
Chapter 8

Business Entities

Forms of business entities

A business organisation may be incorporated in Malta as:

- a limited liability company
- a partnership en nom collectif
- a partnership en commandite (which may have its capital divided into shares)

Other structures and set ups, as indicated further on in this chapter, can also be created in terms of Maltese law.

All these forms acquire a distinct legal personality as soon as they are incorporated and registered under the Companies Act (the “Act”). A foreign corporation that carries on business in Malta must register its branch or place of business in Malta under the Act and is referred to as an Oversea Company. The branch is not recognised as a separate entity and is not incorporated as such. The Act also recognises a joint venture (association en participation) but a joint venture is not required to be registered and is not vested with distinct legal personality.

A body of persons may also be incorporated as a Cooperative Society under the Co-operative Societies Act. Corporation is usually the term applied to government agencies and other public bodies constituted by an Act of Parliament. Cooperative societies and corporations set up by law have a distinct legal personality. Professional and other non-commercial partnerships are referred to as civil partnerships and are regulated by the Civil Code. The categorisation of business entities for income tax purposes is discussed in chapter 13.

The Companies Act replaced the Commercial Partnerships Ordinance in 1995. Shipping companies continued to be regulated by the Ordinance until 1st May 2004. Shipping Companies may elect to be regulated by the Companies Act – in default such shipping companies are regulated by the Merchant Shipping (Shipping Organisations – Private Companies) Regulations.

There are no provisions requiring Maltese companies to have any minimum subscription by Maltese shareholders or to appoint Maltese directors. Except for very exceptional circumstances, no exchange control restrictions apply on the acquisition of shares by non-residents. Certain information may be required for statistical purposes.

Limited liability company

A limited liability company (a company) is formed by means of capital divided into shares. The liability of the shareholders is limited to the amount, if any, unpaid on the shares held. This is the form of organisation favoured by large enterprises and usually preferred by the foreign investor. A company may be incorporated either as a public company or as a private company. A company is a private company if its statute limits the number of its shareholders to 50, provides for restrictions on the transfer of shares and prohibits any invitation to the public to subscribe for shares or debentures. The vast majority of companies in Malta are registered as private companies.

A private company may further qualify as an exempt company if:

- it restricts the number of debenture holders to 50 and
- prohibits the holding of any of its shares or debentures by another company that is not itself an exempt company and does not have a body corporate as director.
- neither the company nor any of the directors is party to an arrangement whereby the policy of the company is capable of being determined by persons other than by directors, members, or debenture holders of the company.

A private and exempt company enjoys certain privileges as to the details of its published financial statements and has the right to give loans to its directors. A company must have at least two shareholders but a private and exempt company may be formed as a single member company. A private, exempt company may also have its sole director act as company secretary.

Formation procedures

A company is constituted by virtue of a memorandum of association, which must, as a minimum, contain the following (whether the company is a public or a private company):

- Name of the company
- Its registered office in Malta
- Whether the company is a public or private company
- Objects of the company, which cannot be described as trade in general
- Description of the authorised and of the issued share capital – where the share capital is divided into different classes of shares, a description of the rights attaching to the shares has to be given
- Particulars of the shareholders and their respective subscription
- The number of directors and the particulars of the first directors
- Particulars of the company secretary
- The manner in which the legal and judicial representation of the company is vested and exercised
- Terms and manner of issue and redemption of preference shares
- Duration of the company.

The subscribers may also register, together with the memorandum, articles of association prescribing regulations for the company. The model regulations contained in the Companies Act apply to a company to the extent that they are not replaced by articles of association. The memorandum and articles of association are usually drawn up by accountants and/or lawyers.

The company may adopt any name that is not already in use as long as it is not found objectionable by the Registrar of Companies. The Registrar of Companies is likely to object if the name chosen is the same as that of another company, or is similar as to create confusion, or is offensive or otherwise undesirable. Furthermore, if the company concerned is a public company the name must be followed by the words “public limited company” or their abbreviation “p.l.c.”. On the other hand, the words “private limited liability” or “limited” or the abbreviation “ltd” must be indicated at the end of the name if the company concerned is a private company. The Registrar may be asked to reserve a name or names for a company in formation.

