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Trusts, Foundations and Fiduciary Structures

by

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TABLE OF CONTENTS

PART 1: BACKGROUND

Beyond advising on Trusts.. 5

I. Types of Trusts 7

- *What is a Fiduciary structure?*
- Trusts
- Public Trusts
- Private Trusts
- Discretionary Trusts
- Reserved Powers Trusts
- Fixed Interest Trusts
- Private Trust Company
- Purpose Trusts

II. Foundations. 13

- Principles of a Foundation
- Trusts and Foundations: *a Quick Comparison*

III. Companies and Partnerships. 15

- Companies
- Partnerships
- Portuguese Civil Companies
- Civil Companies and Trusts
- Civil Companies held in trust

PART 2: PORTUGAL AND TRUSTS

IV. Trusts under Portuguese Law. 17

- Trusts as a Contract
- Trustees and Ownership Rights

V. Taxation of Trusts in Portugal. 19

- Current Legislation
- Aggravated tax rate of 35%

VI. International Pension Trusts. 21

- *"half protected is half not"*
- The Alternative
- Pensions and Portugal
- Estate Planning
- Taxation issues
- Conclusion

Other *e*Books from *euro*FINESCO 24

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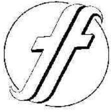


What is a fiduciary structure?

A fiduciary acts on behalf of another. There are many common examples of fiduciary roles in day-to-day life. A parent acts on behalf of a minor child. A guardian stands in for an incapacitated adult; an executor represents the intentions of a deceased person in settling the respective estate.

A *trust* is a device which creates a fiduciary relationship with respect to *assets*, typically separating the responsibility for management of the assets held in Trust from the beneficial ownership of those assets. In a Trust, the *Settlor* (the person who establishes the Trust) appoints *Trustees* (who hold and administer the assets of the Trust according to the Trust Deed)to the welfare and benefit of the *Beneficiaries* (those who receive the material benefit of trust assets).

Trusts

Trusts have been used since the Middle Ages for estate planning and, although they have evolved from the simple planning tool originally used, they have proved to be effective in meeting the international estate planning needs of high net worth families who wish to protect their assets and provide for their heirs.

In the most basic sense, a trust is a legal arrangement which involves (the "Settlor") transferring legal title of assets to another person or body (the "Trustee") to hold for the benefit of one or more persons (the "Beneficiaries") which may include the Settlor. The terms on which the assets are transferred are set out in a

written document known as a Trust Deed. The Trust Deed legally binds the Trustee to administer and manage the trust assets in a predetermined manner.
A Trustee has a fiduciary duty to act in the best interest of the Beneficiaries. Each trustee decision must take into account this duty. Although a Trustee is the legal owner of the trust assets, the benefit of the assets is only reserved for the Beneficiaries. It is important to note that the interests of the Beneficiaries are safeguarded by the powers of the court to supervise the administration of the Trust on application by a beneficiary.

Public Trust

A Public Trust represents the interests of a collective group. Typical groups using a *Trust* as an administrative instrument to meet defined requirements include:

Pension Trust is designed to manage assets to provide pension benefits to its members. Open pension trusts support at least one pension plan with no restriction on membership while closed pension funds support only pension plans that are limited to certain individuals. These are further sub-classified into Single Employer Pension Funds, Multi-employer Pension Funds, Related Member Pension Funds and Individual Pension Funds.

Charitable Trusts are a form dedicated to charitable goals. There are a variety of advantages to charitable trust status, including exception from most forms of tax and freedom for the trustees not found in most types of trusts. To be a valid charitable trust, the organisation must demonstrate both a charitable purpose and a public benefit. Applicable charitable purposes are normally divided into four categories: relief of poverty, promotion of education, religion and other types of trust recognised by the law, which includes trusts for the benefit of animals and a locality. There is also a requirement that the trust's purposes benefit the public or some section of the public, and not simply a group of private individuals.

Unit Trusts/Investment Trusts are a form of collective investment constituted under a trust deed and offer access to a wide range of securities. The underlying value of the assets is always directly represented by the total number of units issued multiplied by the unit/share price less the transaction or management fee charged and any other associated costs. Each fund has a specified investment objective to determine the management aims and limitations.

Private Trusts

Private Trusts are created to the benefit of one or more bespoke beneficiaries. They are highly individualised in nature and receive different treatment than Public Trusts in most jurisdictions. These are the fiduciary structures that are the object of the new Portuguese legislation.

