A third-country fund manager can establish a PIF or an AIF, subject to compliance with special provisions applicable to non-EU AIFMs managing EU AIFs. A self-managed *de minimis* fund can only be established as a PIF. A self-managed fund which is above threshold can only be established as an AIF.

## **Pension Funds**

### *Pension Schemes*

The Maltese government currently provides a mandatory minimum first pillar pension to those who qualify. Following various reforms over the years, the

Special Funds (Regulation) Act<sup>22</sup> was enacted in 2002 to create a framework aimed at supplementing the first-pillar pension.

This reform followed the Social Security Act of 1987, which had consolidated the previous laws (the Old Age Pension Act of 1948 and the National Assistance Act of 1956). The Retirement Pensions Act<sup>23</sup> was enacted in 2011, and was brought into force on 1 January 2015. It strengthens the regulatory framework for the introduction of second pillar and third pillar pension schemes in Malta.

The Special Funds (Regulation) Act regulates second pillar and third pillar pensions in Malta. It provides for, *inter alia*, the registration, application, and regulation of retirement schemes and funds as well as retirement scheme administrators (RSAs) and retirement fund administrators (RFAs). Retirement schemes are usually established in the form of a trust (the scheme document), though they also can be in the form of a contractual arrangement between the contributors and the RSA.

The Special Funds (Regulation) Act recognizes overseas retirement plans that are retirement schemes established under a foreign law. Subject to eligibility requirements, overseas retirement plans may invest in retirement funds set up in Malta under this Act.

The law provides for the regulation of RSAs and RFAs, particularly regarding their appointment and registration, duties, remuneration, removal, and liability. Applicants seeking to operate as RSAs that already possess a Category 2 or Category 3 investment services license or a license under the Trust and Trustees Act need not go through the full application process, but may follow an abridged version. It is a requirement for an RSA to be a company operating in Malta (though it may have its head office in another country approved by the MFSA).

The Special Funds Act empowers the MFSA to issue rules applicable to retirement scheme administrators and retirement funds. The Standard Operational Conditions issued under the Special Funds Act contain the investment guidelines for retirement scheme administrators. An appendix to these conditions also outlines the investment restrictions applicable to retirement funds. These rules were drafted for occupational pension schemes.

However, the MFSA has, over the years, registered several retirement scheme administrators offering personal pension plans. In this case, the rules outlined above apply, but with significant relaxations primarily relating to dispensations with certain investment restrictions.

The MFSA has issued new rules which are to apply to retirement schemes in Malta and which clarify the position in relation to investment restrictions for personal pension plans. However, these new rules should not change the position in relation to investment restrictions for personal pension plans.

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22 Chapter 450 of the Laws of Malta.

23 Chapter 514 of the Laws of Malta.

Retirement schemes and funds require prior authorization by the MFSA to operate as such. Throughout the application process, the applicant can discuss the application with the MFSA in an ongoing process, allowing the applicant to negotiate its particular requirements with the MFSA. The application document that needs to be filled in order to register a retirement scheme in Malta must be accompanied by:

- A description of the nature of the scheme;
- The retirement scheme document;
- A business plan;
- Particulars of the retirement scheme;
- A one-time application fee;
- The terms of appointment of the auditor (and actuary, in the case of a defined benefit scheme); and
- Details of any material contracts (e.g., with custodians).

There are currently 34 retirement schemes duly licensed by the MFSA.

#### *Retirement Pensions Act*

The Retirement Pensions Act was published in the *Government Gazette* on 5 August 2011, and was brought into force on 1 January 2015. It is intended to replace the Special Funds (Regulation) Act for the regulation of second pillar and third pillar pensions in Malta. This new Act remains focused on the protection of members and beneficiaries of a retirement scheme and funds. Although it retains a very similar approach to the Special Funds (Regulation) Act with regard to occupational and private pensions, it will clarify some points of doubt under the previous law. Some notable developments are:

- A clear distinction between second and third pillar pensions;
- Regulation of back-office administrative services providers to the pension industry;
- Specific regulation of occupational pensions, including the mandatory appointment of auditors and actuaries in certain scenarios; and
- More powers and duties to the MFSA, including closer cooperation with the European Insurance and Occupational Pensions Authority (EIOPA).

#### *Qualified Recognized Overseas Pension Schemes*

In December 2009, the MFSA also confirmed that HM Revenue and Customs (HMRC) in the United Kingdom will consider, on a case-by-case basis, pension schemes established in Malta as being eligible for Qualified Recognized Overseas Pension Schemes (QROPS) status. Malta also has registered interest in the structuring of other foreign retirement schemes, such as Qualifying Non-UK Pension Schemes (QNUPS) and Institutions for Occupational Retirement Pensions (IORP).

## Insurance Business

### Legislative and Regulatory Framework

Malta is a growing insurance market, with 60 authorized insurance undertakings (including protected cells) writing a total gross written premium (GWP) of €2,580 billion during 2013. Malta's major selling points are cell legislation, the country's firm but flexible regulatory approach, and cost-effectiveness.

The insurance business in Malta is regulated by two separate but complementary pieces of legislation: the Insurance Business Act<sup>24</sup> and the Insurance Intermediaries Act.<sup>25</sup> These two Acts together regulate all operators in the insurance sector — direct insurers, reinsurers, affiliated (captive) insurers, insurance agents and sub-agents, brokers, and insurance managers — by imposing requirements for authorization from or enrolment with the MFSA. Furthermore, both Acts subject all authorized or enrolled insurance operators to the ongoing supervision of the MFSA.

Largely modeled on United Kingdom law, the Insurance Business Act implements the requirements of the EU Consolidated Life Insurance Directive,<sup>26</sup> as amended, and the First,<sup>27</sup> Second,<sup>28</sup> and Third<sup>29</sup> Non-Life Insurance Directives. The Act regulates the authorization and supervision of direct insurers, reinsurers, affiliated (captive) insurers, and insurance managers and agents operating in and from Malta.

In effect, the Insurance Business Act stipulates that no person may carry on or hold itself out as carrying on the business of insurance in or from Malta unless authorized by the competent authority.

The MFSA considers applications for authorization on a case-by-case basis. Furthermore, the authorization granted also may be restricted to the business of reinsurance or may be issued subject to any condition that the MFSA may deem necessary to impose. The MFSA has issued several detailed Insurance Rules under the Insurance Business Act (the MFSA Insurance Rules) which, *inter alia*, set out the application procedure to be followed by applicants for authorization and that establish the own funds, technical reserves, and

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24 Chapter 403 of the Laws of Malta.

25 Chapter 487 of the Laws of Malta.

26 Directive 2002/83/EC of 5 November 2002 concerning life assurance.

27 Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations, and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance.

28 Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations, and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC.

29 Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations, and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive).

solvency margins required for insurers, depending on the class or classes of insurance in which the applicant intends doing business.

