

EXPLANATORY NOTE

Legal Notice 375 of 2017 Civil Code (Second Schedule) (Register of Beneficial Owners - Foundations) Regulations, 2017

The Civil Code (Second Schedule) (Register of Beneficial Owners - Foundations) Regulations, (the “**Regulations**”), have been drafted on the basis of Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and this, as relating to information about the beneficial owners of foundations established under the Laws of Malta.

The aforementioned Legal Notice was published in Government Gazette No. 19, 924 of the 20th December 2017 and came into force on 1st January 2018. (Please vide the link further down below).

‘Beneficial owners’ refers to the term defined in the Regulations and in 2.2 below.

1.1 Applicability

As per Regulation 3, the following foundations, whether they are registered or NOT with the Registrar for Legal Persons in terms of the Second Schedule to the Civil Code, Cap. 16, Laws of Malta (the “Second Schedule”) or applicable Regulations, are required to comply with the said Regulations, namely:

- ALL foundations established as beneficiary foundations, for a private interest, (so called ‘*private foundations*’);
- ALL foundations established as purpose foundations for the achievement of a social purpose or for the carrying on of any lawful activity on a non-profit making basis.

N.B. Thus, it is to be noted that, SAVE FOR the foundations mentioned hereunder in 1.2, these Regulations apply to ALL foundations:

- whether they are *Beneficiary Foundations (Private Foundations)* or *Purpose Foundations*;
- whether they were established by public deed, private writing, resolution or otherwise, *before April 2008* (so called ‘Existing Organisations’) or established and, or registered *after April 2008*, when the Second Schedule to the Civil Code, Chapter 16 of the Laws of Malta, came into force;
- whether they were established and/or registered *before 1st January 2018* or *after 1st January 2018* when the said Regulations came in to force;
- whether they are enrolled or not with the Commissioner for Voluntary Organisations.

1.2 Exceptions to Applicability

The Regulations shall NOT apply to:

- Foundations which are established and controlled by the Government of Malta where "controlled by the Government of Malta" means that the Government of Malta has the power, whether directly or indirectly, to nominate, appoint, change or remove a majority of the administrators of the foundation; or
- Foundations which constitute a pious foundation or an ecclesiastical entity in the form of a foundation in terms of the Second Schedule or a marriage legacy governed by the Marriage Legacies Law; or
- Any other type of foundation not referred to above which the Minister responsible for Justice may by notice designate.

2.1 Foundations to keep record of Beneficial Owners

As per Regulation 4, every foundation is obliged to take all reasonable steps to obtain and at all times hold adequate, accurate and up to date information in respect of its beneficial owners. (The minimum information which is to be held and the definition of “**beneficial owners**” are found in the Regulations and in 2.2 below). The Regulations provide that the foundation is to obtain such information (including any changes thereto) from the beneficial owners of the foundation and/or from any natural person whom it has reasonable cause to believe to be a beneficial owner, who are bound to provide the said information to the foundation without delay.

Such information is to be **verified** by the foundation on the basis of documents, data or information obtained from a reliable source.

The foundation shall also ensure that it obtains declarations confirming that the beneficial owner is not an intermediary, such as an agent, nominee or trustee, for another person, and, if so, the foundation shall also obtain information on the principal or beneficiary of such intermediary.

Any information contained in the deed or statute of a foundation, or any beneficiary statement, a power of attorney, an engagement or instruction letter, delivered to the Registrar for Legal Persons at the time of the registration of the foundation or at any time thereafter, and any document or notice registered with the Registrar for Legal Persons at any time, any testament or any other official document shall be deemed to be sufficiently reliable for the purposes of carrying out the duties under this regulation.

This information is to be kept by the foundation in a *register of beneficial owners*, which register is to be kept and maintained by the foundation at the registered address of the foundation or at such other place as may be specified in the statute of the foundation. Responsibility for maintaining this internal register of beneficial owners is placed on the officers (the administrators) of the foundation jointly and severally with the foundation itself.

An obligation is imposed on foundations not to update the internal register of beneficial owners or to notify when required upon an event the Registrar for Legal Persons in compliance with the Second Schedule of the name of any beneficial owner, unless it has obtained, as may be applicable, information on the underlying beneficial ownership and unless it has carried out customer due diligence obligations in terms of applicable AML/CFT laws and regulations in force in Malta.

2.2 The obligations of a foundation if the Regulations apply.

As per regulation 4, the foundation must, at all times, take all reasonable steps to hold up-to-date information in respect of its *beneficial owners*, that is:

- its founder(s);
- administrator(s);
- protector or members of a supervisory council, if any;
- beneficiaries, if any;
- controllers¹, if any and as applicable.