The following comprise some of the purposes of Private Trusts:

Privacy: Trusts may be created purely for privacy. The terms of a will are public and the terms of a trust are not. In some families, this alone makes the use of trusts preferable.

Spendthrift protection: Trusts may be used to protect beneficiaries (for example, minors) against their own inability to manage money. These are especially attractive for spendthrifts. Courts may generally recognize spendthrift clauses against trust beneficiaries and their creditors, but not against creditors of a settlor with certain time frames.

Wills and Estate Planning: Trusts frequently appear in wills. Conventional wills typically leave assets to the deceased's spouse and then to the children equally. A trust may come into existence until the contingency age of as minor is reached. The trustee will have powers to assist the beneficiaries during their minority. Usually until 18 years of age.

Asset protection: Trusts may allow beneficiaries to protect assets from creditors. The settlor may be in a position to benefit from the trust assets, without owning them, and therefore in theory protected from creditors. In addition, the trust may attempt to

preserve anonymity with a completely unconnected name. Such strategies are ethically and legally controversial.

Tax planning: The tax consequences of using a trust may offer an attractive alternative to conventional direct private ownership. For this reason, trusts are frequently used for legal tax avoidance.

Co-ownership: Ownership of property by more than one person is facilitated by a trust. In particular, ownership of a matrimonial home is commonly effected by a trust with both partners as beneficiaries and one, or both, owning the legal title as trustee.

Discretionary Trust

This is the most common form of private trust. The Settlor absolutely and irrevocably gifts the assets to the Trustees to hold in trust. The Trustees have full discretion regarding the decisions they make in relation to, amongst other things, the amounts distributed, the timing of distributions and the form in which the assets are distributed. In carrying out their duties Trustees have should have ongoing communication with the Settlor and/or the Beneficiaries. This is especially true with regard to the investment of the trust assets, as the purpose of the Trust and the circumstances and needs of the Beneficiaries may evolve over time.

Reserved Powers Trust

A Reserved Powers Trust allows a Settlor to retain or assign to a third party certain powers which would have traditionally been vested in a Trustee. This enables the Settlor to legitimately retain a degree of control in relation to decisions regarding the investment, distribution and administration of the trust assets. The nature of the powers assigned will be detailed in the Trust Deed.

This type of trust allows peace of mind for Settlors who are less familiar with the trust concept but still wish to use a trust for estate planning purposes. The level of powers assigned need to

be carefully considered to ensure that a valid trust is formed and there are no negative tax or other implications to the Settlor retaining such powers. It should be noted that retaining greater control and influence over the Trustee may impact on the estate planning flexibility, asset protection, tax efficiency, and any forced heirship legislation.

Absolute/Bare Trust

In this form of trust, the Trustee is bound to distribute assets in a pre-determined manner as noted in the Trust Deed. This may include the distribution of trust income and/or capital.

Private Trust Company

Private Trust Companies are a popular estate planning tool for high net worth families who wish to retain a degree of control over assets settled on trust. A PTC is a company specially set up to act as trustee for a specific trust or a group of family connected trusts. The board of the PTC can be made up of family members, advisors and other confidants. The board of the PTC makes the trustee decisions and, with this in mind the make-up of the board will need to be carefully considered, as the board members' relationship with the Settlor and the jurisdiction in which they are resident, can have adverse tax consequences on both the structure and the Settlor.

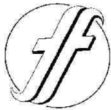
It is common for the board of a PTC to have at least one professional trustee as a member to provide a registered office, company secretary and administration services. This will help to maintain correct governance, affirm the PTC's status and also ensure that decisions are made in a way which is consistent with the Trustees' fiduciary duties.

A PTC enables a family to be more involved with dynastic estate planning and can provide additional flexibility. If appropriate, this extends to including the involvement of a family's younger

generation in the management of a Trust's assets which can be achieved through committee involvement. An added benefit of a PTC is the ease with which a service provider can be changed if the family becomes disgruntled with the service they are receiving. Unlike with a traditional trust, the Trustee will not need to be replaced, merely a new service provider appointed for the administration and registered office services.

Purpose Trust

This type of trust is settled for a specific purpose and does not have individuals as Beneficiaries. A purpose trust can be either charitable or non-charitable. With a traditional trust, oversight of the trust would rest with the Beneficiaries. However, as a purpose trust does not have any Beneficiaries, this oversight is provided by an Enforcer who would be appointed from the moment that the trust is established. This type of trust can be used for charitable purposes, to incorporate and own the shares of a PTC or to own a special purpose vehicle.



