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Malta: Law & Practice
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MALTA

Law and Practice

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1. LEGAL SYSTEM

1.1 Legal System

The Maltese legal system is mixed. For many centuries it was based on Roman law as codified by Emperor Justinian, with the civilian influence being further strengthened during the rule of the Order of St John, which resulted in a predominantly civil law system. Years of British rule introduced several significant legal institutions derived from the English legal system, such as trial by jury, the rules of evidence and the structure of the courts. In time and over the centuries, Malta's legal system therefore continued to evolve into a predominantly civil law system, incorporating some elements from the common law traditions.

The judicial order is organised into:

- a Constitutional Court, which has limited competence;
- a Court of Appeal that is competent for all jurisdictions; and
- first-instance civil and criminal inferior and superior courts.

There are also several administrative tribunals, from which an appeal can be made to the Court of Appeal in its inferior jurisdiction.

2. RESTRICTIONS TO FOREIGN INVESTMENTS

2.1 Approval of Foreign Investments

Following new legislation enacted during 2020, foreign direct investments are subject to the National Foreign Direct Investment Screening Office Act 2020. This act implements the provisions of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019, establishing a framework for the screening of foreign direct investments into the EU. A foreign investment is one made directly by a foreign investor (being a non-EU national or undertaking), or indirectly by any undertaking, organisation, foundation or other entity where at least 10% of its control is held by a foreign investor. Where a foreign investment (i) concerns any of the critical activities set out in the legislation, including any access to sensitive information including personal data; or (ii) the foreign investor either has ties with a third-country government, armed forces or a state body, or otherwise affects public order or there exists a risk that the investor engages in illegal or criminal activities, then the transaction must be notified to the National Foreign Direct Investment Screening Office (the "Office").

2.2 Procedure and Sanctions in the Event of Non-compliance

If a notification is triggered, certain information on the transaction and the parties involved must be provided to the Office. The notification is submitted online, and within five working days from receipt of the notification, the Office must determine whether the transaction is subject to screening. Should screening be required, a decision must be taken within 60 calendar days from the date of determination that screening is required. Any investment in default of notification where this is triggered is automatically considered in violation of the Act, and the Office is empowered at law to take all necessary measures to unwind the investment, and to impose administrative penalties ranging between EUR500 and EUR100,000, depending on the gravity and nature of the offence.

Furthermore, where a person is required to implement certain conditions or commitments, failure to implement such conditions within the time established by the Office may be liable to an administrative penalty of EUR500 per day.

2.3 Commitments Required From Foreign Investors

If the Office determines that the investment might affect the security or public order of Malta, it may require commitments or conditions to completion of the transaction.

2.4 Right to Appeal

A person aggrieved by a decision taken by the Office is entitled to lodge an appeal to the Administrative Review Tribunal. Appeals lie on points of law, and the right to appeal is exercisable within 20 days from the date of the decision taken by the Office or on a decision to impose an administrative penalty. Decisions on an appeal to the Administrative Review Tribunal are subject to appeal on points of law only to the Court of Appeal in its inferior jurisdiction.

3. CORPORATE VEHICLES

3.1 Most Common Forms of Legal Entities

The most common type of corporate vehicle in Malta is the limited liability company, which may be private or public. Other forms of corporate vehicles available under the Maltese legal system include a general partnership (*partnership en nom collectif*); a limited partnership (*partnership en commandite*), which may have its capital divided into shares; a civil partnership; a foundation; and an association. Joint ventures are recognised but are not usually required to be registered and do not have distinct legal personality. Whereas limited companies are frequently used in business and trading, foundations and associations are frequently encountered in connection with charitable or social set-ups. Partnerships are more common among smaller or more traditional businesses.

The liability of shareholders in both forms of limited liability company is limited up to their shareholding. A private limited company can have a single member and single director, provided the company is an exempt company. There is a 50-shareholder limit for private companies, and transfers of shares in such companies must be restricted. If the number of members in a company exceeds 50, it must convert to a public company. The minimum share capital for a private company is EUR1,165.69, paid up at least 20% on incorporation; whereas for a public company it is EUR46,597.47, at least 25% paid up.

3.2 Incorporation Process

The steps involved in incorporation vary depending mainly on the type of entity being incorporated. A company is formed upon subscription by shareholders to a memorandum and articles of association, and their delivery to the Malta Business Registry together with key ancillary documents, which include evidence of paid-up minimum share capital and compliance documentation. Once delivered to the Malta Business Registry, the incorporation can be complete in around one working day.

Other forms of corporation, such as a foundation, are set up either by means of a public deed or through a last will, in each case published in Malta and executed before a notary public.

3.3 Ongoing Reporting and Disclosure Obligations

Private companies are subject to at least annual reporting obligations to the Malta Business Registry, consisting of annual returns and annual financial statements, which, unless a company is registered as a private exempt company, must be audited. Other corporate changes, such as changes to directors and officers, changes to shareholding and to ultimate beneficial ownership, amendments to the company's memorandum and articles of association, and other significant corporate events are also subject to disclosure to the Malta Business Registry within

applicable timeframes. Where a company is subject to licensing and regulation, it is subject to additional reporting and disclosure obligations to the relevant licensing body or authority.

3.4 Management Structures

The board of directors of a company is charged with its management and administration. Members of the board of directors are usually appointed by the shareholders of a company, and the appointed directors are required to be stated in the company's memorandum and articles of association. Although the concept is not recognised under the Companies Act, directors may be appointed in an executive or non-executive role in practice.

In certain cases, the Maltese legal system also recognises shadow directors: these are persons who, although not appointed to the board, act as though they were directors, and liability qua directors may attach to such persons. Two-tier management structures are not formally recognised under the Companies Act; however, a board is free to regulate its procedure and may create a de facto two-tier management structure composed of committees that report to the board.

3.5 Directors', Officers' and Shareholders' Liability

Directors are generally jointly and severally liable with respect to any liability arising from acts or omissions by any member of the board. However, where a particular duty has been delegated to one or more directors, only such directors are liable in damages. Since Maltese corporate law has its roots in English company law, it also borrows the concept of "piercing the corporate veil", although this is applicable in very limited circumstances, such as upon a finding of fraudulent or wrongful trading, or in the event of an unlawful distribution to a member in breach of the Companies Act, where at the time of the distribution, the member knows or has reasonable grounds for believing that it is made in contravention of the Companies Act.

4. EMPLOYMENT LAW

4.1 Nature of Applicable Regulations

The legal situation under Maltese law in relation to employment is principally regulated by the Employment and Industrial Relations Act (EIRA), under which a number of subsidiary laws provide sectoral or national norms. Furthermore, with respect to established conditions of employment, the law prescribes individual contracts (for an indefinite or definite duration), which is the most commonly used form; as well as collective contracts of employment in the form of industrial agreements. Industrial agreements have the force of law between the parties. In the case where a contract of service is not entered into in writing, the provisions of the EIRA serve as the conditions of such a contract.

