



GUIDANCE NOTE 34

Private Foundations

Updated January 2020

The Private Foundations Act 2017 (the "Act") provides for the establishment of private foundations in Gibraltar.

What is a Private Foundation?

Private Foundations are generally bodies that are established for philanthropic purposes in order to make private contributions for charitable causes. Foundations are highly diverse and can vary greatly in their size, in the contributions that they make or the causes that they support. Even though many foundations are set up for charitable or philanthropic purposes, it is not a necessity that they pursue such causes. A Foundation may be set up for any purpose which is capable of fulfilment and which is not unlawful, immoral or contrary to the public policy of Gibraltar.

General Characteristics

Much like a company is governed by a set of constitutional documents (the memorandum and articles of association) so is a Foundation governed by its own set of constitutional documents. For a Foundation these are the Foundation Charter and, where applicable, the Foundation Rules which govern it. When the Foundation Charter and Foundation Rules are registered they bind the Foundation.

A Foundation is established by one or more persons subscribing their name to a Foundation Charter, endowing the Foundation with its initial assets and complying with the requirements of Section 13 of the Private Foundations Act 2017 as to its registration. To 'endow' a Foundation with assets means to pass the title in property absolutely and without consideration to a private foundation so that the property becomes the assets of that foundation, and includes whatever act is necessary in relation to any particular property so as to effectively and irrevocably transfer the title.

When a Foundation is established it becomes a legal entity with a separate legal personality that is able to hold and deal with property in its own name as an absolute legal owner and is able to sue and be sued in its own name. A Foundation holds property that has been transferred to it; either upon its establishment, or at any point thereafter, in order to be effectively dealt with in accordance with the purposes and objects for which the Foundation has been set up. Such purposes and objects would be clearly set out in the Foundation Charter. Assets that have been properly transferred to a Foundation become the property of that Foundation with full legal, equitable and beneficial title and cease to be the property of the transferor. Such property will not belong to any Beneficiaries unless distributed in accordance with the Foundation Charter (and any Foundation Rules, if applicable) and the Act.

Foundations must be registered at Companies House Gibraltar and their name must end with the word "Foundation" or the abbreviation "Fdn". They must also maintain at all times a registered office in Gibraltar and file at Companies House annual returns, accounts and notice of any change in registered particulars in much the same way that limited companies do.

Parties to a Foundation

Founder(s): Founders are the ones who establish the Foundation and endow it with its initial assets. They subscribe their names to the Foundation Charter and will set out what the Foundation's purposes and objects will be. As Founders they may vary or amend the terms of the Constitutional Documents, vary or amend the purpose of the Foundation, remove or appoint Councillors from or to the Foundation Council and remove or appoint a Guardian to or from the Foundation.

Councillor(s): Councillors are appointed in order to administer the Foundation so as to achieve the objects of that Foundation; if there is more than one Councillor appointed to a Foundation they will together make up the Foundation Council. They must act in accordance with the Foundation Charter and the Foundation Rules, they must act honestly and in good faith and they must not derive, whether directly or indirectly, any profit from their appointment as Councillor although they may be paid for their services provided to the Foundation; however nothing prevents a Councillor from benefiting from a Foundation as a named Beneficiary or as a member of one of the identifiable classes of Beneficiaries. Except where the Constitutional Documents provide the Councillors of a Foundation are to act unanimously when making distributions to beneficiaries and the Foundation Council of a Foundation shall, in respect of the management, administration and investment of the property of the Foundation, have all the powers of an absolute beneficial owner. Furthermore, a Foundation registered in Gibraltar must at all times have a Gibraltar resident body corporate holding a Class VII license on its Foundation Council.

Guardian(s): If a Foundation is established or the Foundation Charter is amended in such a way that the provisions contained in Section 4(4) are triggered (generally speaking the trigger is that the class of Beneficiaries of the Foundation is not sufficiently certain or not specifically designated) the Act provides that a Guardian must be appointed to the Foundation. Their purpose is as their name states, and they must act in the interests of the Beneficiaries and the Foundation at all times. They must act jointly unless the Constitutional Documents provide and must act in accordance with the Constitutional Documents. A Guardian may be appointed upon the registration of the Foundation by the Founder(s) or anytime after the registration of the Foundation. Guardians only have as many powers vested in them as is provided for them by the Constitutional Documents.