Indeed, the insurance sector is now subject to a set of regulations that have been issued by the Minister in the form of legal notices establishing, *inter alia*:

- The criteria for the sound and prudent management of insurance businesses;
- The accepted levels of an insurance company's assets and liabilities (i.e., maintenance of assets in Malta, margins of solvency, established minima for guarantee funds, deposit of assets, currency matching, and localization);
- The format of the accounts that must be produced by insurance companies;
- Regulations on linked long-term contracts of insurance (such contracts also are regulated *ad hoc* by the MFSA Investment Services Guidelines);
- The system of administrative penalties that may be imposed by the MFSA in case of non-compliance and non-observance of rules and regulations;
- Regulations on acceptance and approval of auditors retained by insurance companies;
- The reorganization and winding-up of insurance undertakings; and
- The business of affiliated insurance companies.

These regulations have been complemented by 21 insurance directives that establish own funds requirements, criteria for fitness and properness of insurance companies, information to be disclosed to policyholders, the regulation of protection and indemnity clubs, regulations on insurance agents and managers, regulations on funds held in a fiduciary capacity by an insurance operator, content and form of insurance advertisements, preparation of business statements, close links, assistance insurance, and the business of affiliated insurance. Another 21 directives were issued by the MFSA on 30 April 1999 to regulate insurance intermediaries.

The European Passport Rights for Insurance Undertakings Regulations 2004, which came into force on 1 May 2004, implement the Consolidated Life Assurance Directive and the First, Second, and Third Non-Life Insurance Directives. Under these regulations, an insurance undertaking that is already licensed in its home state (being an EU or EEA jurisdiction) to pursue the activity of direct insurance is entitled to establish a branch in Malta or provide services in Malta without being required to obtain a license from the MFSA.

In order to benefit from this entitlement, the insurance undertaking has to comply with notification procedures provided for in the regulations, which reflect the applicable EU Insurance Directives. Insurance undertakings also would have to comply with the MFSA's Conduct of Business Rules, as these apply to the operations of such undertakings. These regulations also extend the passport entitlement to Maltese insurance undertakings intending to offer services or open branches in other EU or EEA jurisdictions.

### **Captive Insurance Companies**

Captive insurance is regulated by the MFSA in terms of the Insurance Business Act and the Insurance Business (Companies Carrying on Business of Affiliated Insurance) Regulations 2003 issued under the Act.

Captive insurance is termed ‘affiliated insurance business’ in Maltese law and it is defined as:

‘. . . the business of a company authorized in terms of the Act, whose head office is in Malta and which carries on business of insurance restricted to risks originating with shareholders or connected undertakings or entities and includes business carried by an affiliated reinsurance company.’

A captive or affiliated insurance company may write risks originating from a wide range of persons, including parent companies; associated or group companies; individuals or other entities having a majority ownership or controlling interest in the captive; and members of trade, industry, or professional associations insuring risks related to the particular trade, industry, or profession.

Affiliated insurance companies enjoy ‘regular insurer’ status in Malta and therefore have easy access to the reinsurance market. They benefit from reduced licensing and regulatory requirements, favorable tax treatment, and access to Malta’s extensive double-taxation network.

### **Banks and Financial Institutions**

#### **Banking Act**

Banking business in Malta is regulated by the Banking Act,<sup>30</sup> which derives its key reference points for the regulatory concepts and supervisory practices from the relevant EU directives. According to the Banking Act, banks are subject to licensing and supervision by the MFSA which has issued banking rules (the ‘Banking Rules’). Prior to 1 January 2002, the Central Bank of Malta was the regulator of banks and financial institutions.

The ‘business of banking’ means the business of a person who accepts deposits of money from the public, withdrawable or repayable on demand or after a fixed period, or who borrows or raises money from the public including by the issue of securities, for the purpose of lending such money to others or investing such sums for its own account and risk. This applies whether the person does so as principal or as agent and if carried out as a regular feature of his business. The solicitation of deposits likewise falls within the statutory definition.

Banks are either set up with a head office in Malta or as a branch or a subsidiary of a foreign bank. Foreign banks also may open a representative office in Malta for the promotion or assistance of banking business carried on overseas.

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<sup>30</sup> Chapter 371 of the Laws of Malta.

Both branches and subsidiaries operating in Malta are subject to the regulatory and supervisory authority of the MFSA. However, in the case of a subsidiary or branch operating in Malta that is fully or partly owned by a foreign person, the MFSA may share its supervisory duties with other foreign competent authorities on the basis of international agreements or on the basis of reciprocity agreements. The MFSA monitors and supervises banks that are deemed to be parent undertakings on a consolidated basis.

In addition to the business of banking, the business activities of a bank also may include the following activities: financial leasing, payment services, participation in securities issues, portfolio management and advice, safekeeping and administration of securities, safe custody services, issuing electronic money, and others. A bank might be required to obtain more than one license, depending on its proposed activities.

### **European Credit Institutions**

Since Malta became a full member of the EU on 1 May 2004, any bank authorized by an authority in the EU or the EEA (a European Credit Institution, ECI) can now use its European passport to establish a branch in Malta or provide crossborder services in Malta without the requirement of obtaining a separate license from the MFSA. A number of conditions need to be satisfied before this right may be availed of, including that the ECI must notify its home state regulatory authority of its intention to establish a branch in Malta or to provide crossborder services in Malta.

In the case of an ECI operating in Malta through a branch, the home state authority of the ECI is afforded the right, after having informed the MFSA, to conduct onsite verifications in Malta of certain information held by the ECI. The foreign authority also may request the MFSA to carry out such verifications. The MFSA also may itself carry out onsite verifications of branches established in Malta to discharge its responsibilities under the applicable law.

Applicable subsidiary regulations also provide for the exercise of passporting rights by Maltese credit institutions. Effectively, therefore, a license to carry on the business of banking issued by the MFSA entitles the bank to establish branches or to provide crossborder services in all the states of the EU or the EEA with minimal formalities. This has proved to be of significant interest to promoters who have chosen to use Malta as a platform for launching their banking activities in Europe.

### **Financial Institutions**

The Financial Institutions Act<sup>31</sup> regulates non-bank financial institutions, which are institutions that do not fund their activities through the taking of deposits.

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<sup>31</sup> Chapter 376 of the Laws of Malta.

The activities that may be undertaken by financial institutions may include lending, financial leasing, venture or risk capital, payment services, issuing and administering means of payment, underwriting share issues and participation in such issues and others, money broking, and issuing of electronic money. Financial institutions are subject to licensing and supervision by the MFSA.

### **Application for Bank License**

Obtaining a license under the Banking Act or the Financial Institutions Act broadly involves satisfying specific requirements. The applicant for a license must submit the requisite application for authorization, along with the required documentation and information. The entity must have own funds, whether in euros or in another currency acceptable to the MFSA, amounting to not less than €5 million or such other amount as may be established by the MFSA. The amount of own funds for financial institutions is established by the MFSA. The Capital Requirements Regulations (the ‘CRR’) and the Capital Requirements Directive IV (the ‘CRDIV’), which together constitute the CRD IV Package, were published in the *Official Journal* (OJ) of the European Union on 27 June 2013. The CRD IV Package sets out the legal framework for the prudential regulation and supervision of credit institutions.

Member States are required to adopt and publish the laws, regulations, and administrative provisions necessary to comply with the CRDIV. Credit institutions shall refer to the provisions in the CRDIV which shall apply until such time local legislation transposing the latter comes into force.