This information is, as a minimum, to include the following:

- (a) the name;
- (b) the date of birth;
- (c) the nationality;
- (d) the country of residence;
- (e) an official identification document number indicating the type of document (e.g. identity card, passport, residence document) and the country of issue;
- (f) the role of the beneficial owner in relation to the foundation e.g. whether a founder, administrator, protector or member of a supervisory council, or controller;
- (g) the date on which a natural person became, or ceased to be, a beneficial owner of the foundation;
- (h) in the case of a beneficiary²:
 - (i) the nature and extent of the benefit;

¹ other natural persons (not being founders, administrators, protectors, supervisory council members or beneficiaries) who control the foundation. These include persons whose consent is to be obtained, or whose direction is binding, for material actions to be taken by the foundation or the administrators.

“Material actions” mean amending the statute; adding or removing a beneficiary or a person from a class of beneficiaries or actions affecting a beneficiary’s entitlement; the appointment or removal of an administrator or protector or a member of the supervisory council; the acceptance of new founders; the re-domiciliation of the foundation; the assignment or transfer of all or the majority of the assets of the foundation; or the termination or revocation of the foundation. Material actions also include other actions achieving the same result;

² applicable only in the case of private foundations; when the beneficiary is a legal entity, information must also be obtained regarding the ultimate beneficial owner of such legal entity;

(ii) any changes in the benefit held;

(iii) the effective date on which a person became a beneficiary and the date on which his beneficial interest increased or decreased, if any;

(iv) where applicable, an indication as to whether there is any suspension of the officer's duty to inform a beneficiary of his benefit under the foundation or that he forms part of a class of beneficiaries which may so benefit³;

(i) in the case of a class of beneficiaries⁴, this is to be identified in the manner indicated in the statute or the beneficiary statement. If these are silent, for the purposes of these Regulations only, any reference to:

(i) the "family" of a person, is considered to mean such person, his direct ascendants, his spouse, his direct descendants, and unless expressly excluded, their respective spouses⁵;

(ii) "children" is to include children born out of wedlock and adopted children;

(iii) "spouse" means the spouse at the relevant time and includes persons with whom there is a civil union or a cohabitation or an arrangement recognised by law in the country where they are habitually resident, including where permitted, of the same gender. It does not include spouses who are divorced or separated.

(j) if the beneficiary is a legal organisation or a fiduciary or other intermediary, information shall be obtained with reference to the natural person who is the ultimate beneficial owner thereof.⁶

N.B

A beneficial owner may not be an intermediary, such as an agent, nominee or trustee, for another person. If so, information must be obtained about the principal or beneficiary of such intermediary.

³in such case, such person shall not be considered to be a beneficiary until such time as he is informed of such benefit or receives actual benefit; the information prescribed in this sub-regulation shall be submitted to the Registrar for Legal Persons as soon as a beneficiary is determined to form part of a class of beneficiaries or is appointed a beneficiary of the foundation, whichever is the earlier;

⁴ applicable only in the case of private foundations;

⁵ when a child is born or a marriage takes place, unless stated otherwise, such child and spouse shall be declared within three months of the birth or marriage;

⁶ Any information contained in the deed or statute of a foundation, or any beneficiary statement, a power of attorney, an engagement or instruction letter, delivered to the Registrar for Legal Persons at the time of the registration of the foundation or at any time thereafter, and any document or notice registered with the Registrar for Legal Persons at any time, any testament or any other official document shall be deemed to be sufficiently reliable for the purposes of carrying out the duties under this regulation;

3. Submission of information to the Registrar for Legal Persons –FORM 1

As per Regulation 5, with effect from 1st January, 2018, where:

- (a) a foundation is *to be established and registered* under the Second Schedule; or
- (b) a foundation *has been established and, or registered prior to the coming into force* of the Regulations;

there shall be delivered to the Registrar for Legal Persons at the Public Registry, Malta, a declaration in the prescribed form (Form 1) containing the information on all the beneficial owners of the foundation in accordance with regulation 4 and signed in the manner stipulated in regulation 5.

A foundation, and all relative documents, shall not be registered unless the Registrar for Legal Persons is satisfied that the requirements of this regulation have also been complied with.

4. Changes to the information submitted to the Registrar for Legal Persons –FORM 2

The information on beneficial owners provided to the Registrar for Legal Persons must be adequate, accurate and up-to-date. Accordingly, as per Regulation 7, whenever there is a change in the beneficial owners or any other change occurs as a result of which any particulars provided to the Registrar for Legal Persons are incorrect or incomplete, the foundation is obliged, within 14 days from the date when the change is recorded with the foundation, to deliver to the Registrar for Legal Persons a notice in the prescribed form (Form 2) of the change, providing the information required by Regulation 4 on any new beneficial owner, updated information on each of the other beneficial owners and the effective date of changes made.

If the change in the beneficial ownership information relates to a change in administrator(s), it is the duty of the new administrator to inform the Registrar for Legal Persons of such change.