4.2 Characteristics of Employment Contracts

Subsidiary Legislation 452.83 entitled "Information to Employees Regulations" establishes the minimum conditions of employment that should be included in every employment contract, namely: in the case of a fixed-term contract of employment, the expected or agreed duration of the contract period; wages; the period of employment; the period of probation; the hours of work; and leave and any other conditions related to the employment, including any benefits, terms of engagement, terms of work participation, manner of termination and the mode of settling any differences that may arise between the parties to the agreement.

Although the law stipulates what the minimum conditions of employment are, other conditions not in breach of the law may be negotiated. If

a negotiated condition is less advantageous to the employee than those set out in the EIRA, the less advantageous condition shall not apply and shall be replaced ipso jure with the condition laid down in the EIRA. This shows that the EIRA is designed to protect employees and therefore, in such a case, the fundamental principle of pacta sunt servanda established under Maltese law of contract shall not apply in the case of less favourable conditions.

Once the employee engages with the employer, the latter is to explain to the employee the provisions of the conditions of employment and shall deliver to the latter a written statement or a letter of engagement about the prescribed conditions by not later than eight working days from the start of employment.

4.3 Working Time

Under the Information to Employees Regulations (Subsidiary Legislation 452.83), the employer must inform the employee of the normal rates of wages payable and the normal hours of work within eight working days from the commencement of employment. The contract of employment may, in addition, provide for the allowance payable in respect of hours worked in excess of the normal hours of work.

An employer may only oblige an employee to work overtime where the employee has consented to it in writing, and where the total hours of a week's work, including overtime, does not exceed 48 hours (48 hours being the maximum stipulated under the Organisation of Working Time Regulations (Subsidiary Legislation 452.87)). In terms of the Protection of Maternity (Employment) Regulations (Subsidiary Legislation 452.91), employees shall not be obliged to work overtime during pregnancy and for a period of 12 months from either the date of birth of the child or from the effective date of the adoption of a child.

Various wage regulation orders (WROs) set out the minimum overtime rates of particular industries. If the industry in which the employee works is not covered by a WRO, then an employee shall be paid one-and-a-half times the normal rate for work carried out in excess of a 40-hour week averaged over a four-week period or over a shift cycle. Part-time workers are not entitled to overtime payment unless they work over 40 hours per week.

Under the Overtime Regulations (Subsidiary Legislation 452.110), in all sectors, whether these sectors are covered by a WRO or not, the employer may choose to implement schemes to bank hours whereby 376 of the normal annual working hours in each calendar year are "banked", which thus allows extra hours over and above the normal weekly working hours to be worked during periods of higher work activity, and then compensated during periods of lower activity by having working hours below the normal weekly working hours. However, the rule of the average weekly working time including overtime not exceeding 48 hours should be adhered to nonetheless, unless the employee concerned has given their consent in writing to work more than a weekly average of 48 hours.

4.4 Termination of Employment Contracts

Probationary Period

The first six months of any employment (whether for a fixed or indefinite term) is a probationary period, unless the parties agreed to a shorter probationary period or, in the case of employees holding technical, executive, administrative or managerial posts, to a longer probationary period.

During the probationary period, either party may terminate employment without the need to assign a reason for termination. However, if the employee has been in employment for more than

one month, the party terminating the contract must give a week's written notice of termination to the other party.

Once the probationary period lapses, an employee may terminate an indefinite contract of service for any reason by giving the employer a notice of termination, and the notice period under the EIRA depends on the continuous length of employment. The employer may choose to terminate an indefinite contract solely on grounds of redundancy and the employee shall be entitled to re-employment if the formerly occupied post becomes available again within one year from the date of termination of employment. Both parties are excused from giving notice and may proceed with immediate termination where the reason for the termination of employment amounts to a "good and sufficient cause".

Fixed-Term Contracts, Benefits and Injury

In the case of termination of fixed-term contracts after the probation period has lapsed, the parties are expected to perform the contract for its entire duration. If there is no justified reason to terminate employment prior to the agreed expiry date, the party terminating shall be liable to pay the other party a sum equal to half of the full wages that would have accrued had the contract of employment remained in force.

Where an employee is entitled to the benefits of maternity regulations, any such employee may not be dismissed, nor receive notice from the employer. Similarly, any employees who are injured in the course of their employment may not be dismissed from work before the lapse of one year from the accident.

Collective Redundancies

The Collective Redundancies (Protection of Employment) Regulations (Subsidiary Legislation 452.80) defines collective redundancies as termination of employment by an employer on grounds of redundancy over a period of 30 days of:

- ten or more employees in establishments normally employing 20 to 99 employees;
- 10% or more of the number of employees in establishments employing 100 to 299 employees; and
- 30 or more in establishments employing 300 employees or above.

An employer that declares a collective redundancy shall not terminate the employment of the affected employees unless the employees' representative as well as the director of the Department of Industrial and Employment Relations (the "Director") are notified in writing.

In doing so, the employer must provide the employees' representative with the opportunity to consult with the employer, which consultation period shall commence within seven working days from the day on which the employees' representative was notified of the intended collective redundancies. During the seven-working-day period, the employer shall also provide the employees' representatives with certain information, including the reasons for the redundancy, the number of employees affected, the proposed criteria for the selection of the employees to be made redundant, the period over which the lay-offs will be effected and details on the redundancy payments due.

The primary purpose of the consultation period is to discuss and find means of avoiding the collective redundancies, or, if impossible to do so, to reduce the number of employees affected and to ensure that any consequences linked to the collective redundancies are mitigated.

Notice of Termination

The notice of termination of employment may start to run from the date of the consultation

period. However, termination of employment of any projected collective redundancies notified to the Director shall only take effect on the lapse of 30 days after the employer makes such notification. The employer may be granted a shorted or longer period at the Director's discretion.

Any employer who does not abide by the collective redundancy process shall be guilty of an offence and liable to a fine for every employee who is declared redundant.

In the eventuality that an undertaking or business is transferred, the employment contracts of workers affected by such transfer are to be preserved and respected by the business or undertaking taking over, in whole or in part, from the previous employer.

4.5 Employee Representations

Consultation and information are compulsory in specific areas, such as the applicable conditions of employment and disciplinary rules. Representation is indispensable in collective bargaining as well as in circumstances giving rise to collective redundancies and transfer of undertakings.

An employee has a right to join a trade union and equally to choose not to do so. Therefore, employee representation must be seen in the context of freedom of association of employees and is regulated by specific norms in the Recognition of Trade Unions Regulations (Subsidiary Legislation 452.112).

The appointment of an employee representative is a requirement in cases of collective redundancies and transfer of businesses or undertakings, for those businesses or undertakings employing at least 50 employees. In those cases where there exists no recognised union, the non-unionised employees may select from among themselves a representative elected by means of a secret ballot called by the employer. However, if the previously non-unionised employees become represented by a recognised trade union, the term of office of the elected employee representative shall be automatically terminated on the date of the granting of recognition of the respective category of employees to the trade union by the employer.

Procedure When a Ballot Is Called

When a ballot is called by the employer for the election of an employee representative, the employer must not only ensure that the ballot procedure is fair but must also supply the director general responsible for the Department of Industrial and Employment Relations with the election process at least one month before the projected date of the ballot. Employees who have passed their probationary period shall be entitled to stand as candidates in the ballot. The appointed representative shall not hold office for more than a period of three years from the date of appointment.