Before registration, it is necessary to deposit at least the amount of the initial paid-up capital in a bank account titled “Company Name—Company in Formation”. A copy of the bank deposit slip must be submitted to the Registrar of Companies together with the memorandum and articles of association. In certain specific circumstances and by way of an exception to the existing general rule of opening a bank account (whether locally or abroad) in the name of the new Maltese company, the said bank deposit slip may be replaced by a certificate issued by an authorised practitioner confirming that an amount equal to the initial share capital of the company was deposited in the practitioner’s clients’ account.

The memorandum and articles of association must be delivered to the Registrar of Companies, who will then register the company and issue a certificate of registration. This will usually take a few days from the date when complete documentation is filed. Upon registration of the memorandum and articles of association, the company comes into existence and is capable of commencing business. The fee for the registration of a company ranges from a minimum of €245 to a maximum of €2,250 depending on the amount of the authorised capital. Annual fees for the filing of the company’s annual return range from €100 and €1,400, depending on the company’s authorised share capital. The memorandum and articles of association may be amended by the delivery of the relative shareholders’ resolution to the Registrar together with the revised and updated text.

When shares or debentures are issued by a public company, the application forms for shares or debentures must be accompanied by a prospectus that sets out detailed information. Commission Regulation (EC) No 809/2004 as regards information contained in prospectus as well as the format, incorporation by reference and publication of such prospectus as well as dissemination of advertisements is directly applicable.

Every officer signing a document on behalf of a commercial partnership or overseas company must state the capacity in which he is signing. A commercial partnership is obliged to disclose the details below in its business letters, order forms as well as internet websites:

- Its name
- Kind of commercial partnership
- Its registered office
- Its registration number

When a commercial partnership is being wound up, this fact together with the name of the liquidator/s must be stated in every letter, invoice or other document issued by or on behalf of the commercial partnership.

Where, in case of a company, reference is made on the website or other documents to the capital of such company, the reference shall include a mention of both the issued and paid up capital. A partnership en nom collectif and a partnership en commandite must also include the names of the partners with unlimited liability in all business letters and order forms.

Capital structure

The authorised share capital of a private company cannot be less than €1,164.69, while that of a public company cannot be less than €46,587.47. When the share capital is the minimum authorised, it must be fully subscribed in the memorandum of association. When it is more than the legal minimum, at least the said prescribed minimum must be subscribed. Furthermore, in respect of private companies, at least 20 percent of the par value of each share taken up must be paid upon the signing of the memorandum. With respect to public companies, not less than 25 percent of the nominal value of each share taken up must be paid on the signing of the memorandum. There are no statutory limits to the amount of the authorised share capital of a company, and no special permits are required to go beyond any given limit.

Shares of no par value are not allowed, except in the case of investment companies with variable share capital (SICAVs), which are regulated by specific provisions in the law.

Shares may be issued at a premium, and the proceeds of the premium must be placed in “the share premium account”. A company’s memorandum and articles of association may permit the company to purchase its own shares, but this is subject to certain limitations and conditions.

Shares may be of different classes, having different voting, dividend and other rights. All shares must be registered. A private company is not permitted to issue bearer shares. Ordinary shares are shares that participate in the profits of the company and are not restricted to a fixed dividend. Preference shares may be participating or non-participating, cumulative or non-cumulative, voting or non-voting. The company may be authorised by its memorandum or articles of association to issue redeemable preference shares. Such redemption can be made only out of that part of the company’s profits that would otherwise be available for the payment of dividends or out of the proceeds of a fresh issue of shares made for the purpose of redemption. No redemption can be effected unless the shares have been fully paid up. If any premium is payable upon redemption, it must be provided out of the company’s profits or its share premium account.