The CRR is directly applicable in all Member States and does not require national transposition. With the exception of certain articles, the CRR is applicable as from 1 January 2014.

As a result of the above, Directive 2006/48/EC and Directive 2006/49/EC have been repealed with effect from 1 January 2014. The CRDIV package will be complemented by well over 100 Binding Technical Standards (BTS), i.e., Regulatory/Implementing Technical Standards (R/ITS), Guidelines, and Lists which will be drafted by EBA and issued by the EU Commission as (automatically binding) EU Regulations.

Since the CRR covers most of the provisions which were found in Banking Rules, a number of such Rules have either been repealed in their entirety, or amended to remove those provisions covered by the CRR which no longer need transposition. Amendments to Banking Rules have also taken place to transpose provisions found in the CRDIV.

Pursuant to the above-mentioned rules, at least two individuals must effectively direct the licensed entity’s business in Malta. All qualifying shareholders, controllers, and all persons effectively directing the business must satisfy the ‘fit and proper’ test.



The MFSA is bound to decide on an application for a license within six months (three months in the case of a financial institution) of receipt of application or submission of such additional information as it may request the applicant to provide. In any event, an application must be decided on within 12 months of its receipt (six months in the case of a financial institution).

Licensed banks and financial institutions must at all times comply with the conditions of the particular license. The MFSA also has extensive rights to request information and to carry out inspections for regulatory purposes, along with other rights.

### **Payment Institutions and Electronic Money Institutions**

The Payment Services Directive<sup>32</sup> was transposed into Maltese law by means of, *inter alia*, the Financial Institutions Act. This resulted in the introduction of payment institutions being recognized and regulated under the Act. Payment institutions may engage in activities such as providing services enabling cash to be placed on a payment account as well as all the operations required for operating a payment account, issuing and/or acquiring payment instruments, and money remittance.

‘Electronic money institutions’ refer to institutions other than a bank that issue means of payment in the form of electronic money. These institutions are governed by the Financial Institutions Act, by recent amendments to the legislation.

### **Winding Up of Credit Institutions**

The EU Credit Institutions Directive<sup>33</sup> has been transposed into Malta by virtue of the Credit Institutions (Reorganization and Winding Up) Regulations 2004 (Credit Institutions Regulations), issued under the Banking Act. The Credit Institutions Regulations apply to EU and EEA Member States.

The Credit Institutions Regulations broadly provide that it is the home Member State of a credit institution<sup>34</sup> that will have exclusive jurisdiction to open winding up proceedings in relation to the credit institution (and its branches set up in host countries). All the winding up proceedings will be governed by the insolvency law of the home Member State (the *lex concursus*), subject to specified exceptions. It is not possible for a Member State in which the credit institution has a branch to open any local secondary insolvency proceedings in relation to the insolvent credit institution.

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32 Directive 2007/64/EC of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC, and 2006/48/EC and repealing Directive 97/5/EC.

33 Directive 2001/24/EC of 4 April 2001 on the reorganization and winding up of credit institutions.

34 The home Member State is the Member State in which the head office of the credit institution is situated and in which the credit institution has been authorized, in accordance with Directive 2000/12/EC, arts 4–11.

The Credit Institutions Regulations also apply to credit institutions not having a head office within a Member State, when such institution has branches in at least two Member States. Under the Credit Institutions Regulations, each such branch would be treated individually, although there must be cooperation between the respective authorities of each Member State where a branch is located.

### **Corporate Service Providers**

The Company Service Providers Act, 2013 (the 'Act') came into force on 24 December 2013. Pursuant to the Act, corporate or company service providers ('CSPs') have an obligation to register with the Malta Financial Services Authority ('MFSA'). The MFSA published rules that supplement the Act's legal framework and include the more detailed regulatory requirements binding CSPs.

A CSP must register with the MFSA if it is a natural or legal person residing or operating in or from Malta and by way of business:

- Forms companies or other legal entities; or
- Acts (or arranges for another person to act) as a director or company secretary or as a partner in a partnership or some similar position or office in other legal entities; or
- Provides a company, partnership, or other legal entity with a registered office, business correspondence or administrative address, or other related corporate services.

### **Key Criteria for Registration**

The 'fit and proper person' test is the criterion by which a person's suitability to provide the services and to be registered as a CSP will be determined by the MFSA. Its elements are amply described in the rules issued by the MFSA in this respect.

### **Capital Markets**

#### **Applicable Legislation**

A number of laws have a direct impact on capital markets in Malta, including:

- The Companies Act;
- The Financial Markets Act<sup>35</sup> and the MFSA Listing Rules issued under this Act;
- The Prevention of Financial Markets Abuse Act,<sup>36</sup> and

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<sup>35</sup> Chapter 345 of the Laws of Malta.

- The Securitization Act.<sup>37</sup>

### **Prospectus**

The Companies Act, inspired to a large degree by its United Kingdom counterpart, sets the backdrop for all corporate financial activity in Malta. As a general rule, Maltese company law requires that whenever a public company wishes to offer securities (equity or debt securities) to the public, the company must first publish a prospectus.

The prospectus should contain all information that is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses and prospects of the issuer (and of any guarantor), and of the rights attaching to such securities. Private companies are precluded from offering to the public any shares in or debentures of the company.

Under the Listing Rules (discussed in the next subsection), a prospectus also must be published whenever a company wishes to admit securities to trading on a regulated market.

Malta has transposed the provisions of the Prospectus Directive.<sup>38</sup> Accordingly, under Maltese law, the requirements for the drawing up, scrutiny, and distribution of the prospectus when securities are offered to the public or admitted to trading are largely equivalent to those of the other EU Member States.

### **Listing Rules**

The Financial Markets Act provides for the authorization of regulated markets, central securities depositories, and for orderly trading in transferable securities. This law is an important pillar in Malta's capital markets legislation and establishes the Listing Authority (the MFSA), whose functions include the authorization of admissibility of financial instruments to any recognized list and the issuance of the Listing Rules.

The Listing Rules are a detailed set of rules that currently govern admissibility to listing, methods of bringing securities to listing, continuing obligations, takeover procedures, and related matters. The Listing Rules transpose the provisions of Directive 2004/109/EC<sup>39</sup> and the provisions of the Takeover Bids Directive.<sup>40</sup>

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36 Chapter 476 of the Laws of Malta.

37 Chapter 484 of the Laws of Malta.

38 Directive 2010/73/EC (EU) of 24 November 2010 on the prospectus to be published when securities are offered to the public or admitted to trading.

39 Directive 2004/109/EC of 15 December 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

40 Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

## **Taxation**

### **Legislative Background**

Malta's tax legislation is modeled on United Kingdom tax laws and reference is frequently made to English case law for the purpose of interpretation. The Income Tax Act,<sup>41</sup> the Income Tax Management Act,<sup>42</sup> and the Duty on Documents and Transfers Act<sup>43</sup> are the three most relevant pieces of legislation.

Maltese fiscal laws have been subject to various amendments over the years. Malta has evolved from its initial tag as an 'offshore' center in the 1980s to an 'onshore' financial center within the EU. Malta's taxation system was scrutinized in detail by the EU at the time of Malta's accession in 2004. Certain changes were made in 2007 to Malta's tax system to address concerns raised by the EU Commission during these discussions, and Malta has since then consolidated its attractiveness as a significant jurisdiction from which business can be conducted within the EU and in a tax-efficient manner.