Principles of a Foundation

Families from civil law jurisdictions have traditionally used foundations as an alternative estate planning tool to trusts. A foundation can offer similar transparency, family control and dynastic structuring. There are, however, some key differences between trusts and foundations. Unlike a trust, but similar to a company, a foundation is a legal entity in its own right which holds assets in its own name. In a trust, it the trustee, not the trust, who holds the assets.

A foundation allows a family to have direct involvement over the assets transferred to the foundation. This involvement can be achieved by participating in the foundation's council, which can be made up of family members, advisors and other confidants. A foundation's council would need to include a qualified person who would guide the council to ensure it is acting correctly. As with trust planning, there may be tax consequences for the founder retaining control over the assets. A foundation will need to have a guardian who monitors the council's activities and may have to provide approval for certain decisions.

A foundation has a charter and regulations. The charter is a public document which contains the foundation's name, statutes and what will happen to the assets if the foundation is wound up. The regulations will outline the way the foundation should be managed and administered and contains provisions in relation to the appointment, removal, retirement and remuneration of the council members and guardian.

Trusts & Foundations: a Quick Comparison

Key facts	Trust	Foundation
Recognition	Mostly common law, but some civil law jurisdictions have changed their legislation to recognise trusts.	Mostly civil law, but some offshore common law jurisdictions now recognise foundations.
Structure	A legal obligation held by the trustees for the benefit of the beneficiaries	An independent, self-governing legal entity.
Creation	Created by a settlor during lifetime or upon death	Created by founder during lifetime or on death.
Legal owner and control	Trustees. Settlor can reserve powers (depending on jurisdiction) but should not have too much control.	Council Members have control but founder can reserve powers.
Privacy	Do not require registration and can be kept private.	Have to be registered in the established jurisdiction on public record.
Duration/ time limit	Limited: As specified in the trust deed or trust jurisdiction perpetuity period	Unlimited
Beneficiaries rights	Depending on the type of trust, beneficiaries have certain rights to the trust income/capital and information.	Beneficiaries have no automatic rights to the assets within a foundation (unless stipulated under local laws).
Assets	A trust has to have assets transferred into it to exist. Only the settlor can transfer assets into trust	A foundation can be created and have assets transferred into it at a later date. Assets placed into a foundation may come from the founder and/or others
Purposes	Trusts are mainly used as a vehicle to hold business and personal assets for succession, tax planning and asset protection purposes.	Foundations are predominately used for succession planning in Civil Law jurisdictions and less so for tax planning.

Companies

Companies are separate legal entities that typically have limited liability and can be used either on a standalone basis or, more commonly, as part of a trust structure. They can be used to hold a variety of assets including investment portfolios, bank accounts, aircraft, art, yachts, real estate, patents and royalties.

Partnerships

Unlike a company, a Limited Partnership, an LP has no legal existence in its own right. It is the relationship between two or more persons conducting a business together with a view to making a profit. The a partnership has unlimited liability. It is also transparent, so profits are attributed and assessed directly to the partners.

Another form of partnership is the Limited Liability Partnership (LLPs). An LLP is a statutory partnership with legal personality thereby offering limited liability to the partners. LLPs usually involve a general partner who will administer the LLP and limited partners who can make passive investments.

Portuguese Civil Companies

In Portugal, a *"Sociedade Civil de Simples Administração de Bens Próprios"* is a Civil Company designed solely for purpose of managing assets as regulated under the Civil Code. These Companies limit their activity to the administration of assets held as reserves for or to the benefit of its shareholders as well as the acquisition of immoveable property for the housing of the Company shareholders. These companies have no registered commercial activity in contract to a conventional commercial company. Rather than profit, their primary purpose is to manage and protect the assets held in benefit of the shareholders (usually a family unit).

Civil Companies and Trusts

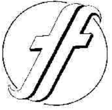
In this context, it is easy to recognise certain similarities between a Common Law Trust and a Civil Code Company. Underlying both is a fiduciary relationship whereby an asset is held by one party for the benefit of another. In a Trust, it is the Trustees, not the Trust itself, who have legal title to the property. Through this nominee ownership, they maintain control which remains separate from *equitable* ownership and benefits. The trustees are the legal owners of trust's assets. A trustee may be held personally responsible for all liabilities incurred in performing the trust, including debts to third parties.