A share transfer must be registered with the Registrar by the delivery of the statutory form. The form must first be delivered to the Commissioner of Inland Revenue who will certify that the stamp duty on the transfer has been paid or that the transfer is exempt from stamp duty. The stamp duty rate is 5% of the consideration (or market value if higher) for property companies and 2% in other cases. No stamp duty is payable on the issue of new shares. However, changes in the company’s issued share capital or a change in the voting rights may give rise to value shifting considerations.

A company can at any time increase or decrease its capital. When a reduction involves either a diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, it will only take effect three months after a notice is published in the Government Gazette and as long as no creditors file valid objections. The company may capitalise reserves and profits that are otherwise available for distribution by the issue of fully paid bonus

shares to its shareholders. The share premium account can only be reduced in the same manner as the paid-up share capital of the company. The share premium account can, however, be utilised by the company for the issue of shares to the shareholders as fully paid bonus shares, or to write off preliminary expenses or expenses connected with the issue of debentures or to provide for the premium payable on the redemption of any redeemable shares or debentures of the company.

“Debenture” is defined by company legislation to include debenture stock, bonds and other debt securities of the company. A debenture is normally issued as security for a loan, and it provides for the payment of interest at a specified rate until the repayment of the principal. Debentures are transferable, and they are usually redeemable on a specified date. They may carry the right of conversion into ordinary shares of the company at specified times and upon specified terms. Companies that have issued debentures must keep a register of debentures at their registered office, showing all details of the debentures and their holders.

Directors’ responsibilities

The business of a company is conducted by its directors. Public companies must have at least two directors but private companies can have a sole director. The directors need not, unless so required by the memorandum and articles of association, be holders of any shares in the company. The shareholders may remove a director by means of a simple majority vote. In general, a director may not carry on any business in competition with the company and may not receive loans from the company. Any director who has an interest in a contract with the company must declare that interest to the other directors. The law assigns a number of statutory, administrative, fiduciary, solvency, and managerial obligations on directors, and they are generally jointly and severally liable for damages for any breach of these duties. A breach of duty can result in a personal liability of the directors for administrative penalties and civil damages. Directors can be exposed to criminal prosecution in the case of fraudulent or unlawful trading or other offences linked to fraudulent insolvency.

Every company must appoint a secretary, who may also be a director. However, a sole director may not also be the secretary, unless the company is a private exempt company. The secretary is an officer of the company.

In order to promote best practice in transparency, accountability and fairness in the governance of companies the Malta Stock Exchange approved the ‘Code of Principles of Good Corporate Governance’ in 2001. The Code applies specifically to all companies the securities of which are listed on the Official List and/or the Alternative Companies List of the Malta Stock Exchange with the exception of Collective Investment Schemes. Compliance with the Code is not of a mandatory nature, but public companies are required to disclose the extent to which they comply with the Code by attaching a statement of compliance to their annual report. Auditors are also required to include a report on the ‘Statement of Compliance’ drawn up by the company directors, in the Company’s Annual Report.

Shareholders' meetings and voting rights

The company is required to hold its first general meeting not later than 18 months after its registration. Thereafter, the company must hold a general meeting each year and not later than 15 months from the date of the previous annual general meeting. Extraordinary general meetings can be convened at any time by the directors and as often as they think necessary. A person or persons holding not less than one-tenth of the paid-up share capital of the company have the right to request the company to hold an extraordinary general meeting. Fourteen days' notice of a general meeting must be given, but if all the shareholders entitled to attend and vote at a meeting so agree, a meeting can be convened at a shorter notice.

The business of an annual general meeting normally includes a consideration of the directors' and the auditors' reports, the approval of the accounts, the confirmation of the dividends proposed to be distributed by the directors, the election of the directors and the auditors, and the fixing of the directors' and auditors' remuneration. The Companies Act lists various matters that can only be approved by an extraordinary resolution, such as changes to the Memorandum and Articles of Association. The company's articles may specify further special matters that are subject to this restriction. A motion of an extraordinary resolution must be notified in advance to the shareholders and the law specifies the minimum majority required for its approval. A resolution in writing, signed by all the shareholders for the time being entitled to receive notice of and attend general meetings, is as valid and effective as if the same had been passed at a general meeting duly convened and held.