Beneficiaries: Beneficiaries are entitled to benefit from the Foundation by being identified by name in the Constitutional Documents or by virtue of belonging to a particular class whose identity is ascertainable from the terms of the Constitutional Documents. A Founder, Councillor or Guardian of a Foundation may also be a Beneficiary thereof.

Registration of a Foundation

Every Foundation is to be registered in accordance with Section 13 and those wishing to register a Foundation must deliver to the Registrar of Foundations the following documents:

- The Foundation Charter;
- Details of the endowment;
- A notarised declaration signed by the Councillors to the effect that the initial assets of the Foundation have been placed at their disposal and are available to them without condition for the purposes of the Foundation;
- A declaration signed by the Founder or his agent confirming that the details contained within the Foundation Charter are correct and an accurate reflection of the purposes of the Foundation;
- The names and addresses of the Councillors together with their written consent to act;
- The name and address of the Guardian together with his written consent to act (if applicable);
- The address and telephone number of the registered office in Gibraltar;
- The fee specified by the Registrar;
- Any other document or information that the Registrar may require.

Upon the Registrar receiving all the requisite documents and being satisfied as to their contents the Foundation is registered, allocated a registration number and a Certificate of Establishment is sent to the Foundation's registered office, signed and sealed by the Registrar.

Filings to be made by Foundations

Annual Returns: Every Foundation must file with the Registrar successive Annual Returns, each of which is made up to a date not later than the anniversary of the Foundation's registration. Annual Returns will be made in the form prescribed by the Registrar and shall be filed within 28 days after the date to which it is made up. However if a Foundation is in default of filing its Annual Return for a period of 6 months, the Registrar may send a registered letter to the Foundation advising it of the default and requesting that the default be remedied within one month of the date thereof. If the Foundation continues in default thereafter the Registrar may apply to the Court for an order to wind up the Foundation. Therefore it is extremely important that a Foundation is not in default of filing its Annual Returns.

Accounts: Foundations must keep proper books of account at the registered office with respect to all sums of money received and expended by the Foundation, the matters in respect of which the receipt and expenditure takes place and the assets and liabilities of the Foundation. A Foundation has up to 18 months to prepare its first set of accounts; thereafter subsequent financial years are determined beginning with the day immediately following the end of the Foundation's previous financial year and ending 12 months thereafter. The Foundation Council has a collective duty to ensure that the annual accounts for each financial year are drawn up and filed with the Registrar, and the accounts must be signed by two Councillors of the Foundation unless there is only one Councillor, in which case they may be signed by that Councillor.

Change in registered particulars: If during the lifespan of a Foundation there is a change to any of the particulars of the Foundation which was delivered to the Registrar upon its establishment, including any change to the Foundation Charter, or if a person becomes or ceases to be a Councillor or a Guardian, notice of the change signed by the Councillors must be delivered to the Registrar within 21 days from the date of the change. Where the change is to the Foundation's name or registered office the change is not effective until the Registrar has issued the Foundation with a new Certificate of Establishment.

Registration of Overseas Foundations

An Overseas Foundation may apply to the Registrar to be registered as a Gibraltar Foundation in accordance with the provisions of Part VIII of the Act.

However, certain prerequisites must be established before registration can take place:

- The Overseas Foundation must first be authorised to re-register under the law of the place of where it is first established, and following this it must first comply with all the requirements of that law in relation to the re-registration as a Gibraltar Foundation;
- Secondly, the Overseas Foundation cannot be registered in Gibraltar if:
 - (i) it is bankrupt;
 - (ii) a receiver or administrator has been appointed in relation to any property of the Foundation;
 - (iii) an application has been made to a court (no matter where the court is situate) to put the Foundation into liquidation, to wind it up, to have it declared insolvent, for the approval of a compromise or arrangement between the Foundation and a creditor, or for the appointment of a receiver or administrator in relation to any property in the Foundation when the application has not been fully disposed of.

Application for registration

An application for registration of an Overseas Foundation is made in the prescribed form to the Registrar and needs to include or be accompanied by:

- (a) a copy of the Foundation's Certificate of Establishment in the place in which it is established or registered;
- (b) a copy of the Foundation Charter which will be binding on the Foundation immediately after its registration in Gibraltar, together with a copy of the Foundation's current Foundation Charter;
- (c) a statement of the Foundation's current Councillors or equivalent officers (comprising the full name and address of every Councillor);
- (d) a statement of the address of the Foundation's registered office in the place in which it is established or registered;
- (e) the proposed name under which the Foundation is to be registered;
- (f) evidence that the Foundation is not prohibited from being registered;
- (g) evidence that on the date of registration the Foundation will cease to be established and registered outside Gibraltar;
- (h) evidence that the Foundation has legal personality in the place where it is established or registered;
- (i) a declaration of compliance;
- (j) the prescribed fee for the application.