In a Civil Company, the Company is the nominee owner and shareholders the beneficial owners. The Company, not its Administrators, has title to the assets and has unlimited liability. The Administrators manage the day-to-day affairs of the Company. As a transparent, "look-thru" structure, any liability and responsibility issues lie with the Shareholders, not the Administrators.

Civil Companies to be held in trust

Civil Companies can also be a valuable tool for holding assets within a trust. When a settlor wants to hold immovable property in trust, companies are customarily used. Trustees normally will not accept direct ownership of real property. However, if the property is owned by a company, there is usually acceptable for trustees to hold the company shares. Because this is a non-commercial use of the company, it fits perfectly within the formal objectives of Civil Companies for asset management.

For Portuguese tax residents, using a Portuguese civil company to hold Portuguese property is a logical extension of their residing in Portugal. This type of company has as one of its stated purposes in the Portuguese Corporate Tax Code "*the acquisition of immoveable property for the housing of the Company shareholders*".



Recent changes in the taxation of Trusts in Portugal have brought to the fore taxation issues regarding trusts for Portuguese fiscal residents. Beyond conventional long-term use by the expatriate community, tax treatment of trusts has come into greater focus following the adoption of the Non-Habitual Resident Regime to attract foreigners to move to Portugal. Some of these new arrivals bring with them trust structures which require analysis from a tax and legal perspective.

Trusts as a Contract

With the exception of the Madeira Free Trade Zone (where trusts are recognised when created under the laws of another jurisdiction), Portuguese law does not formally acknowledge the fiduciary concept implicit in a Trust whereby the rights are divided between the legal title in the hands of the trustees and the equitable rights with the beneficiaries. This lack of legal recognition raises several questions as to their tax and legal treatment.

Portuguese law views a trust as a contract. All transactions involving trusts are deemed to be made with the trustees – the legal owners of the trust's assets – rather than with the entitled beneficiaries under the terms of the trust. Beneficial interest is not a right formally recognised under Portuguese legislation.

Apart from the rules governing usufruct, Portugal does not generally apply the concept of split property interests. Even in the case of Civil Companies (as discussed in the previous chapter), the principal of fiscal transparency blurs the distinction between Company title and the beneficial ownership of the shareholders. For example, if the shareholders wishes to use the Company's property, authorisation from the Company is requires. This is usually done in the form of a "*Contrato de Comodato*" (a gratuitous loan contract).

Trustees and ownerships rights

The trustee, as legal owner of the assets, is deemed to hold full ownership rights. If a settlor makes a contribution to a trust for no consideration, such contribution will be treated as a gift (a gratuitous transfer). Similarly, if the trustee makes a gratuitous distribution to a beneficiary, this distribution will be treated as a gift.

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Historically, transfers made to the trustees or of distributions made by the trustees were not subject to income tax in Portugal. Income tax implies a certain action (work, investment, consideration) on the part of the recipient. Nevertheless, Portuguese law did tax certain gratuitous transfers (gifts) under the Stamp Duty Code. This assessment could apply to contributions made by a Portuguese settlor to a trust, where the trust is considered a non-resident corporate entity, and the assets being transferred were deemed to be located in Portugal. These circumstances were the exception rather than the rule.

In the 2015 Budget, Portugal formally recognised Trusts in mainstream legislation for the first time. In the new statutes, Trusts are defined as *bespoke fiduciary structures* and are now liable to taxation. Public Trusts, such as pension funds, are not affected by the changes. As defined in the new rules, three forms of taxation may now be levied: a flat 28% tax on distributions from a Trust; Capital Gains Tax when winding up a Trust; and Stamp Duty on gifts distributed from a Trust. Whenever a trust is deemed to be a bespoke fiduciary structure (a private trust), transfers made by trustees to a Portuguese resident beneficiary are considered to be a chargeable event, assessed as follows:

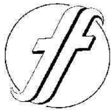
1. Distributions characterised as investment income from the trust paid to a Portuguese resident beneficiary are taxed under the Individual Income Tax Code (CIRS) at the current rate of 28%. Income paid by an entity resident in a black-listed jurisdiction is taxed at 35% rather than the normal rate;

2. Distributions on the winding-up of the trust will be:
    a. Characterised as Capital Gains if the beneficiary, being resident in Portugal, is the settlor of the trust, to be taxed under CIRS at the current rate of 28%. Nevertheless, no Capital gains Tax is due upon winding up a trust when the Beneficiary is different from the Settlor;
    b. Qualifying as a Gift if the beneficiary, being resident in Portugal, is not the settlor of the trust and is taxed under the Stamp Duty Code at a general rate of 10% (only if the income, either cash or assets, is to be deemed located in Portugal).
    c. A beneficiary who is related to the settlor (spouse, ascendant or descendant) may qualify for an exemption from this tax.