Malta has retained the cornerstone of its tax system, the imputation system of taxation of dividends under which shareholders are imputed with the tax suffered by the company on distributed profits. Apart from the imputational tax credit, tax refunds are now available in varying degrees to all shareholders of Maltese companies without discrimination and irrespective of whether or not the company is deriving such profits from outside Malta.

### **Taxation of Individuals and Companies**

#### *Income Tax*

Income tax is payable on income and capital gains derived from the transfer of certain chargeable assets, including:

- The transfer of the ownership of or usufruct over immovable property or any rights thereon;
- The transfer of the ownership of or usufruct over or from the assignment or cession of any rights over any securities, business, goodwill, copyright, patents, trade marks, and trade names;
- Gains or profits arising from a transfer of the beneficial interest in a trust; or
- The transfer of ownership of or usufruct over or from the assignment or cessation of any rights over any interest in a partnership.

Maltese resident individuals are taxed at progressive rates, with the highest rate being 35 per cent, while Maltese companies are taxed at a flat rate of 35 per cent. However, the availability of tax refunds for shareholders of

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41 Chapter 123 of the Laws of Malta.

42 Chapter 372 of the Laws of Malta.

43 Chapter 364 of the Laws of Malta.

Maltese companies in certain cases may significantly lower the effective tax burden.

A company is considered resident in Malta for tax purposes if it is incorporated in Malta, irrespective of its place of management and control. Non-Maltese companies whose control and management are exercised in Malta also are considered to be tax resident in Malta, but will only be charged tax on their income/capital gains arising in Malta and on any income arising overseas and remitted to Malta.

Local investment income (and certain foreign-source investment income when paid through an authorized financial intermediary) is subject to a final tax liability of 15 per cent. Non-residents are exempt from tax on any interest arising in their favor from Malta sources.

#### *Stamp Duty*

The transfer of shares and other securities gives rise to a liability for payment of stamp duty under the Duty on Documents and Transfers Act. Documents by which marketable securities are transferred by or to any person resident in Malta attract stamp duty. However, an exemption from stamp duty in the case of acquisitions and/or disposals of marketable securities can be obtained if any of the following conditions are satisfied:

- The Maltese company has more than half of its ordinary share capital, voting rights, and rights to profits held by persons who are not resident in Malta (and who are not owned or controlled directly or indirectly by persons resident in Malta) and it has been determined that the majority of the company's business interests are situated outside Malta;
- The Maltese company carries on business or has business interests to the extent of more than 90 per cent outside Malta;
- The Maltese company is licensed as a CIS; or
- The Maltese company holds an investment services license issued under the Investment Services Act and its activities comprise the provision of management, administration, safekeeping, or investment advice to CISs.

#### *Value-Added Tax*

As a general rule, value-added tax (VAT) is charged on every supply of goods or services that takes place in Malta made for a consideration by a taxable person acting as such. The standard VAT rate in Malta is 18 per cent. A reduced rate of seven per cent applies to hotel accommodation and licensed premises, and a reduced rate of five per cent applies to supply of electricity, works of art, collectors' items and antiques, certain confectionery, medical accessories, and printed matter, among others.

A zero per cent rate applies to exports, intra-Community supplies made to taxable persons, international transport, and the supply and repair of

commercial aircraft and vessels. Furthermore, other supplies are exempt from VAT in Malta, including the transfer and certain rentals of immovable property and insurance, banking, and certain investment services.

#### *Double-Taxation Agreements*

Malta has concluded double-taxation agreements with a number of countries to ensure that the same income is not taxed twice in crossborder situations. Appendix A provides a detailed list and the applicable maximum rates of withholding tax payable by persons from treaty countries when making payments of dividends, royalties, or interest to a Maltese person pursuant to the relevant double-taxation agreement.

Most of the double-taxation agreements to which Malta is a party are principally modeled on the Organization for Economic Cooperation and Development (OECD) Model Double Taxation Convention on Income and on Capital. The wide treaty network makes Malta an attractive jurisdiction for the location of companies that receive income or capital gains from qualifying treaty countries.

#### **Refunds and Participating Holding Exemption**

Subject to certain conditions, tax refunds may be claimed and obtained by the shareholders of a Maltese company upon a distribution of dividends by the company.

Refunds are available in respect of taxed profits allocated to the foreign income account (FIA) and the Maltese taxed account (MTA). The FIA consists of an exhaustive list of incomes that are considered to arise outside Malta or are closely connected to such incomes.

It mostly refers to passive income, though trading profits also may be allocated to the FIA in certain circumstances. The MTA is a default taxed account to which all taxable profits that have not been allocated to the FIA, the final taxed account, and immovable property account would be allocated.

The standard refund is six-sevenths of the tax paid by the company. This is reduced to five-sevenths of the tax paid when the company's income consists of passive interest and royalties and to two-thirds of the tax paid when the company's income was allocated to the FIA and double-taxation relief is claimed.

In this case, a type of tax sparing relief (known as the 'flat rate foreign tax credit') at a rate of 25 per cent will be available to the company when computing its tax liability and effectively reduces the tax it has to pay. Refunds are gross of actual double-taxation relief such that if any material foreign tax is suffered, this may significantly reduce the net Maltese tax paid.

Furthermore, when income or gains allocated to a company's FIA are derived from a 'participating holding' (PH) or from the transfer of a PH, the company

may opt to claim a participation exemption and not pay any tax on such income or gains. Alternatively, if the company opts to pay tax, the refund available to shareholders is 100 per cent of the Maltese tax paid by the company.

A PH exists if a Maltese resident company has an equity holding (including units in funds and interests in a partnership) in a non-resident company or in the case of certain partnerships where such holding confers an entitlement to at least 10 per cent of any two of the following rights: a right to vote; a right to profits available for distribution; and a right to the assets available for distribution on winding up.

Other commonly utilized criteria for a PH are when the Maltese company has an investment which represents a total value of at least €1,164,000 (or the equivalent in other currencies) and the holding is held for an uninterrupted period of 183 days or when, on account of its holding (and even if it holds less than the 10 per cent of the equity shares referred to above), the company has a certain level of control and/or other rights (e.g., share preemption rights, right to appoint directors) in the entity not resident in Malta. In respect of dividends received from a PH, the exemption applies only if one out of three anti-abuse tests is satisfied. The test would be satisfied if:

- The holding is in an entity incorporated or resident in the EU;
- The foreign entity is subject to any foreign tax of at least 15 per cent; or
- The foreign entity does not derive more than 50 per cent of its income from passive interest or royalties.

If the holding does not fall within any of these three ‘safe harbors’, the ‘participation exemption’ can still be availed of if:

- The PH or equity held by the Maltese company is not a ‘portfolio investment’ as defined in the Income Tax Act; and
- The foreign company has already been subject to any foreign tax at a rate of five per cent or more, or the ‘passive interest or royalties’ of the foreign company have already been subject to foreign tax at a rate of five per cent or more.