It is important to note that the obligation to file a notice with the Registrar for Legal Persons in terms of these Regulations does not exonerate the foundation, or any of its officers, from any duty to notify such changes to the Registrar for Legal Persons or any other person in terms of the applicable special law.

5. Rectification

Any person who feels aggrieved by information included or omitted from the register kept by the foundation or the Register of Beneficial Owners kept by the Registrar for Legal Persons may apply to the First Hall Civil Court for rectification of the applicable register and the Court may, *inter alia*, order the rectification of the relevant register and the payment by the

foundation of compensation of up to EUR 1,000 for any loss sustained by any party aggrieved.

6.1 Offences and Penalties

As per Regulation 12, any officer of the foundation (including, in the case of an administrator which is a legal organisation, the persons entrusted with its management and administration) or a beneficial owner thereof who ***knowingly or recklessly*** makes a statement, declaration or otherwise provides to the Registrar for Legal Persons information on the beneficial ownership of a foundation that is ***misleading, false or deceptive in a material particular***, shall be guilty of an offence and shall be liable on conviction to:

- (a) a fine (*multa*) of not more than EUR5,000; and/or
- (b) to imprisonment for a term not exceeding 6 months.

6.2 Administrative penalties

As per Regulation 15 and the Schedule to the Regulations, in case of default, the foundation and every officer of the foundation who is in default shall be jointly and severally liable to an initial penalty of EUR 500 and, for every day during which the default continues, to a further penalty of EUR 5 for the following:

1. Failure by the foundation to maintain the register of beneficial owners (Reg. 4(9) of the Regulations);
2. Failure to deliver the information on the beneficial owners of a foundation to the Registrar for Legal Persons (Reg. 5(3) of the Regulations);
3. Failure to provide information to the Registrar for Legal Persons about a change in the Beneficial Ownership of a foundation (Reg. 7(5) of the Regulations).

An officer of the foundation shall not be liable personally if he shows that he had exercised all due diligence to comply with the provisions of the Regulations and the default was not due to negligence on his part.

7. Register of Beneficial Owners kept by the Registrar for Legal Persons

The information on the beneficial owners of every foundation provided to the Registrar for Legal Persons in accordance with the Regulations shall be kept by the Registrar for Legal Persons in a Register of Beneficial Owners. This Register is distinct from the Register of Legal Persons kept by the Registrar for Legal Persons in terms of the Second Schedule to the Civil Code, Chapter 16 of the Laws of Malta.

The Register of Beneficial Owners is accessible only to such persons and in accordance with such procedures as set out in the Regulations (Reg. 9 of the Regulations). In case of conflict regarding accessibility, these Regulations prevail over the provisions of the Second Schedule

in so far as the Register of Beneficial Owners is concerned. The Registrar for Legal Persons is entitled to require online requests to access information in the Register of Beneficial Owners and to levy a fee for such access.

8. Electronic Register

As per Regulation 14, any document which is required to be delivered to the Registrar for Legal Persons in terms of these Regulations and any such delivery and the retention of any such document by the Registrar for Legal Persons may be in such format and by such means, including in electronic form and by electronic communication, as the Registrar for Legal Persons may deem appropriate.

9. Links and Contact Details:

- Webpage of the Registrar for Legal Persons: <https://identitymalta.com/legalpersons/>
- Legal Notice 375 of 2017: Civil Code (Second Schedule) (Register of Beneficial Owners-Foundations) Regulations, 2017:
<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12745&l=1>
- FORM 1: Submission of initial information on beneficial ownership of Foundations:
<https://identitymalta.com/wp-content/uploads/2018/06/FORM-1-Foundations-Editable-Format.doc>
- FORM 2: Changes:
<https://identitymalta.com/wp-content/uploads/2018/06/Changes-Foundations-FORM-2-Editable-Format.doc>
- Method of Submission of Forms to the Registrar for Legal Persons at the Public Registry, Malta:
<https://identitymalta.com/wp-content/uploads/2018/09/Method-of-Submission-of-Beneficial-Ownership-information-to-the-Registrar-for-Legal-Persons-1.pdf>
- Address: Office of the Registrar for Legal Persons, Public Registry, Evans Building, Level 1, Merchants Street, Valletta, Malta.
Opening hours for telephone enquiries: Tuesdays and Thursdays from 08:00 hrs to 13:00 hrs. Telephone: 25904108 / 25904109
Email: hilary.grech@gov.mt; rochelle.magri@gov.mt

Disclaimer:

Whilst every effort has been made to ensure the accuracy of the information contained herein, this notice is not intended to impart any advice of any sort. This notice is also not intended to serve as a substitute for a thorough reading and understanding of the Regulations, nor is it intended to be an absolute exhaustive list of all the obligations arising under the relevant Regulations.