Effect of registration

Once the Registrar is satisfied with the application the Registrar shall allocate the Foundation with a number, insert the name of the Foundation on the Register and issue the Foundation with a Certificate of Establishment and the Certificate will be conclusive evidence that the Foundation has satisfied all the requirements as to registration and that it is duly registered.

When an Overseas Foundation is registered as a Gibraltar Foundation it must file with the Registrar as soon as possible any certificate or document issued under the law of the place from where the Foundation has ceased to be established evidencing the fact that the Foundation has ceased to be so established.

Foundations transferring their registration out of Gibraltar

A Foundation may apply to the Registrar in the prescribed form to be removed from the Register in accordance with Part VIII.

However a Foundation cannot be removed from the Register unless, before it applies to the Registrar from removal, it has given notice to all its creditors stating that it intends to so apply. Furthermore a Foundation may not be removed from the Register unless the Foundation Council satisfies the Registrar that the Constitutional Documents permit such a removal.

Furthermore a Foundation cannot be removed from the Register if:

- (i) it is bankrupt;
- (ii) a receiver or administrator has been appointed in relation to any property of the Foundation;
- (iii) an application has been made to a court (no matter where the court is situate) to put the Foundation into liquidation, to wind it up, to have it declared insolvent, for the approval of a compromise or arrangement between the Foundation and a creditor, or for the appointment of a receiver or administrator in relation to any property in the Foundation when the application has not been fully disposed of;
- (iv) possession or control has been taken of any of the Foundation's property or affairs by or on behalf of creditors issued by it;
- (v) an application has been made to the Supreme Court of Gibraltar for the Foundation's compulsory winding up.

Application for transfer of registration

An application for the transfer of the Foundation's registration is made to the Registrar in the prescribed form and must include or be accompanied by:

- (a) evidence that the removal of the Foundation from the Register is not prohibited by any of the reasons set out above;
- (b) evidence that on the date of removal from the Register the Foundation will be established under the law of another place;
- (c) evidence that the Foundation will continue to have legal personality in accordance with the law of the place in question;
- (d) a declaration of compliance;
- (e) the prescribed fee.

Effect of transfer

Upon receipt of the above documentation the Registrar is to give notice of the proposed transfer and after 28 days the Foundation shall cease to be a Gibraltar Foundation, with the Registrar removing its name from the Register of Foundations.

Where a Foundation is removed from the Register of Foundations pursuant to these provisions, the Foundation must file with the Registrar as soon as possible any certificate or document issued under the law of the place from where the Foundation has become established evidencing the fact that the Foundation has become established under the law thereof.

Registration or transfer not to prejudice continuity of Foundation's existence

The registration of an Overseas Foundation as a Gibraltar Foundation or the removal of a Gibraltar Foundation from the Register for the purpose of transferring the registration does not prejudice or affect the identity or continuity of the Foundation's legal personality that shall continue uninterrupted by the process of transfer.

Dissolution and termination

A Foundation shall terminate and be dissolved, by being wound up by the Foundation Council, upon:

- (a) the expiry of its duration (if it is of limited duration);
- (b) the happening of any event specified in that regard in the Constitutional Documents;
- (c) the Foundation no longer having any property or assets;
- (d) the bankruptcy of the Foundation;
- (e) the completion, failure or lapse of its purpose by order of the Court on the application of the Foundation Council, the Guardian or the Beneficiaries or with the consent of the Guardian and the Beneficiaries;
- (f) upon the making by the Court of an order for the winding up of the Foundation.