### **Features Relevant to Crossborder Tax Structures**

In view of Malta’s full imputation system of taxation of dividends, no further Maltese tax is payable by the shareholders in respect of any taxed profits received from a Maltese company by way of dividend. Non-resident shareholders are not obliged to file a Maltese tax return in respect of dividends received.

Subject to certain conditions, refunds are not taxable in the hands of non-resident shareholders and are paid by the Commissioner of Inland Revenue in Malta on production of an appropriate dividend voucher. Refunds of Maltese tax

must be paid by the Commissioner of Inland Revenue to the respective shareholder no later than 14 days after they become due. A claim for a refund is time-barred after four years. Refunds are payable in the same currency in which the profits were charged to tax.

No withholding taxes apply on royalties and interest payable to non-residents. This exemption applies provided that the person is not engaged in any trade or business in Malta to which the interest or royalties are effectively connected and provided that the beneficial owner is non-resident and is not owned and controlled by, directly or indirectly, nor acts on behalf of, individuals who are ordinarily resident and domiciled in Malta.

There are no Maltese withholding taxes on profits or capital gains derived by non-residents on transfers of shares in companies which do not own, directly or indirectly, immovable property in Malta. This exemption is subject to the same beneficial ownership test as that applicable for royalties and interest.

### **Taxation of Investment Funds**

The tax treatment of collective investment funds set up in Malta and of the unit holders depends on whether the fund is a 'prescribed fund' or a 'non-prescribed fund'.

A prescribed fund is a fund set up in accordance with Maltese laws and which has at least 85 per cent of the value of its assets situated in Malta. A non-prescribed fund is principally a fund that has less than 85 per cent of the value of its total assets consisting of assets situated in Malta.

Prescribed funds are taxable only in respect of 'investment income', as defined under Maltese income tax laws, and income from immovable property situated in Malta. Non-prescribed funds are exempt from tax, except in respect of income from immovable property situated in Malta.

Non-Maltese resident unit holders are exempt from Maltese tax in respect of any profits or gains derived from the redemption and transfer of units in both prescribed and non-prescribed funds. Maltese resident unit holders are exempt from Maltese tax only in respect of transfer of securities listed on a stock exchange recognized under the Financial Markets Act, provided that these are securities in a CIS held in a prescribed fund.

### **Taxation of Trusts**

When at least one of the trustees of a trust is a person resident in Malta, tax is normally payable in Malta on all income attributable to the trust. Maltese fiscal law ensures that opting for a trust structure does not create a more fiscally onerous obligation than that which would otherwise be applicable had a trust not been used. For this reason, the rules on the taxation of trusts are based on the transparency model, whereby the authorities look through the trust and tax or exempt from tax (as the case may be) any transaction or party



to the trust in the same manner as they would have done in the absence of such a trust.

Therefore, since taxation in Malta is based on residency and domicile, when the beneficiaries of a trust are not resident in Malta and the trust has no income arising in Malta or the income is exempt (such as income from a Maltese bank account payable to a non-resident), there will be no tax implications under Maltese law.

On the other hand, where the beneficiaries of a trust are Maltese resident or there is income arising in Malta, then the income of a trust is taxable in Malta and the trustees are liable to pay tax unless the trustees have distributed the trust income by no later than 31 March of each year (in which case this income will be taxable in the hands of the beneficiaries upon a distribution being made).

Maltese law also allows the possibility for a licensed trustee to irrevocably elect to have the trust treated as a company ordinarily resident and domiciled in Malta for tax purposes. This is only possible where the trust is established by an instrument in writing and where the income attributable to the trust consists of interest, royalties, capital gains, and income from investments. In this case, when distributions are made by the trustee to the beneficiaries, they would be considered as dividends distributed by a company ordinarily resident and domiciled in Malta to the shareholder, and shall be treated as such. The election to be treated as a company can give rise to numerous alternative planning opportunities and opens up the benefits of the Maltese corporate regime, and its full imputation system of taxation and shareholder refunds, also to trusts. The election can also facilitate the recognition of the trust for Double Tax Treaty purposes.

### **Taxation of Foundations**

The tax treatment of foundations is regulated by the ‘Foundations (Income Tax) Regulations, 2010’ (hereinafter referred to as the ‘Foundation Rules’).

For Maltese income tax purposes, unless a foundation opts to be taxed as a trust, the default tax position is that a foundation is treated in the same way as a company that is ordinarily resident and domiciled in Malta. All tax provisions regulating Maltese companies will therefore apply equally to a foundation.

The standard applicable tax rate for a foundation is the same as the corporate tax rate of 35 per cent. The tax refunds applicable to a Maltese company also would be available to the beneficiaries of a foundation.

Accordingly, such beneficiaries may claim tax refunds on a distribution made by the foundation in the same way as do shareholders of a Maltese company. This would reduce the effective tax leakage in Malta after the claim of tax refunds by the beneficiaries to between five per cent and 10 per cent, depending on the nature of the income derived by the foundation and the tax account from which dividends are distributed.

A foundation may elect to be taxed in accordance with the applicable provisions dealing with trusts for the purposes of Malta's tax legislation. If the foundation elects to do so, all provisions regulating the taxation of trusts would apply to a founder, the foundation, and its beneficiaries (as discussed in the previous subsection 'Taxation of Trusts'). Foundations enjoy access to the vast network of double-taxation treaties to which Malta is a party. If the foundation has established segregated cells, each cell would, for tax purposes, be deemed to be a separate foundation and taxed accordingly.

Foundations enrolled as Voluntary Organizations or, if not enrolled, which are established for a social purpose and with a non-profit making motive, may opt to be treated according to the applicable tax regulations on companies. In the case that such an option is not availed of, the foundation shall be chargeable to tax in accordance with the progressive rates under the Income Tax Act, provided that, in the case of non-proprietary foundations, the applicable rate of tax shall be the flat rate of 30 per cent.

Maltese foundations should also qualify under the definition of a 'person'<sup>44</sup> for the purpose of obtaining access to the vast network of Double Tax Treaties to which Malta is a party.

## **Employment Law and Work Permits**

### **Contract of Employment**

Maltese labor law is essentially based on the contractual relationship between employer and employee, with certain controls being imposed by statutory intervention. While certain conditions of employment are governed by statute, other conditions (such as restraint of trade) are unregulated, and parties can therefore agree on whatever terms and conditions are acceptable to them and are reasonable in the eyes of the judicature.

The Employment and Industrial Relations Act (the Employment Act),<sup>45</sup> which regulates some conditions of employment and contracts of service, currently governs Maltese labor law. This Act amended the pre-2002 legislation in this field of law and introduced the necessary legal framework for Malta to come in line with other European jurisdictions.

Under Maltese law, every employee must have a written contract of employment or a statement of minimum conditions. A contract of employment may be written or verbal. In the case of a verbal contract, the employer has eight working days to give the employee either a contract of employment or a written

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44 The OECD Commentary provides that the definition of the term 'person' is not exhaustive and, thus, in applying the treaty one should interpret the term widely. The term 'person' includes any entity that, although not incorporated, is treated as a body corporate for tax purposes, thus allowing for a foundation to possibly fall within the meaning of the term 'person' for treaty purposes.