Once an employee representative is appointed, the employer is obliged to inform the employees in writing of the identity of the employee representative and shall hold an information and consultation meeting within two months from the date of appointment. At least one meeting must be held every six months after the date of each preceding meeting. An employer must provide information to the trade union and/or employee representative(s) on:

- the development of the undertaking's activities and economic situation;
- the situation, structure and probable development of employment within the undertaking, including any anticipatory measures envisaged where there is a threat to employment; and
- decisions likely to lead to substantial changes in the work organisation or contractual relations.

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Ultimately, an employee representative or trade union is there to protect employees and their rights and interests, and to interfere, where necessary, in the relationship between the employer and the employees. It is imperative for employers subject to compulsory election of employee representatives to ensure that employees can effectively exercise their right to information and consultation.

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Teleworking

Subsidiary Legislation 452.104 entitled "Telework National Standard Order" regulates the possibility for any employee to carry out teleworking. Telework may be required as a condition of employment in an employment contract, or where there is no specific reference to teleworking in the employment contract, by agreement, in the course of the employment relationship. If the employer proposes to the employee to telework during the course of the employment relationship, the employee is free to accept or refuse the offer. If the employee refuses, the refusal shall neither constitute a good and sufficient cause for terminating employment, nor shall it lead to a change in the conditions of employment of the employee.

A telework agreement should be in writing, and, among other matters, it should contain written information in relation to the location where telework is to be carried out; equipment to be used for telework, including its ownership, maintenance, liability and costs; the amount of working time to be spent at the place of telework and at the workplace; provisions related to monitoring; and notice of termination of agreement.

Unless a definite period is agreed between the parties in the telework agreement, then both parties may decide to terminate the said agreement either in the first two months from the telework agreement provided three days' notice in writing is given to the other party or after the first two months from the telework agreement provided two weeks' notice in writing is given to the other party.

Teleworkers shall enjoy the same rights laid down in the EIRA and the regulations issued thereunder, and they shall also have the right to participate in training and career development programmes provided by the employer in the same manner as comparable employees at the employer's premises.

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5. TAX LAW

5.1 Taxes Applicable to Employees/ Employers

Income Tax

Employees are subject to tax in Malta where the income-earning activity is performed in Malta (source state), irrespective of their nationality, domicile and residence. Where the employees are either resident in Malta or domiciled in Malta, but not both resident and domiciled in Malta, tax would be due on income generated in Malta and, where applicable, on foreign-sourced income remitted to Malta. Maltese resident and domiciled employees are subject to tax on their worldwide income and capital gains irrespective of whether it is remitted to Malta or not.

Employees and other work permit holders, individuals working in Malta on short-term engagements (ie, holding a work permit for up to six months) and holders of a temporary visa who are either retired or based temporarily in Malta and working abroad are considered as expatriates in Malta and are subject to tax on any employment income arising in Malta, subject to double taxation treaty relief.

Tax on employment income is levied at progressive rates, starting from 0% to 35% (unless benefiting from a special tax programme in Malta, in which case a 15% flat rate may apply). It varies depending on the gross chargeable income of the employees and their status, whether they are married, single, a parent, a resident or a non-resident. Tax payments are mainly affected through the Final Settlement System (FSS), where the employer withholds the tax at source.

Benefits

Under Maltese legislation, employment income includes fringe benefits, bonuses, gifts and other gains or profits provided in the context of the employee-employer relationship. These, therefore, are to be taken into account when calculating the gross amount for tax purposes. It is important to highlight that certain fringe benefits, such as share options and share award schemes, are deemed distinct and separate from the employees' other income, and while tax on the gains is deducted at source, the tax rate may vary from the progressive one. In the case of share options and share award schemes, tax is charged at a flat rate of 15% on the taxable value.

Additionally, employees who are ordinarily residents but not domiciled, and who are not benefiting from a special tax status under a Maltese tax programme, are subject to a minimum tax of EUR5,000 per year where the foreign income exceeds EUR35,000 and is not received or not fully received in Malta.

Social Security

Both the employee and the employer have the obligation to make weekly social contributions. These are split equally between the employer and the employee. Depending on the conditions of the employment and the type of person employed, whether the employment is part-time or full-time, social contributions will vary between EUR6.62 and EUR72.08 weekly.

There are also maternity fund contributions that the employer is obliged to pay.

Maternity Fund Contributions

Private sector employers are obliged to pay a monthly contribution to the maternity fund

through the FSS system for each employee. The amount of contribution to be paid depends on the category under which the employee falls and ranges from EUR0.20 to EUR1.44 weekly for basis year 2020.

5.2 Taxes Applicable to Businesses

Corporate Income Tax

Companies that are incorporated in Malta are automatically considered as ordinarily resident and domiciled in Malta and therefore liable to corporate income tax on their worldwide income at a standard rate of 35%. Foreign companies may also be subject to tax in Malta upon migrating their tax residency to Malta or if they have a place of business in Malta as per a double tax treaty.

Malta operates a full imputation system of taxation, whereby when dividends are distributed to shareholders out of the taxed profits of the company, the dividends carry an imputation credit of the tax paid by the company on the profits so distributed. This effectively eliminated the double taxation of profits of the company.

Upon receipt of the dividends, the shareholders may claim a refund of the tax paid at the level of the Maltese company. The refund depends on the type of income of the Maltese company, with the most common being that of six-sevenths, which brings the effective tax rate down to 5% upon certain conditions being satisfied. Other refunds are the five-sevenths refunds and the two-thirds refund.

Withholding Tax

Dividends

Distributions of dividends by a Maltese company are exempt from withholding taxes in Malta. The general rule is subject to an exception where the dividends represent a distribution of untaxed income and they are paid to shareholders who are either Maltese resident individuals or non-resident persons (including companies) who are directly or indirectly owned and controlled by, or act on behalf of, a Maltese-domiciled and ordinarily resident individual. Such withholding tax would be of 15%.

Interest and royalties

No withholding tax is due on the payment of interests or royalties by a Maltese company provided that the recipients are not directly or indirectly owned nor controlled by, or act on behalf of, a Maltese domiciled and ordinarily resident individual and do not carry trade or business through a permanent establishment in Malta that the interest or royalty income is effectively connected to.

Other withholding tax

Maltese financial institutions are under an obligation to withhold 15% of the income derived from interest to resident individuals. For investment income of collective investment schemes, the withholding tax is set in the range of 10% to 15% where the payees are resident in Malta for tax purposes.

Value Added Tax (VAT)

The standard VAT rate in Malta on taxable supplies is 18%. However, a reduced rate applies on certain goods or services. For instance, a 7% rate applies on holiday accommodations and the use of sport facilities, while a 5% rate applies on essentials such as electricity, printing materials and medical accessories. Maltese VAT law also provides for an exhaustive list of supplies that are zero-rated, including food for human consumption and pharmaceutical produces. Other supplies are exempt from VAT, such as the letting of immovable property (not being holiday accommodations).

5.3 Available Tax Credits/Incentives

Malta operates a vast number of tax incentives, which are updated and renewed from time to

time, as well as regimes that make it a compelling jurisdiction in which to set up and conduct business. Malta has regimes that encourage the opening of new businesses as well as support existing ones. Examples of tax incentives operating in Malta are detailed below.