Aggravated tax rate of 35%

Income paid by an entity resident in a black-listed jurisdiction is be taxed at a rate of 35% rather than the normal 28%.

Following the changes to the taxation of trusts, the question arises whether the accountable entity should be deemed to be the trustee or the underlying source of the income. In other words, should the trust be a transparent or an opaque structure? In the absence of statutory clarification, it is assumed that the accountable entity would still be the trustees who remit the amounts to the beneficiary.



"half protected is half not"

The Non-Habitual Resident regime has proven popular with beleaguered taxpayers throughout the EU and beyond. Enticed by the promise of a 10-year tax holiday, many thousands have signed up for the programme only to discover that there is a "*fly in the ointment*". The guidelines state that most sources of foreign income are exempt from tax in Portugal provided that they are subject to taxation in the Source Country as defined in the appropriate Double Tax Treaty. This means that most streams of revenue "may be taxed" or are exclusively taxed at source prior to being considered for assessment in Portugal, as illustrated in the following income categories detailed in Double Tax Treaties:

- *Business Profits*
- *Capital Gains*
- *Independent Services*
- *Dividends*
- *Employment*
- *Government Service*
- *Interest*
- *Rental income*
- *Artistes & Sportsmen*
- *Royalties*
- *Director's Fees*
- *Teachers and Student*

The only income category eligible for full tax exemption in Portugal is *Pensions*. That's not much of a "holiday" if first you must pay tax before any income arrives in Portugal. This is especially true since protection from double taxation already existed under these treaties.

The Alternative

However a solution exists. The above forms of investment-related income can be transferred into a qualifying pension vehicle, thereby turning tax-free an otherwise taxable portfolio. An International Pension Trust is ideally suited for this purpose.

Pensions and Portugal

While most people believe that the only way to meet the prerequisites of a pension is via regular contributions throughout a working career, many are unaware that a compliant plan can be created on a lump-sum basis. Unlike annuities or conventional onshore retirement plans, often implying a labyrinth of restrictive do's and don'ts, an International Pension Trust can be simple, flexible and tax-efficient, all in a fully compliant structure.

An International Pension Trust is a segmented "public trust" as are most pension funds. These are fiduciary structures where the trustees/administrators hold the assets of the pension fund for the benefit of the plan's members. They are collective as opposed to bespoke in nature. However, the segmentation assures full autonomy within the structure. Investment choices of each member remain independent from others, allowing full control by individuals as well as freedom to choose how and when to draw income.

The 2015 statutory changes on taxation of trusts were directed at "private trusts" – those customised to an individual or family – not collective group structures. Pension trusts have always been taxed in Category H (pensions) and continue unchanged. As a fiscal resident of Portugal, you are only taxable on 15% of your gross annual income from an International Pension Plan.

Taxation

Members who are resident for tax purposes in Portugal or those who have outlived their Non-Habitual Resident tax holiday can benefit from an attractive partial exemption on their pensions. For example, in 2016, with this exclusion, a couple, each receiving a qualifying pension of €60,000, would pay less than €1,000 jointly in gross Portuguese income tax, rather than almost €42,000 if taxed on the full €120,000 pension income.

Estate Planning

An International Pension Trust can also qualify as a QNUPS (Qualifying Non-UK Pension Scheme), leaving the fund independent from one's estate. It acts as an effective estate planning vehicle, free from Inheritance Tax, just as it does for EU nationals.

An International Pension Trust can offer flexible benefits upon death:

- Within two years of death of the member the scheme can be wound up and the assets paid over to the beneficiaries;
- The trust can continue to allow the assets to roll-up for future beneficiaries;
- Beneficiaries can elect to continue taking income from the pension trust.

Conclusion

If you chose Portugal to take advantage of the Non-Habitual Resident Regime, you can unlock the full benefit afforded by this re-structuring opportunity. By transferring your investment portfolio to an International Pension Trust, you can achieve full relief on all of your income, not just your occupational pension.

"*Half protected is half not*."

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