45 Chapter 452 of the Laws of Malta.

statement of minimum conditions in accordance with the Information to Employees Regulations 2002. Such information includes normal rates of pay, overtime rates, hours of work, place of work, and leave entitlement.

Contracts of employment may be entered into for a fixed term or for an indefinite term. Fixed-term contracts or those entered into for a specified task are permitted as long as the employee is not continuously employed with the same employer on a fixed-term contract for more than four years. Thus, as soon as the four years are up, the employee's fixed-term contract of employment becomes an indefinite one, unless the employer has objective reasons to justify the renewal of the fixed-term contract. Casual employment also is possible.

### **Terms and Conditions of Employment**

#### *In General*

The currently applicable law regulates the principal terms of conditions of employment. Each of these is discussed in turn.

#### *Probationary Period*

The probationary period within which the employer may terminate the employment of the employee without assigning any reason is set at a maximum of six months for lower-grade employees. However, if the employee's employment is of a technical, executive, administrative, or managerial nature and the employee's wages are at least double the minimum wage during that year, the probationary period is usually set at one year.

#### *Working Time*

Working time in Malta is regulated by the Organization of Working Time Regulations 2003. The average working time is 40 hours a week, and overtime is common in most employment sectors.

#### *Minimum Holiday Provisions*

Employees are entitled to 192 hours' holiday time, which usually amounts to four working weeks and four working days of vacation leave per annum. This entitlement is exclusive of any public or national holidays, which add up to approximately 13 extra working days of leave, depending on the calendar year.

#### *Regulation of Sick and Other Leave*

There is a minimum sick leave provision specified by law, which amounts to two working weekdays of sick leave a year. However, most sectors are covered by a Wage Regulation Order that contains the minimum amount of sick leave that has to be given. Maternity leave, parental leave, and urgent leave also are regulated by statute.

*Protection of Business Interests*

An employer may, within strict limits, protect his legitimate business interests by the inclusion of restraint-of-trade, anti-solicitation, and confidentiality clauses in the contract of employment. Although penalty provisions linked with such clauses are generally unenforceable, reimbursement for training costs incurred also may be successfully sought by the employer if the employee terminates his employment within a specified period of time.

*Anti-Discrimination Provisions*

As in other European countries, the Constitution of Malta and Maltese employment statutes protect employees from discrimination on the basis of sex, religion, race, and other areas in which discrimination is prohibited. Discrimination against part-timers and persons employed on fixed-term contracts also is regulated.

*Termination of Employment*

Employees can be dismissed without notice for a good and sufficient legal cause. Employees on an indefinite-term contract also may be made redundant due to reorganization or if the company is in financial difficulty. Leading and managerial employees fall under the same rules as other employees as far as dismissal is concerned.

Notice money (severance pay) is only to be paid if the employee is made redundant. No other severance payment is necessary. The amount of notice money depends on the employee's length of service and is either regulated by the Employment Act or is agreed to in the contract of employment or collective agreement.

*Works Councils and Collective Bargaining*

Although union membership rates are on the decline, unions are popular in Malta. European works councils are regulated by statute and, although some larger companies have internal works councils, they are not widespread.

*Dispute Resolution*

Employment claims may be brought before the civil courts or before the Industrial Tribunal, depending on the nature of the claim. Decisions of the civil courts and of the Tribunal are quite predictable, and some reasoned speculation on the outcome can usually be made.

*Pay and Minimum Wage*

The present minimum wage is approximately €166 per week. Every employee must pay income tax and national insurance contributions, which are both payable to the government authorities by his employer. Under Maltese tax

law, an employee must pay tax in Malta on all income arising in or remitted to Malta.

The tax rates are set according to income brackets. As a rule of thumb, salaries of more than €9,300 per annum are taxed at 15 per cent, on an increasing scale, up to a maximum rate of 35 per cent.

### **Other Labor Legislation**

The Civil Code governs ‘contracts of letting of work and industry’ and ‘contracts of works or *locatio operis*’. Admittedly, these provisions form part of Maltese employment law in the wide sense of the term because, in practice, they regulate the legal relationship arising between a person engaging or employing another person (generally a freelancer) for a specific job. A turnkey project would be a typical example.

The Code of Organization and Civil Procedure<sup>46</sup> also is relevant with respect to service with the government of Malta. Under the Code of Organization and Civil Procedure, such service constitutes a special relationship governed by a separate legal regime. The conditions of employment of government employees are regulated by an *ad hoc* management code.

### **Work Permits**

#### *In General*

The Immigration Act<sup>47</sup> regulates, among other things, matters relating to the issuing of employment licenses to foreigners. The Act provides that no person can exercise any profession or occupation or hold any appointment, nor can he be employed by any other person or engage in any business in Malta, without a license from the pertinent authority.

#### *Work Permits for Citizens of European Union*

As of May 2011, EU citizens do not require an employment license to work in Malta. EU nationals can enter Malta and find work as if they were Maltese nationals, the only difference being that an EU national needs to obtain a residence registration certificate from the Department of Expatriates and Citizenship after he has been in Malta for three months.

Although the principle of free movement for EU citizens is respected by Malta, Bulgarian and Romanian nationals are still obliged by law to apply for a work permit as if they were non-EU nationals. However, in principle, the government of Malta will not refuse work permits for Bulgarian and Romanian nationals unless there is a strain on the local market caused by persons wishing to come to Malta for work.

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46 Chapter 12 of the Laws of Malta.

47 Chapter 217 of the Laws of Malta.

*Work Permits for Non-European Union Citizens*

Non-EU citizens always require a work permit in order to work in Malta. The permit may be obtained from the Employment and Training Corporation (ETC), with a validity period of one year.

A non-EU citizen wishing to be employed in Malta must have a genuine prospect of securing employment before entering Malta to work. Work permits are only issued to non-EU citizens if the employer proves that he has been unsuccessful in his efforts to fill a particular post with a Maltese citizen. Once the prospective employer has been identified, the applicant may be issued with an entry visa (if required) to attend an interview.

Once a work permit is obtained by a non-EU citizen, his dependants (spouse and children below 21 years of age) also are given the right of residence and the right to work in Malta upon application for and issuance of a valid work permit.

To apply for a work permit, a specific form has to be submitted to the ETC. This form must be accompanied by:

- An updated Curriculum Vitae of the applicant;
- Three passport-sized photographs;
- A certified copy of the applicant's identification card or passport;
- A covering letter explaining why the applicant should be granted a work permit; and
- Documentation from the employing company, including any other documentation as required by the authorities.

After submitting an application for a work permit to the ETC, the applicant may be required to undergo a medical assessment at a government clinic.

Once a work permit has been obtained from the ETC, the non-EU citizen must personally present his passport to the immigration authorities and have it stamped with the necessary permit(s). Non-EU citizens also may apply to the Department of Expatriates and Citizenship for a residence permit.

## **Legislation on Prevention of Money Laundering and Combating Terrorism Funding**

### **Legislative Framework**

The prevention of money laundering and combating the funding of terrorism in Malta is principally regulated by the Prevention of Money Laundering Act<sup>48</sup> and the Prevention of Money Laundering and Funding of Terrorism

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48 Chapter 373 of the Laws of Malta.