Research and Development (R&D) Tax Credit Schemes

Aid for R&D projects

Companies may claim qualifying expenditures associated with R&D as tax credits to offset their income tax liabilities. The eligible R&D projects must seek to achieve advances in science or technology. It is not a requirement for the R&D to actually be successful to be able to claim the expenditures.

The standard tax credit is set at 25% of the eligible expenses for large undertakings, which is increased to 35% if the beneficiary is a medium-sized enterprise and to 45% for small enterprises. The total support awarded is capped at EUR15 million per project.

Investment Aid Tax Credits

This is a comprehensive tax credit incentive regime that aims to help establish, expand and develop businesses.

Small to medium-sized enterprises and (in certain circumstances) large enterprises may benefit from tax credits as the percentage of qualified expenditures in qualified economic activities. Qualified economic activities include manufacturing, repair, maintenance, software, R&D, pharmaceuticals, provision of education, healthcare, hotel services and cultural activities.

Qualifying expenditure covers both tangible assets (expenditures on land, buildings, plant, machinery and equipment) and intangible assets (expenditures for patents, know-how and other types of intellectual property). The percentage of expenditures that the undertakings can benefit from as tax credits depends on the size of the beneficiary undertaking, with small undertakings benefiting from up to 30% of qualified expenditures, 20% for medium undertakings and 10% for large undertakings.

Business Development Tax Credits Scheme

The aim of this scheme is to support businesses that are establishing their base of operations in Malta, or to help existing businesses to expand or to restructure their operations. Tax credits based on the percentage of the qualified costs are the usual aid measure, but at the discretion of the Maltese authorities, direct cash grants may also be available.

Companies that work in manufacturing, R&D, international market services, waste management, industrial solutions or aircraft maintenance may benefit from up to EUR200,000 over any period of three consecutive years.

The eligible costs that are covered by the scheme include payroll, relocation, rent, services provided to the business, licensing and utilities.

Patent box regime

Malta has a special tax scheme that is a system of tax deductions for qualifying intellectual property expenditures. In essence, a taxpayer is entitled to a tax deduction that is calculated by considering the income that is derived from intellectual property and the expenditures incurred for developing the intellectual property.

Skills Development Tax Credits

Malta encourages employers to invest in the personal development of their employees using a special tax incentive programme. Companies that invest in their employees' training are able to benefit from a set of tax credits that are based on a percentage of the costs that the taxpayers have incurred when providing training or educa-

tion to their employees. The maximum tax credit allowed per undertaking is EUR1 million.

On the other hand, there is also a scheme for individuals called "Get Qualified", which provides those following educational, vocational or training courses that lead to certification or a diploma with a tax credit on their personal income tax. Thus, individuals who are paying out of their pocket can still recoup some of the costs.

Personal Income Tax Incentives for Highly Qualified Employees

One of the goals of Maltese fiscal policy is to bring in and retain foreign talent in certain industries; ie, aviation, financial services and assisted reproductive technology and gaming. One of the incentive programmes that Malta operates for this purpose is easement of income tax liability for certain highly sought-after workers that cannot be found other than through hiring from abroad. Non-domiciled persons who are employed by Maltese companies and who have positions in R&D, analytics or innovation, or who are managers in these sectors, are able to enjoy a reduced income tax rate of 15% for up to five consecutive years for EU/EEA individuals and up to four consecutive years for non-EU/EEA individuals, and which can, upon application, be extended.

Double Taxation Treaties

Malta is well known for its highly attractive refund system, which allows the effective utilisation of capital and reduction of the tax burden on holding companies. Additionally, Malta has over 70 double taxation treaties with the majority of developed jurisdictions.

Tax Refund System

See **5.2 Taxes Applicable to Businesses**.

Participation Exemption

Maltese holding companies that have an equity holding of 5% or more in either local or foreign companies may benefit from what is known as the participation exemption. This regime allows the Maltese holding company to benefit from an exemption on capital gains and income tax liabilities when receiving dividends from the equity holding, provided that certain conditions are met. The participating holding regime does not apply on dividends received by a Maltese holding company from a Maltese subsidiary.

In light of the recent developments in international tax law and EU measures, Malta has also introduced a new anti-abuse provision conditioning the enjoyment of its participating holding regime. Companies cannot apply for this regime for income derived from holdings in entities that are located in jurisdictions that the European Union has defined as "non-cooperative" for tax purposes. This list is updated twice a year and represents the list of jurisdictions that are deemed to not be fully compliant with the international tax compliance practices and measures. As of June 2021, the non-cooperative jurisdictions for tax purposes are:

- American Samoa;
- Anguilla;
- Dominica (new);
- Fiji;
- Guam;
- Palau;
- Panama;
- Samoa;
- Trinidad and Tobago;
- US Virgin Islands;
- Vanuatu; and
- Seychelles.

This provision does, however, include an exception, whereby if it can be proven to Malta's Commissioner for Revenue that these entities hold

sufficient significant people functions in those jurisdictions, then the Maltese holding company can still benefit from the participating holding exemption. This ensures that the element of "substance" is respected when utilising the Maltese tax system.

Full Imputation System

Malta also operates a full imputation system that ensures that dividends are not subject to economic double taxation. This means that if a shareholder, whether foreign or local, receives dividends from a Maltese company, on the profits that were already taxed, the shareholder will not have to pay income tax again on the receipt of those dividends.

5.4 Tax Consolidation

Malta has recently introduced tax consolidation rules that are applicable as of year of assessment 2020.

Under these rules, groups of companies can elect to be treated as a single fiscal tax unit, with the principal taxpayer being the holding company. Both subsidiaries resident in Malta and outside can form part of the tax unit. Only subsidiaries in which the parent company holds at least 95% of the shares will be eligible to form part of the fiscal unit.

All the entities in the group must have the same financial year dates. Additionally, the holding company must be either incorporated in Malta, be resident in Malta, or perform some activities in Malta. It can also be a Maltese trust or foundation if it has elected to be treated as a company for the purposes of income tax.

The fiscal unit will benefit from a streamlined and simplified income tax determination and will be able to use the refund system. In addition, the reduced income tax rate stemming from the refund system is allowed even if some of the members of the fiscal unit are not distributing profits. The lower effective tax rate will be applicable immediately, hence resulting in better cash flow for the group, as the holding company will not have to wait for tax refunds.

Tax-Paying Responsibilities

The principal taxpayer will be the one responsible for income tax and thus all the income and gains of the members of the fiscal unit will be allocated to the principal taxpayer. Consequently, all the deductions, tax credits, refunds, etc, will also be allocated to the principal taxpayer. This also includes any rights claimed under double taxation treaties for subsidiaries located outside Malta.

The principal taxpayer will also onboard all the income tax rights and obligations of the other members of the fiscal unit. Hence it will be the only one required to file income tax returns, reducing compliance costs.

In 2018, Malta also introduced a VAT Grouping for Financial Services and Gambling Industries, whereby companies forming a group of companies may be considered as one fiscal unit for VAT purposes.

5.5 Thin Capitalisation Rules and Other Limitations

Maltese legislation does not contain provisions regarding thin capitalisation rules.