Dividends

Dividends may be declared by the shareholders' general meeting. Typically however, no dividend can exceed the amount recommended by the directors. Interim dividends may from time to time be paid by the directors in such amounts as appear to them to be justified by the profits of the company. Dividends can be paid only out of distributable profits as defined by the Maltese company law.

Liquidation

Liquidation procedures start with a resolution of the company or an order of the court to dissolve the company. Liquidation may take the form of a voluntary winding up, which may be a "members' voluntary winding up" or a "creditors' voluntary winding up". A members' winding up is only possible in the case of a solvent company. A company may also be wound up by the court. The Companies Act lays down detailed procedures for the different forms of winding up of companies, including rules on the obligations of liquidators and official receivers, on fraudulent and wrongful trading, on the liability of directors and shareholders, and on special powers of the court.

The Companies Act also contains provisions on company reconstructions and company recovery procedures.

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Books, records and statutory audit

Matters concerning books, records and audit requirements are discussed in Chapter 10.

Partnership en nom collectif

A partnership en nom collectif (general partnership) has its obligations guaranteed by the unlimited and joint and several obligations of all the partners. At least one of the partners shall be either an individual or a body corporate having its obligations guaranteed by the unlimited, joint and several liability of one or more of its members. No action lies against the individual partners unless the property of the partnership has been first discussed. A partnership en nom collectif is formed by a deed of partnership, which must be delivered to the Registrar for registration. Changes in the deed of partnership, including the introduction of new partners or the withdrawal of any existing partners must also be reported to the Registrar. The rights of third parties are protected by law in case of withdrawals from or additions to the partnership.

Partnership en commandite

A partnership en commandite or limited partnership operates under a partnership-name and has its obligations guaranteed by the unlimited and joint and several liability of one or more general partners and by the liability limited to the amount, if any, unpaid on the contribution of one or more limited partners. At least one of the general partners shall be either an individual or a body corporate having its obligations guaranteed by the unlimited, joint and several liability of one or more of its members. Its capital may be divided into shares.

Other structures and set ups

Trusts

The Trusts and Trustees Act opened the trust concept to residents and to assets situated in Malta.

A trust is deemed to exist whenever a person (i.e. the trustee) holds as owner or has vested in him property under an obligation to deal with that property for the benefit of other persons called the beneficiaries (whether or not yet ascertained or in existence), or for a charitable purpose which is not for the benefit only of the trustee, or for both such aforesaid benefits.

The law does not require trust deeds to be registered with any authority. However as a general rule persons resident or operating in Malta and receiving property on trust require authorization. The Civil Code and the Trusts and Trustees Act lay down a number of fiduciary duties which trustees owe to beneficiaries.

Foundations & Associations

The Civil Code (Amendment) (No.2) Act, Act XIII of 2007, provides for the setting up of foundations and associations.

A foundation is defined as an organisation consisting of a universality of things constituted in writing whereby assets are entrusted to the administration of a designated person/s either for the fulfilment of a specified purpose or for the benefit of a named person/s. A foundation is endowed with legal personality and the assets of a foundation are kept distinct from the assets of its founder, administrators or beneficiaries.

A foundation may only be constituted by virtue of a public deed or by a will.

A foundation may not be established to trade or carry on commercial activities even if the proceeds of such efforts are destined for social purposes. Important exceptions are:

- A foundation endowed with commercial property or shareholding in a profit making enterprise, a franchise, a trademark or other asset which gives rise to income, as well as a ship as long as the organisation is only the passive owner of the asset;
- A foundation used as a collective investment vehicle (including pension or employee benefit arrangements), and which issues units to investors, for the passive holding of a common pool of assets, the management of which is delegated to a third party;
- A foundation used as a securitisation vehicle.