Regulations 2008,<sup>49</sup> issued under the Prevention of Money Laundering Act, and the Criminal Code.<sup>50</sup> The Regulations broadly reflect the EU directives on the prevention of money laundering and the funding of terrorism. Thus, the provisions of the Second Money Laundering Directive<sup>51</sup> are incorporated in the Regulations. The Regulations also transposed the provisions of the Third Money Laundering Directive<sup>52</sup> into Maltese law.

### **Participation in International Covenants**

Maltese law reflects the Forty Recommendations and the Nine Special Recommendations of the Financial Action Task Force (the FATF). Malta's compliance with the FATF Forty Recommendations and the Nine Special Recommendations was confirmed in a progress report and written analysis by the Secretariat of Core Recommendations adopted at the Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures (MONEYVAL), Thirty-fourth Plenary Meeting in 2010. Malta also acceded to the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime<sup>53</sup> on 19 November 1999 (in force in Malta since 1 March 2000) and to the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances on 28 February 1996 (in force in Malta since 28 May 1996).

Malta is a founding member of MONEYVAL, which was established in September 1997 by the Committee of Ministers of the Council of Europe in order to conduct self-assessment and mutual assessment exercises of the anti-money laundering measures in place in the 24 Council of Europe countries that are not members of the FATF. Malta chaired the Committee until December 2003. The Malta Financial Intelligence Analysis Unit (FIAU), set up under the Prevention of Money Laundering Act (as amended), also became a member of the Egmont Group in July 2003. Malta also has joined the International Organization of Securities Commissions (IOSCO). Although not a member of the FATF, the IOSCO is deemed to have cooperation status with the FATF. Malta also fully cooperates with the OECD. Malta is not a member of the Financial Stability Forum and the level of its regulatory systems are deemed by the Financial Stability Forum to be of a medium degree.

A report on regulatory developments in financial services and anti-money laundering in Malta, published by the Bureau for International Narcotics and Law Enforcement Affairs of the United States Department of State on 1 March 2004, confirms the progress in financial services regulation made over the last

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49 Legal Notice 180 of 2008.

50 Chapter 9 of the Laws of Malta.

51 Directive 2001/97/EC of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering.

52 Directive 2005/60/EC of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

53 ETS Number 141.

10 years and outlines Malta's genuine transition from an offshore into a mainstream financial services jurisdiction and its EU membership status.

### **Implementing Procedures and Guidelines**

The Prevention of Money Laundering Act has been considerably amended by Act XXXI of 27 December 2001. The amendment introduced a significant development by which the FIAU was set up. The FIAU is a government agency that is responsible for, *inter alia*, the collection, collation, processing, analysis, and dissemination of information with a view to combating money laundering and the funding of terrorism. In addition, the FIAU is responsible for providing and promoting training of personnel, gathering information, and cooperating and exchanging information with local and other competent supervisory authorities overseas.

The Implementing Procedures were published by the FIAU on 20 May 2011. The purpose of the Implementing Procedures is to enable subject persons to understand and implement their obligations under the Prevention of Money Laundering and Funding of Terrorism Regulations. The Implementing Procedures are binding, and failure to comply with them will render subject persons liable to an administrative penalty of not less than €250 and not more than €2,500. The FIAU has removed the risk of 'double jeopardy'; therefore, if the same act gives rise to a breach of both the Regulations and the Implementing Procedures, only one penalty will be inflicted.

The Malta Institute of Financial Services Practitioners (IFSP) also has published Guidance Notes on the Prevention of Money Laundering and Financing of Terrorism in order to provide guidance to its members, who belong to various sections of the financial services industry and include lawyers, external accountants, tax advisors, fiduciaries, and trustees.

### **Prevention of Money Laundering Act and Regulations**

The Prevention of Money Laundering Act is of general application. According to the Act, money laundering is considered to be a criminal offense entailing criminal prosecution together with the freezing of the property of the person accused. The offense of money laundering is committed if the proceeds of any criminal offense are converted, transferred, concealed, disguised, acquired, possessed, or retained without reasonable excuse in the knowledge or suspicion that such proceeds are derived directly or indirectly from a criminal activity or from an act or acts of participation in criminal activity.

The Prevention of Money Laundering Act does not deal with compliance with money laundering provisions and procedures, as these are dealt with in detail by the Prevention of Money Laundering and Funding of Terrorism Regulations. According to the Regulations, any person carrying out either a 'relevant activity' or a 'relevant financial business' is obliged to follow:

- Customer due diligence, including identification and verification procedures;



- Record-keeping procedures;
- Internal reporting procedures;
- Initial and ongoing educational and training procedures; and
- Procedures on internal control, risk assessment, risk management, compliance management, and communication.

These obligations are laid down in detail in the Regulations, which also require subject persons to develop effective client acceptance policies and procedures that are conducive to determining, on a risk-based approach, whether an applicant for business is a politically exposed person (PEP).

Both risk-assessment and risk-management procedures are mandatory, while the risk-based approach is optional. The risk-based approach ensures that subject persons may determine the extent of the application of customer due diligence requirements on a risk-sensitive basis, which depends on the type of customer, business relationship, product, or transaction.

The Prevention of Money Laundering and Funding of Terrorism Regulations also have provisions concerning PEPs, which require the application of enhanced customer due diligence in respect of such persons. Significant developments in the Regulations include, *inter alia*, provisions on simplified and enhanced customer due diligence, together with exemptions from certain customer due diligence measures whenever financial activity is carried out occasionally or on a very limited basis, among others.

Any one of the following activities is considered to be ‘relevant financial business’ for the purposes of the Prevention of Money Laundering and Funding of Terrorism Regulations:

‘(a) any business of banking or any business of an electronic money institution carried on by a person or institution who is for the time being authorized, or required to be authorized, under the provisions of the Banking Act,<sup>54</sup>

‘(b) any activity of a financial institution carried on by a person or institution who is for the time being authorized, or required to be authorized, under the provisions of the Financial Institutions Act;

‘(c) long-term insurance business carried on by a person or institution who is for the time being authorized, or required to be authorized, under the provisions of the Insurance Business Act or enrolled or required to be enrolled under the provisions of the Insurance Intermediaries Act . . .,<sup>55</sup>

‘(d) investment services carried on by a person or institution licensed or required to be licensed under the provisions of the Investment Services Act;

‘(e) administration services to collective investment schemes carried on by a person or institution recognized or required to be recognized under the provisions of the Investment Services Act;

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54 Chapter 371 of the Laws of Malta.