In terms of the Income Tax Act, expenses are only allowed as deductions against chargeable income if such expenses are incurred wholly and exclusively in the production of the income. Accordingly, interest paid by a person on any borrowed money may be deducted as an expense against chargeable income as long as the amount borrowed by a person is used in its business activities to generate trading income.

Through the transposition of the EU Anti-Tax Avoidance Directive (the "EU ATAD Directive") in 2018, Malta introduced new interest limitation rules, which entered into force in January 2019. The new interest limitation rules implemented the maximum limitation on the amount of deductions that a company can claim in relation to borrowing costs: either 30% of the taxpayer's earnings before interest, taxes, depreciation and amortisation (EBITDA) or EUR3 million, whichever is higher.

Exemptions

Exemptions apply to the above-mentioned limitations of 30% where taxpayers are allowed to deduct exceeding borrowing costs up to EUR3 million. Standalone entities may fully deduct exceeding borrowing costs when they are not part of a consolidated group for financial accounting purposes and have no associated enterprises or permanent establishment; as well as members of a consolidated group, when the taxpayer can demonstrate that the ratio of its equity over its total assets is equal to or higher than the equivalent ratio of the group.

Borrowing costs are described as interest expenses on all forms of debt, payments under profit participating loans, imputed interest, the finance cost element of finance lease payments and other costs economically equivalent to interests.

Taxpayers may also carry forward exceeding borrowing costs without time limitation, and carry forward unused interests for a maximum period of five years.

5.6 Transfer Pricing

Maltese legislation does not contain detailed provisions regarding transfer pricing rules yet. However, mentions of the arm's-length principle can be found in the income tax legislation. Additionally, a new Budget Implementation Act recently passed into Maltese law. This act explicitly states that Malta's Commissioner for Revenue has the power to pass subsidiary items of legislation regulating the applicability of transfer pricing and advance pricing agreements in Malta. Thus, Malta has formally initiated the incorporation of transfer pricing rules into its domestic tax system. However, as of the time of writing, there have not been any subsidiary pieces of legislation promulgated regulating transfer pricing in Malta.

The Maltese Income Tax Act provides that income derived by a Maltese company and attributable to a permanent establishment outside of Malta shall be calculated in accordance with the arm's-length principle. The Act also provides that any artificial or fictitious scheme with the purpose of reducing the amount of tax due by the taxpayer shall be cancelled or modified by the Commissioner in order to eliminate the tax advantage obtained.

The provisions in the Income Tax Management Act refer to the situation where a non-resident person carries on business with a resident person and the transactions are not made in accordance with the arm's-length principle, producing a different amount of profit for the non-resident person. In these situations, the Commissioner for Revenue will impose taxation based on the ordinary profits that might be expected to arise from the business.

Patent Box Regime

In 2019, Malta announced a patent box regime and references are made to the transfer pricing method in order to determine the income or gains, providing that the transfer pricing method in terms of the OECD's Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations is to be used.

Reference to the arm's-length principle is also made in many of the double tax treaties entered into by Malta with other countries, which often includes in the provisions on associated enterprises that both countries that are parties to the treaty have the right to adjust the amount of the tax charged in transactions involving related parties, when the profits are different from those that would be made between independent enterprises.

5.7 Anti-evasion Rules

A general anti-abuse provision exists under the Income Tax Act that disregards any artificial or non-genuine schemes that aim to obtain a tax advantage by avoiding, reducing or postponing the tax liability of the taxpayer.

The Income Tax Act also provides for anti-tax avoidance provisions with respect to the participation exemption regime, whereby dividends received from a foreign entity would fall within the exemption only if the foreign entity is resident or incorporated in an EU member state, if it is subject to foreign tax of at least 15%, or if it does not derive more than 50% of its income from passive interest or royalties.

Where none of the conditions mentioned are satisfied, the exemption would apply only if the equity holding in the foreign entity is not a portfolio investment and the foreign entity or its passive interest or royalties are subject to at least 5% foreign tax. Other general anti-abuse provisions are found in the EU ATAD Directive as implemented in Malta.

In 2021, the Maltese Parliament has introduced a bill amending the participation exemption by including an additional anti-abuse/limitation rule. The bill is currently in its third reading and is expected to be introduced into law in the coming months. The exemption will be amended to include a clause whereby dividends received from entities resident in jurisdictions that are on the list of EU non-cooperative jurisdictions will not be able to benefit from the exemption.

CFC Rules

Through the EU ATAD Directive, Malta introduced controlled foreign company (CFC) rules, providing that where an entity or a permanent establishment does not have its profits subject to tax or is exempt from tax, it shall be treated as a CFC if the taxpayer holds, directly or indirectly, more than 50% of the voting rights, or 50% of capital, or is entitled to receive more than 50% of the profits; and the corporate tax paid on its profits by the entity or the permanent establishment is lower than the difference between the tax that would have been charged on the entity or permanent establishment under the Income Tax Act and the tax paid on its profits by the entity or permanent establishment.

An entity or a permanent establishment considered as a CFC shall have its non-distributed income included in the tax base of the Maltese company, when an arrangement or a series of arrangements are considered non-genuine. Some exemptions may be applied.

Exit Taxes

Exit taxes were also introduced in Malta and the taxpayer may be subject to tax on capital gains when assets are transferred:

- from the head office or permanent establishment in Malta to another permanent establishment in an EU member state or a third country and where Malta no longer has the right to tax capital gains from the transfer of such assets due to be transferred;
- when a taxpayer transfers its tax residence from Malta to another EU member state or third country and the assets do not remain effectively connected with a permanent establishment in Malta; or

- where the business carried out from Malta through a permanent establishment is transferred to another EU member state or to a third country and Malta has no right to tax capital gains from the transfer of such assets.

Additionally, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS came into force in Malta in April 2019, with the main purpose to modify double tax treaties and establish measures to combat tax avoidance. The changes made by the Multilateral Instrument, to be applied, need to consider when the instrument came into force for both states part of the double tax treaty.

6. COMPETITION LAW

6.1 Merger Control Notification

Mergers and acquisitions become subject to notification in Malta when they qualify as a "concentration" and when the two turnover thresholds set out in the applicable regulations are met. A concentration encompasses the following transactions:

- mergers between two or more previously independent undertakings;
- the acquisition by one or more undertakings of direct or indirect control of the whole or part of one or more other undertakings; and
- full-function joint ventures.

A concentration must meet the "control" criterion. This is met where the concentration leads to a lasting change of control, or where rights or contracts confer decisive influence on composition, voting or decisions of the organs of an undertaking.

Once the presence of a concentration is established, this is notifiable to the competition authorities where, in the preceding financial year, the aggregate turnover in Malta of the undertakings concerned exceeded EUR2.3 million, and each of the undertakings concerned had a turnover in Malta equivalent to at least 10% of the combined aggregate turnover.

6.2 Merger Control Procedure

The Office for Competition in Malta, being the competent body for competition law in Malta, invites parties that believe a transaction might be subject to notification to pre-notification meetings at the outset. Such meetings are not mandatory, but are usually helpful to determine the nature and quality of data available and required. The notification process is mandatory, and must be notified within 15 working days of conclusion of the agreement, announcement of the public bid or acquisition of a controlling interest.