For the purpose of registering a foundation:

- i) In the case of a purpose foundation, an authentic copy of the constitutive instrument is to be delivered to and filed with the Registrar of Legal Persons.
- ii) In the case of a private foundation the constitutive deed and a note of reference referring solely to the founder shall be filed with the Registrar.

A foundation may be converted into a trust and vice-versa provided the written consents required by the law are duly obtained. When a trust is converted into a foundation, the administrators of the foundation shall be bound to execute a public deed and register the foundation within thirty days of the receipt of all consents required by the law and this by filing with the Registrar the documents required by the Second Schedule of the Civil Code.

On the other hand, an association is defined as an agreement between three or more persons to establish an organisation with defined aims or purposes to be achieved through the dedication of efforts and resources by such person and other persons who may join voluntarily. Associations are not bound by law to register as legal persons, though they may elect to do so.

The provisions relating to Foundation and Associations came into force on the 1st April 2008.

Joint venture

The Companies Act recognises a form of joint venture under the rules on association en participation. The association comes into existence under an agreement whereby a person (the associating party) assigns to another person, for a valuable consideration, a portion of the profits and losses of a business or of one or more commercial transactions. In relation to third parties, the joint venture is deemed to belong to the associating party. No registration is required for this type of association and the association is not vested with a legal personality distinct from that of its members.

Branch of a foreign corporation

A company incorporated outside Malta that establishes a place of business in Malta must register with the Registrar as an overseas company by delivering the following:

- An authentic copy (translated into English or Maltese if the original is not in either of these languages) of the instrument of constitution;
- Details of the directors and the secretary, if any;
- A return containing the following particulars: the name under which the branch or place of business is carrying out its activities in Malta if different from the name of the overseas company; the address of the branch or place of business; the activities carried out through the branch; the names and addresses of one or more individuals resident in Malta authorised to represent the overseas company; the extent of the latter individual's authority; the legal form of the overseas company; the identity of the register in which the overseas company is registered and the number with which it is registered.

Any changes after initial registration must likewise be registered within one month from such alteration.

The overseas company must state, in every prospectus inviting subscription of its shares or debentures in Malta, the country in which it is constituted or incorporated. Moreover, detailed provisions are made to regulate the issue and circulation in Malta of prospectuses that offer for subscription debentures or shares of a company registered or incorporated, or to be registered or incorporated, outside Malta in a non-EU member State or in a non-EEA state.

An overseas company is required to comply, as much as possible, with the rules on financial statements similar to those applicable to Maltese companies. Where the accounting requirements under the law of the foreign company varies from those of Maltese companies, the Registrar may accept the company's accounts as long as full details are given as regards the operations in Malta.

Continuation of companies

The Continuation of Companies Regulations allows a foreign body corporate of a nature similar to a company as known under Maltese laws to be continued in Malta without being wound up, i.e. move its corporate seat to Malta without being dissolved in the country or jurisdiction from which it is exiting. With effect from the date of the issue of a provisional certificate of registration (to be replaced subsequently by a final one), the company is subject to all rights and obligations under Maltese law.

Continuation does not operate to create a new legal entity or affect the property of the company. The continued company retains all its rights, assets and liabilities. The request for continuation will be accepted if continuation is permissible under the law of the company's jurisdiction and the company's constitutive documents and the foreign country is an approved jurisdiction.

The foreign registry of a continuing company is deleted and the company is treated as if it had been incorporated in Malta. Similarly, a company registered under the Companies Act may request the deletion of its Maltese registry to be continued as a company incorporated in another company as long as the law of that country allows the procedure.

Malta does not charge any tax on the mere exit of a company to be continued in a foreign jurisdiction nor does it charge tax on the mere continuation of a foreign company in Malta.

Sole proprietorship

There are no particular requirements relating to the registration or organisation of a sole proprietor. The provisions of the Commercial Code as regards commercial records and bankruptcy apply to sole traders.