55 Chapter 487 of the Laws of Malta.

- '(f) a collective investment scheme marketing its units or shares, licensed or recognised, or required to be licensed or recognised, under the provisions of the Investment Services Act;
- '(g) any activity other than that of a scheme or a retirement fund, carried on in relation to a scheme, by a person or institution registered or required to be registered under the provisions of the Special Funds (Regulation) Act . . . ;
- '(h) any activity of a regulated market and that of a central securities depository authorized or required to be authorized under the provisions of the Financial Markets Act;
- '(i) any activity under paragraphs (a) to (h) carried out by branches established in Malta and whose head offices are located inside or outside the Community;
- '(j) any activity which is associated with a business falling within paragraphs (a) to (i).'<sup>56</sup>

Under the Prevention of Money Laundering and Funding of Terrorism Regulations, the term 'relevant activity' means:

- ' . . . the activity of the following legal or natural persons when acting in the exercise of their professional activities:
  - '(a) auditors, external accountants, and tax advisors, including when acting as provided for in paragraph (c);
  - '(b) real estate agents;
  - '(c) notaries and other independent legal professionals when they participate, whether by acting on behalf of and for their client in any financial or real estate transaction or by assisting in the planning or execution of transactions for their clients concerning the:
    - '(i) buying and selling of real property or business entities;
    - '(ii) managing of client money, securities, or other assets, unless the activity is undertaken under a license issued under the provisions of the Investment Services Act;
    - '(iii) opening or management of bank, savings, or securities accounts;
    - '(iv) organization of contributions necessary for the creation, operation, or management of companies;
    - '(v) creation, operation, or management of trusts, companies, or similar structures, or when acting as a trust or company service provider;
  - '(d) trust and company service providers not already covered under paragraphs (a), (c), (e), and (f);
  - '(e) nominee companies holding a warrant under the Malta Financial Services Authority Act and acting in relation to dissolved companies registered under the said Act;

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56 Prevention of Money Laundering and Funding of Terrorism Regulations, reg 2(1).

‘(f) any person providing trustee or any other fiduciary service, whether authorized or otherwise, in terms of the Trusts and Trustees Act;

‘(g) casino licensee;

‘(h) other natural or legal persons trading in goods whenever payment is made in cash in an amount equal to fifteen thousand euro (€15,000) or more, whether the transaction is carried out in a single operation or in several operations which appear to be linked; and

‘(i) any activity which is associated with an activity falling within paragraphs (a) to (h).’<sup>57</sup>

The Prevention of Money Laundering and Funding of Terrorism Regulations cater to two important exceptions to the duty imposed on independent legal professionals and notaries to report a suspicious transaction, which also extends to auditors, external accountants, and tax advisors.

Accordingly, the duty of reporting to the FIAU will not arise in the case of notaries or independent legal professionals (and auditors, external accountants, and tax advisors) regarding information they receive or obtain in the course of ascertaining the legal position for their client or while performing their duty of defending or representing their client in or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during, or after such proceedings.

Persons who are subject to the Prevention of Money Laundering and Funding of Terrorism Regulations must examine with special attention, and to the extent possible, the background and purpose of any complex or large transactions, including unusual patterns of transactions that have no apparent economic or visible lawful purpose and any transactions that are particularly likely, by their nature, to be related to money laundering or the funding of terrorism. They also must pay special attention to business relationships and transactions with persons, companies, and undertakings from a non-reputable jurisdiction, including those carrying out a relevant financial business or a relevant activity.

Each person or body corporate subject to the Regulations must designate a money laundering reporting officer (MLRO). The MLRO must be an official of the subject person and an individual of sufficient seniority within the organization. The MLRO will receive reports on any information or other matters which give rise to a knowledge or suspicion that another person is engaged in money laundering or in the funding of terrorism.

The MLRO has the duty to assess any initial report received, to make a report to the FIAU when a suspicion arises, and to respond to any request for information made by the FIAU. The MLRO is required to complete an annual compliance report which is then submitted to the FIAU within the time frame laid down in the FIAU Implementing Procedures.

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<sup>57</sup> Prevention of Money Laundering and Funding of Terrorism Regulations, reg 2(1).

Any official or employee of a person or body corporate subject to the Prevention of Money Laundering and Funding of Terrorism Regulations who discloses to a client or to a third party (other than the MLRO) that an investigation is being carried out or that information has been transmitted to the FIAU pursuant to the provisions of the Regulations is guilty of an offense. On conviction, the offender is liable to a fine (*multa*) not exceeding €50,000 or to imprisonment for a term not exceeding two years, or to both the fine and imprisonment.

### **Exchange Control Liberalization**

Exchange control limitations have been abolished in Malta, and Maltese persons may enter into foreign currency transactions without limitation. The only requirement in this regard is that statistical data relating to certain foreign currency transactions must be submitted by Maltese credit institutions, on the appropriate forms, to the Central Bank of Malta in terms of the External Transactions Act 1972.<sup>58</sup>

Failure to notify the Central Bank of Malta will not impinge on the ability of the non-Maltese counterparty to claim payment and will have no impact on the validity of the underlying transaction. In the event that, for any reason, a party needs to prove and/or claim in a Maltese liquidation, the solvent party's claim must be expressed in euros.

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58 Chapter 233 of the Laws of Malta.

**APPENDIX A**

Table I: Status of Malta's Double-Taxation Agreements as at 25 April 2014

Country	Current Status
Albania	In force
Armenia	Under negotiation
Australia	In force
Austria	In force
Azerbaijan	Under negotiation
Bahrain	In force
Barbados	A protocol amending the current agreement between the Government of Malta and Barbados is currently under negotiation
Belgium	A protocol amending the current agreement has been signed, but is not yet in force
Bosnia and Herzegovina	Under negotiation
Bulgaria	In force
Canada	In force
China	In force
Croatia	In force
Curacao	Under negotiation
Cyprus	In force
Czech Republic	In force
Denmark	In force
Egypt	In force
Estonia	In force
Finland	In force
France	In force
Georgia	In force
Germany	In force
Greece	In force
Guernsey	In force
Hong Kong	In force
Hungary	In force
Iceland	In force
India	In force
Ireland	In force
Isle of Man	In force
Israel	In force
Italy	In force
Jersey	In force
Jordan	In force
Korea (Republic of)	In force
Kuwait	In force
Latvia	In force
Lebanon	In force
Libya	In force
Liechtenstein	In force
Lithuania	In force

Country	Current Status
Luxembourg	In force
Malaysia	In force
Mauritius	An agreement has been signed but is not yet in force
Mexico	In force
Moldova	An agreement has been signed but is not yet in force
Montenegro	In force
Morocco	In force
Netherlands	In force
Norway	In force
Oman	Under negotiation
Pakistan	In force
Poland	In force
Portugal	In force
Qatar	In force
Romania	In force
Russian Federation	In force
San Marino	In force
Saudi Arabia	In force
Serbia Republic	In force
Singapore	In force
Slovak Republic	In force
Slovenia	In force
South Africa	In force
Spain	In force
Sweden	In force
Switzerland	In force
Swiss Confederation	Agreement concluded only in relation to profits derived from the operation of ships and/or aircraft in international traffic; double-taxation agreement initialed August 2006, signed 18 December 2008, and awaiting ratification
Syrian Arab Republic	In force
Thailand	Under negotiation
Tunisia	In force
Turkey	In force
Ukraine	Agreement signed but not yet in force
United Arab Emirates	In force
United Kingdom	In force
United States	Application of the double-taxation treaty subject to the satisfaction of the 'limitation on benefits' clause; in addition to a comprehensive tax treaty, a separate agreement limited to profits derived from the operation of ships or aircraft in international traffic is in force
Uruguay	In force
Vietnam	Under negotiation