The notification form largely corresponds to European Commission Form CO. The form is annexed to the relevant regulations. Unless a notification qualifies for the simplified, shorter procedure, a Phase I decision must be issued within six weeks, unless the authority has made a request for information or for submission of remedies. If, following the end of the Phase I period, a decision is taken to launch Phase II proceedings, such a decision must be reached within four months of the initiation of the investigation.

6.3 Cartels

There are rules to govern anti-competitive agreements and practices under the Competition Act (Chapter 379 of the Laws of Malta). To a large extent, these reproduce the rules found in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), with applicability to anti-competitive agreements and practices that have an effect on Maltese markets. Such agreements and practices are prohibited where they have the object or effect of preventing,

restricting or distorting competition within Malta or any part of Malta.

In broad terms, the prohibition covers the most serious infringements, such as cartels, as well as other forms of horizontal co-operation, such as joint production, R&D, purchasing or commercialisation agreements. The framework allows for the applicability of block exemptions, where these have been prescribed by the minister responsible for competition or by the European Commission. Both public and private enforcement of cartel infringements is possible in Malta.

6.4 Abuse of Dominant Position

The Competition Act prohibits the abuse by one or more undertakings of a dominant position, which includes price exploitation and price discrimination. The rules apply to conduct that has an effect in Malta. A relevant product or geographic market share in excess of 40% is usually indicative of dominance, although the assessment depends on a range of factors of competitive conditions, in addition to market shares.

Where the activity concerns trade between Malta and any one or more EU member states, then that activity is also subject to the provisions of Article 102 of the TFEU.

7. INTELLECTUAL PROPERTY

7.1 Patents

As provided in the Patents and Designs Act (Chapter 417 of the Laws of Malta), inventions are patentable in Malta if they are novel and do not form part of prior art (everything that is already available to the public), involve an inventive step, and are susceptible to industrial applications (the invention can be made or used in any kind of industry).

Biological inventions may also be patentable, subject to certain ethical and moral exceptions. Discoveries, scientific theories, mathematical methods, aesthetic creations, programs for computers and presentations of information are not regarded as patentable inventions.

A patent becomes protected once it is registered at a patent registry. An application for registration of a patent must be filed at the Office of the Comptroller of Industrial Property and shall be accompanied by the prescribed documents.

The term of a patent is 20 years from the filing date of the application. The right to a patent belongs to the inventor or their successor in title. Where the application for a patent is made by two or more persons jointly, a patent may be granted to them jointly and they will have equal rights unless otherwise agreed between them.

Any right-holder shall have the right to prevent third parties from performing without authorising the following acts:

- the making of a product or the use of a process incorporating the subject matter of the patent;
- the offering or the putting on the market of a product incorporating the subject matter of the patent, the use of such product, or the importation or exportation, or stocking of such product for such offering or putting on the market or for such use; and
- the inducing of third parties to perform any of the above acts.

Applications for Damages

Any application to sue for damages shall be made within five years from the date when the injured party obtained knowledge of the infringement and the application shall be filed before the Patents Tribunal, which has the power to order the infringing party to deliver to the right-holder

articles and apparatus that are deemed to be in contravention of the patent.

As per the Enforcement of Intellectual Property Rights (Regulation) Act (Chapter 488 of the Laws of Malta), the First Hall of Civil Court (FHCC) of Malta may, on an application filed by the injured right-holder, order the infringer to pay the right-holder damages commensurate with the actual prejudice suffered as a result of the infringement. Such damages are inclusive of lost profits and damages relating to unfair profits made by the infringer, as well as damages based on moral prejudice caused to the right-holder. Alternatively, the FHCC may award a lump sum of damages that would include at least the amount of royalties and fees that would have been due had the infringer requested authorisation to use the intellectual property in question.

In addition to such damages, the Court may, upon the plaintiff's application, issue an injunction against the infringer aimed at prohibiting the continuation of the infringement. Where the infringer unknowingly engaged in infringing activities, the FHCC shall order the recovery of profits or the payment of damages. Furthermore, the FHCC may order the taking of the following corrective measures:

- recall and remove from circulation within commercial channels; or
- order the destruction of items/materials (where applicable) that are found to be infringing or were used for the creation of infringing items/materials.

7.2 Trade Marks

Trade marks under the Malta Trademarks Act (Chapter 597 of the Laws of Malta) (the "TM Act") are defined as marks that consist of any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that any such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings. A trade mark must also be represented on the register in a manner that enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.

Registered trade marks are protected for a period of ten years from the date of filing. Once submitted, the application shall be examined by the Maltese Industrial Property Office (IPO). If the mark and the application meet the requirements of the TM Act, the mark is registered.

An infringement of a trade mark is actionable by the proprietor of the trade mark by sworn application, which is to be filed in the FHCC. Remedies claimable by injured rights-holders shall be those as stated in Chapter 488, and as briefly elaborated in **7.1 Patents**. The proprietor of an existing trade mark is entitled to exercise their rights arising out of the registered trade mark by filing a notice of opposition to the registration of any trade marks on the basis of a similarity of part or the totality of the mark itself as well as the similarity of part or the totality of goods or services. Oppositions falling within the remit of civil actions can be lodged within a five-year period following the date of completion of the registration procedure. If a proprietor of the trade mark is prevented by either fraud or concealment from discovering facts entitling the trade mark holder from applying for an order, an application may be made at any time before the end of the period of six years from the date on which one could, with reasonable diligence, have discovered those facts.

7.3 Industrial Design

Design means the appearance of the whole or a part of a product resulting from the features of, in particular, lines, contours, colours, shape,

texture and/or materials of the product itself, and/or its ornamentation. Designs are classified for registration according to the Locarno Agreement (1968), which establishes an international classification for industrial designs used for the purposes of the registration of industrial designs.

A registered design is a property right obtained by the registration of the design under the Patents and Designs Act (Chapter 417 of the Laws of Malta). A design is protected by a design right if the design in question is novel (no identical design has been made available to the public prior to the filing date) and has individual character (the overall impression it produces on the user differs from any overall impression of a design that has already been made available to the public). An application for registration of a design must be filed with the Comptroller of Industrial Property with the required documents.

A design right is protected for a period of five years from the date of filing of the application, and is renewable for one or more periods of five years, up to a total term of 25 years. Any right-holder who feels aggrieved by an action in contravention of the exclusive rights conferred by the design right may initiate civil proceedings within five years from the date when the right-holder obtained knowledge of the infringement and the identity of the alleged infringer. Remedies claimable by injured rights-holders shall be those as stated in Chapter 488, and as briefly elaborated in **7.1 Patents**.

7.4 Copyright

As provided in the Copyright Act (Chapter 415 of the Laws of Malta), copyright protects artistic, audio-visual, databases, literary and musical works, and is granted automatically to a work that has an original character and that has been written down, recorded, fixed or otherwise reduced to material form. Therefore, there is no need for registration, as protection is granted upon the creation of the work. Ideas, procedures, methods of operation or mathematical concepts cannot be granted copyright protection. Except in the case of computer programs and databases, copyright protection shall always vest in the author or joint author, as the case may be.