Winding up of a Foundation by Supreme Court

The Court may order the winding up of a Foundation on the application of any Councillor, Guardian, Beneficiary or creditor thereof or on the application of the Registrar if in its opinion:

- (a) it is not reasonably practicable to carry on the Foundation in conformity with the Constitutional Documents;
- (b) it was established by duress, fraud, mistake, undue influence or misrepresentation or in breach of fiduciary duty;
- (c) it is, or is being conducted in a way that is immoral or contrary to public policy;
- (d) its terms are so uncertain that its performance is rendered impossible;
- (e) the Foundation is bankrupt;
- (f) if the Foundation is indebted to a creditor for a sum exceeding £750, the creditor has served a statutory demand on the Foundation demanding payment and the Foundation has failed to pay the debt within a period of 21 days;
- (g) there has been a failure by the Foundation to comply with the requirements in relation to its proper registration;

- (h) a Guardian or Enfranchised Beneficiary has been denied access to the accounts to which he is entitled under the Act;
- (i) the affairs of the Foundation have been conducted in such a way so as to defraud creditors or in an unlawful manner;
- (j) there has been persistent default by the Foundation in complying with the requirements or conditions imposed by the Act or any regulations;
- (k) the Founder, Foundation Council or a Councillor have in connection with the formation of the Foundation been guilty of fraud, misfeasance, breach of fiduciary duty or other misconduct in relation to the Foundation;
- (l) or that it is just and equitable to do so.

When a Foundation is required to be wound up its affairs, unless a liquidator has been appointed by order of the Court, shall be wound up by the Foundation Council.

De-registration of companies limited by guarantee or by shares and guarantee on becoming a registered foundation

Subject to the provisions of Schedule 1 of the Act, a company limited by guarantee or by shares and guarantee that is incorporated and registered under the Companies Act 2014 may be de-registered from the Register of Companies and be re-registered as a Foundation.

However the following companies cannot be de-registered and re-register as a Foundation: (1) a public limited company; (2) a company which is licensed under the Financial Services Act 2019; or (3) a company which is licensed or authorised in accordance with a Community requirement.

In order to do so, an application for the company to be de-registered as a company on registration as a Foundation must be lodged with the Registrar in the prescribed form and signed by the director or secretary of the company and must be accompanied by the following documents:

- (a) a special resolution of the company stating:
 - (i) the capital contributions of the company;
 - (ii) that the total amount of the guarantee of the company and (where applicable) the share capital of the company shall become the endowment of the Foundation and that each member of the company shall become a Founder of the Foundation for all the purposes of the Foundation and this Act;
 - (iii) for the method of converting membership or both shares and membership, as the case may be, into the endowment of the Foundation, specifying the sum contributed to the endowment of the Foundation by each member and (where applicable) shareholder, as the case may be; and
 - (iv) for the making of such alterations to the memorandum and articles of the company as are necessary to bring them (in substance and in form) into conformity with the requirements of this Act as the Charter and Rules (if applicable) of the Foundation under this Act.

- (b) a printed copy of the memorandum and articles as altered in pursuance of the special resolution

to be the Charter and Rules containing:

- (i) the name of the company and the name under which registration as a Foundation is to be sought, which name shall comply with the provisions of this Act;
 - (ii) the proposed registered office of the Foundation;
 - (iii) the date on which it is proposed to register as a Foundation under this Act.
- (c) a certificate of good standing in respect of the company issued by the Registrar of Companies;
- (d) evidence to the satisfaction of the Registrar that no proceedings for insolvency have been commenced against the company in Gibraltar;
- (e) evidence to the satisfaction of the Registrar that any mortgage or other charge recorded in respect of that company has been discharged in accordance with the Companies Act or the consent in writing to the de-registration of every registered mortgagee or chargee has been obtained;
- (f) where the Councillors of the Foundation are to be different to the directors of the company:
- (i) the names and addresses of the proposed Councillors together with their written consent so to act; and
 - (ii) letters of resignation from the directors of the company; and
- (g) the name and address of the Guardian together with his consent so to act.

A copy of the special resolution is subject to section 206 of the Companies Act 2016 and is to be forwarded to the Registrar within 30 days; the rest of the application documents may follow as long as they are not lodged with the Registrar before the special resolution is received.

Upon receipt of the application, and upon the Registrar being satisfied that the company has complied with all the applicable requirements, the registration of the company as a Foundation shall take effect on the date and time specified. Once the re-registration is finalised the memorandum and articles of the company, duly altered as specified in the special resolution, shall take effect as the Charter and Rules of the Foundation and any appointment of Councillors and Guardians shall take effect thereon.

A Foundation registered pursuant to these procedures is deemed to be a continuation of the company previously de-registered.

Guidance only

These notes are intended for general guidance only. Companies House Gibraltar does not assume legal responsibility for the accuracy of any particular statement. In the case of a specific problem, we recommend that you seek professional advice.

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