The author of a work eligible for copyright (or beneficiary where copyright has been transmitted by assignment or by testamentary disposition) enjoys, until the expiry of copyright, in addition to copyright, the moral right:

- to claim authorship of their work, in particular, the right that their name as far as practicable be indicated in a prominent way on the copies and in connection with any public use of that work; and
- that their name be not indicated on the copies or in connection with any public use of their work, or that their pseudonym be used.

It is not possible to transmit any of these moral rights during the lifetime of the author.

Protection of copyrights is granted under Maltese law for the following periods.

- Literary, musical or artistic works and database – 70 years after the end of the year in which the author died, with no regard to when the work was lawfully made available to the public.
- Audio-visual works – 70 years after the end of the year in which the last person out of the following died: principal director, the author of the screenplay, as well as the author of the dialogue and the composer of music that was specifically created for its use in the audio-visual work.
- With regard to publishers of previously unpublished works for which the copyright protection has expired – 25 years from the

time when the work was first lawfully published or lawfully communicated to the public.
- Neighbouring rights (performer rights) – 50 years from the end of the year in which the fixation of the performance was first lawfully published or lawfully communicated to the public.
- Neighbouring rights (producer's rights) – 50 years from the end of the year in which, the earlier of, the sound recording or the first fixation of the audio-visual work was first lawfully published or lawfully communicated to the public; or, in the absence of publication or communication to the public, from the end of the year in which the first fixation was made.
- Neighbouring rights (broadcaster's rights) – 50 years from the end of the year in which the broadcast was first transmitted, whether by wire or over the air, regardless of whether such broadcasting was made by cable or satellite.
- Sui generis rights of databases – 15 years as of January 1st of the year following the date of completion of the making of the database; or, if made available to the public, the right shall be protected for a period of 15 years from 1 January of the year following the date when the database was first made available to the public.
- Sui generis rights in respect of semiconductors – ten years from the end of the year in which the semiconductor product topography was first commercially exploited at any point in the world or for 15 years from the first fixation or encoding of the semiconductor product topography if it has not been commercially exploited.

The FHCC shall have jurisdiction to decide on enforcement measures in actions filed by the right-holder for infringement of copyright, neighbouring rights or sui generis rights. Damages claimable by injured rights-holders shall be those as stated in Chapter 488, and as briefly elaborated in **7.1 Patents**.

Enacted in November 2018, Subsidiary Legislation 460.36, which transposed Directive (EU) 2017/1564, is another important piece of legislation that aims to establish rules on the use of certain work subject to copyright protection for the benefit of persons who are blind, visually impaired or otherwise print-disabled without the need to request authorisation from the rights-holder.

7.5 Others

The Copyright Act considers databases and software as work eligible for copyright. However, the content of the database is excluded from copyright protection. Software is included within a wider term "computer program", which, in turn, forms part of the literary works described in **7.4 Copyright**. As a general rule, the intellectual property rights pertaining to literary works apply also with respect to software.

The Copyright Act also contains the concept of sui generis rights granted to the maker of the database. This exclusive right protects against the unauthorised extraction and re-utilisation of the whole or substantial content of the database provided that there has been a qualitatively or quantitatively substantial investment in either the obtaining, verification or presentation of the contents of the database. However, this exclusive right shall not apply to the extraction and re-utilisation of non-substantial parts of the content of a database, provided that a licensed user does not perform acts that conflict with the normal exploitation of the database or in any manner prejudice the legitimate interests of the maker of the database.

Furthermore, a database will only be eligible for copyright if it constitutes the author's intellectual creation.

In the case of computer programs and databases, where work is carried out during the author's employment, the economic rights granted by way of copyright protection shall be deemed to be transferred to the author's employer unless there is an agreement to the contrary limiting or otherwise excluding such transfer.

Trade Secrets

Trade secrets have also become a recognised intellectual property within the Maltese jurisdiction, following the introduction of the Trade Secrets Act (Chapter 589 of the Laws of Malta). This act, which came into force on 13 July 2018, is a transposition of Directive 2016/943/EU on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

For a trade secret to obtain a legally protectable status, it would have to satisfy the definition established by the Trade Secrets Act.

According to this act, a "trade secret" means information that meets all the following requirements:

- it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- it has commercial value because it is secret; and
- it has been subject to reasonable steps under the circumstances, by the person lawfully in control of information, to keep it secret.

Trade secrets under the Trade Secrets Act are protected from:

- unauthorised access, appropriation, copying of documents, object materials, substances or electronic files that are lawfully under the control of the secret holder and that contain either the trade secret or information from which the trade secret can be deduced; and
- any conduct not contained in the above point that can be considered as contrary to honest commercial practices.

Furthermore, unlawful use or disclosure of a trade secret is considered to arise in situations in which a person, without the consent of the trade secret holder, is found to have met any of the following conditions:

- they acquired the trade secret unlawfully;
- they are in breach of a confidentiality agreement or any other duty not to disclose the trade secret;
- they are in breach of a contractual or any other duty to limit the use of the trade secret; or
- they know that the trade secret has been obtained directly or indirectly from another person who was using or disclosing the trade secret unlawfully.

According to Article 9 of this act, any party has the ability to protect a trade secret against its unlawful acquisition, use or disclosure. During the course of legal proceedings, a trade secret's confidentiality may also be preserved.

Damages claimable by injured rights-holders shall be those as stated in Chapter 488, and as briefly elaborated in **7.1 Patents**.

8. DATA PROTECTION

8.1 Applicable Regulations

The primary legislative instrument regulating personal data protection in Malta is the Data Protection Act (Chapter 586 of the Laws of Malta). Furthermore, given Malta's status as an

EU member state, the EU General Data Protection Regulation (EU) 2016/679 (GDPR) is directly applicable to the territory of Malta.

The Data Protection Act aims to implement and further specify the relevant provisions of the GDPR. Accordingly, the Data Protection Act together with the subsidiary legislation issued thereunder essentially regulate areas that are either not addressed by the GDPR or where the GDPR allows member states to implement their own rules. This includes the setting up and composition of the data protection supervisory authority in Malta.

Therefore, while the GDPR provides the substantive data protection rules, the Data Protection Act essentially establishes the local enforcement and procedural rules. In particular, the latter establishes the Office of the Information and Data Protection Commissioner (IDPC), which is the regulatory authority overseeing all aspects of data protection in Malta, as well as the Information and Data Protection Appeals Tribunal, which hears appeals from parties that feel aggrieved by any decision taken by the IDPC.

8.2 Geographical Scope

Given that the GDPR is directly applicable in Malta, any processing of personal data relating to Maltese data subjects is primarily governed by the GDPR. As such, the territorial scope set out in Article 3 of the GDPR includes all personal data processing activities that are:

- carried out by establishments from within the territory of the EU, including Malta; and/or
- targeting the EU territory (including the Maltese territory) by way of offering goods and services aimed at the EU territory or monitoring the behaviour of data subjects within the EU.

Accordingly, any foreign company undertaking personal data processing activities of customers located in Malta should comply with the rules established by the GDPR. Furthermore, the specific provisions of the Data Protection Act shall apply in cases where:

- the processing of personal data is done in the context of activities of an establishment of a controller or a processor located in Malta or in a Maltese Embassy or High Commission abroad;
- the processing of personal data is done in relation to data subjects who are located in Malta, by a controller or processor not established in the EU; this applies where the processing activities are related to the offering of goods or services to data subjects in Malta or the monitoring of their behaviour in so far as their behaviour takes place within Malta; and
- the processing of personal data is done by a controller not established in the EU but in a place where the laws of Malta apply by virtue of public international law.

8.3 Role and Authority of the Data Protection Agency

The authority in charge of supervision and enforcement of data protection legislation in Malta is the IDPC.

Pursuant to the Data Protection Act, the IDPC is granted authority to monitor and enforce the application of the provisions of the Data Protection Act and the GDPR, with a special focus on:

- protecting the fundamental rights and freedoms of natural persons relating to the processing of their personal data; and
- facilitating the free flow of personal data between Malta and any other member states.

Furthermore, the role of the IDPC includes the facilitation of the right to access information held

by public authorities and to promote transparency and accountability within government.

Under the Data Protection Act, the IDPC is given authority to exercise its tasks and powers with complete independence and free from any external influence, whether direct or indirect. The person appointed to hold office as commissioner is appointed by the prime minister of Malta, following consultation with the opposition leader.

9. LOOKING FORWARD

9.1 Upcoming Legal Reforms

No further information has been provided in this jurisdiction.

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WH Partners is a Maltese-based leading law firm with a business focus and expertise in fintech, technology, gaming and gambling, tax, M&A and corporate finance. The firm also advises clients on intellectual property; data protection; capital markets; commercial contracts; real estate; employment law; trusts and foundations; and citizenship, residence and immigration. WH Partners is the exclusive member for Malta of Ally Law. More information is available at www.whpartners.eu.

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Trends and Developments

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Anti-Money Laundering, Funding of Terrorism and Virtual Financial Assets Regulations in Malta

Money laundering and terrorist financing

Anyone who has tried to open a new bank account, buy or sell a property, or invest assets with a firm is now familiar with the term "anti-money laundering", which is a catch-all phrase that to most of us only means filling in forms and providing documentation, but in fact is a set of laws which are intended to keep the world we live in safe from terrorists and our economies stable.

Allowing money laundering to flourish effectively means supporting terrorism, drugs and violence in our neighbourhoods. Businesses set up with the intent of cleaning dirty money have no qualms about undercutting their prices as long as they appear legitimate, while causing distress to genuine entrepreneurs. Such activities also often involve a degree of tax evasion, thereby denying the government financial resources which could otherwise be invested in the community in sectors such as infrastructure, health or education for the benefit of society at large.

The Prevention of Money Laundering and Funding of Terrorism Regulations in Malta

After a short stint as an FATF grey-listed country, Malta breathed a sigh of relief in 2022 at having been removed from the FATF grey list following genuine efforts to address shortcomings towards the end of 2021.

The general consensus among Maltese practitioners (after recovering from the shock of being grey-listed in the first place) was that if grey listing was what it took to wake up those who were not pulling their weight in the fight against money laundering and funding of terrorism, perhaps grey listing was a blessing in disguise for the jurisdiction.

Now, with the ship righted and wind in its sails, Malta can continue on its journey as a financial services centre of excellence within the European Union. The Prevention of Money Laundering Act (Chapter 373 of the Laws of Malta) together with the Prevention of Money Laundering and Funding of Terrorism Regulations (Subsidiary Legislation 373.01) and the Implementing Procedures issued by Malta's Financial Intelligence Analysis Unit (FIAU) are excellent pieces of legislation, in line with the highest standards and EU law. Moreover, the FIAU has also published sector-specific Implementing Procedures (IPs), to further guide subject persons or obliged entities on how they should comply with the law.

Among these sector-specific IPs are those aimed at the virtual financial assets (VFAs) sector.

Anti-money laundering, funding of terrorism and virtual financial assets

The need for sector-specific IPs is obvious given how VFAs increase the risk of money laundering and terrorist financing by being anonymous, immediate and by bypassing the need for a central authority which would police transactions.

The IPs for VFAs apply to persons regulated by Malta's VFA Act (Chapter 590 of the Laws of Malta), including VFA agents, VFA issuers and VFA service providers.

In Malta, subject persons who are not VFA service providers, but are required to handle VFAs while conducting relevant financial business or relevant activity, are also caught by these sector-specific IPs, with the net effect that the law is widely cast, to include:

- a person licensed under the Investment Services Act;
- collective investment schemes;
- providing services in Malta;
- liquidators;
- anyone providing VFA services in an incidental manner in the course of a professional activity, such as lawyers or company service providers.

The IPs for VFAs focus on risks which are particular to VFAs, being anonymity, immediacy, irrevocability and decentralisation. Subject persons are required to mitigate such risks by drawing up a Business Risk Assessment (BRA) which, amongst other things, accounts for the nature and risks of the VFA business and any improvements in this sector. The BRA shall be reviewed by subject persons bi-annually, or earlier where necessary.

VFA service providers are required to have their anti-money laundering and counter-funding of terrorism (AML/CFT) controls, policies, and procedures reviewed by an independent external third party. The independent review must be conducted at least every 18 months or whenever the VFA service provider's AML/CFT programme is improved or undergoes a major change.

The IPs for VFAs provide guidance as to how customer due diligence should be carried out, particularly regarding simplified customer due diligence in low-risk cases involving consumers trading with VFAs under EUR1,000.

Subject persons must also gather, record and keep on file transaction data which would consist of:

- wallet addresses involved in the transaction;
- identification details of the customer;
- full names of the parties involved;
- type and amount of the VFAs exchanged; and
- bank/wallet account details.

The IPs for VFAs guide subject persons on how to transact with different types of wallets, such as private wallets, custodian wallets and multi-signature wallets. Subject persons are to apply analytical tools to determine the content of the wallets and the history of the coins. The wallet addresses concerning the transaction must be screened for potentially harmful media in the public domain. Subject persons, in identifying their customer's source of funds, must also ascertain the origin of their coins by paying special attention to the customer's mining activities.

The IPs for VFAs include a list of red flags, trends, and case studies specific to VFAs to assist VFA service providers in better understanding what to look for when planning and implementing their AML/CFT programmes.

Conclusion

While in the VFA industry regulation is often frowned upon and seen as running counter to the very nature and scope of VFAs (ie, to be decentralised and democratic), when one keeps in mind the scope and purpose of anti-money laundering laws, and how important they are to our safety and the stability of our economies, it is easy to see why VFAs, like any other financial asset, should be subject to anti-money laundering and terrorist financing laws. In our opinion, regulation also gives VFAs a level of trustworthiness that will make them more mainstream.

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WH Partners is a Maltese-based leading law firm with a business focus and expertise in fintech, technology, gaming and gambling, tax, M&A and corporate finance. The firm also advises clients on intellectual property; data protection; capital markets; commercial contracts; real estate; employment law; trusts and foundations; and citizenship, residence and immigration. WH Partners is the exclusive member for Malta of Ally Law. More information is available at www.whpartners.eu.

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