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Gibraltar: Gibraltar foundations, a bridge between common law and civil law traditions

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ABSTRACT

The contribution explores Gibraltar's Private Foundations Act of 2017, which establishes foundations as legal entities distinct from their founder for, for example, estate planning, wealth transfer, and philanthropy. Unlike common law trusts, Gibraltar foundations offer flexibility, balancing founder control with professional governance. The article contrasts Gibraltar's adaptable, precedent-driven common law system with the prescriptive, state-supervised civil law frameworks of countries like France. Gibraltar's foundations, blending autonomy, and transparency, provide a compelling alternative for global wealth management, distinct from trusts and civil law foundations.

Foundations in Europe are part of a rich and diverse legal tradition, inherited from Roman law and adapted to national contexts. Whereas not-for-profit foundations have existed for centuries in civil law Europe, private-benefit foundations only appeared on the scene in the 20th century.

As regards the non-profit foundations established in European countries, a project of a European statute for foundations emerged in the 2000s to harmonize the disparities between national regimes. However, differences of opinion between Member States on sensitive issues, such as taxation and the control of foundations, have slightly slowed down negotiations to which Gibraltar is not part, as it has been considered as a foreign jurisdiction since Brexit. The status of Gibraltar foundations will thus neither be considered nor recognized as the country has not been part of the European Union since the Brexit.

Gibraltar's Private Foundations Act (the "Act") came into force on 11 April 2017 as an alternative to traditional common law trusts.

A foundation is defined as a legal entity established in Gibraltar, capable of holding and managing property in its own name as the absolute legal owner, and being able to sue or be sued independently (Article 3(2) of the Act). Its legal personality is acquired once the foundation is officially registered with the Gibraltar Companies House and, once the Foundation Charter and, if applicable, its Regulations are registered, they become legally binding on the foundation.

The procedure of legal recognition provides clarity and legal certainty to entrepreneurs, philanthropists, and wealthy families who want to establish a structure reflecting their long-term vision and ensuring independence as a separate legal entity.

A foundation can be established for any purpose which is capable of fulfilment, and which is not unlawful, immoral, or contrary to public policy in Gibraltar (Article 4(1)). It can be easily adapted to estate planning and intergenerational wealth transfer, as well as holding international real estate portfolios, art collections, family businesses, or crypto assets and structuring family offices.

Additionally, a Gibraltar foundation may engage in certain commercial activities that support its primary objectives, although it may not be established with the primary purpose of generating profit (Article 4(2)). As such, foundations may hold investments, subsidiaries, or other commercial interests, if this aligns with their stated purposes, a distinction intended to differentiate foundations from pure commercial entities.

Although its public visibility is limited, the existence of a public register with mandatory disclosure enhances the foundation's legitimacy and transparency, especially in a global environment that is increasingly committed to combating money laundering.

As part of the foundation's set up process, the founder puts his name to the Charter, sets its objectives, and allocates the initial assets to it (Article 5). The Act also allows the founder

to retain or delegate certain powers at its discretion. He may retain the power to amend the foundation's objectives, appoint or remove members of the Foundation Council, appoint or remove a Guardian, and modify the Charter or, where applicable, the Foundation's Regulations.

A feature of Gibraltar law is that at least one member of the Council must be a locally based entity holding a valid Class VII license (Article 24(1)(a)), effectively serving as a professional trustee with fiduciary-like responsibilities. This requirement ensures a high level of professional governance, compliance with international AML/CRFT regulations, and regulatory oversight.

Although the role of the Council is comparable to that of company directors, its members do not legally own the foundation's assets. However, the Council exercises full powers like those of an absolute owner with respect to the management, administration, and investment of the foundation's property.

According to Article 32(1), the beneficiaries of a foundation may be identified by name or as members of a clearly defined class, provided that this classification is clearly outlined in the founding documents. Foundations can be structured to grant beneficiaries fixed rights or to operate on a discretionary basis to enhance asset protection. In the latter case, the Council determines whether, and to what extent, benefits are allocated. Unless otherwise specified in the Charter or Regulations, all decisions regarding distributions to beneficiaries shall be made unanimously by the Council.

Notably, unless expressly prohibited in the founding documents, Article 32(4) permits the founder, a Council member, or a Guardian to be appointed beneficiary of the foundation. Subject to compliance with their fiduciary duties and the rules on conflicts of interest, this enables them to remain involved in the daily management while also benefiting from the foundation.

While foundations are particularly appealing to citizens from civil law jurisdictions due to their familiarity with foundation structures, as opposed to common law trusts, several other factors drive this choice such as the flexibility the Gibraltar foundation regime provides to founders.

THE COEXISTENCE BETWEEN GIBRALTAR FOUNDATIONS AND GIBRALTAR TRUSTS

Private law foundations in Gibraltar, frequently aligned with altruistic or philanthropic aims, share a fundamental similarity with common law trusts as both involve the allocation and management of assets in pursuit of a defined objective. However, trusts, by contrast, are better suited for the purpose of private wealth management and a broad range of individual needs.

In both models, as discussed above, assets are administered by a person or entity that does not hold economic ownership but acts on behalf of others, whether in the interest of specific beneficiaries or a broader purpose.

The asset management of Gibraltar foundations is entrusted to appointed councillors, who are required to comply with the principle of speciality that dictates that all actions undertaken by the foundation must be directly related to its stated mission and therefore provides a safeguard against the deviation from its original aims. However, a Gibraltar foundation's statutes may always be amended to adapt its original purpose, provided such changes are consistent with the founder's initial intentions.

Founders keep considerable power. Although once the founder irrevocably transfers his assets to the foundation, the Act enables him to exercise strategic oversight over the management of its assets as he can participate in the management of the foundation as a member of the foundation Council (Article 23(8)) which have, in respect of the management administration and investment of the property of the foundation, the powers of an absolute beneficial owner (Article 27).

Although collective decision-making limits the influence of an individual council member appointed by the founder (Article 23 (1) (c)), the presence of the founder in the Council may give rise to conflicts of interest if ever tempted to favour his own interests to the detriment of the foundation's general mission.

The mandatory appointment of a Gibraltar professional trustee in the foundation Council may be viewed as a way of balancing a potential influence of the founder over the foundation's management thereby preserving its independence and integrity as a separate legal entity.

Founders can establish internal rules that guide the Council's decision-making and strengthen the foundation governance. They may also appoint a Guardian acting in good faith in the best interests of the beneficiaries and the foundation's mission to oversee the Council's compliance with the foundation's objectives and legal obligations.

The founder retains considerable influence by defining operational rules, setting conditions for the allocation of resources, and possibly acting as a member of the council or as a guardian (if the founder is not appointed as a council member): This is not very different from the centralized control often found in trust arrangements, which are usually administered by one or more trustees who are bound by fiduciary duties. Indeed, while trustees are accountable to the beneficiaries, they generally exercise broad discretion in managing assets.

For example, founders retaining powers (e.g., amending charters) risk blurring the line between personal control and the foundation's legal independence. This could invite challenges from creditors or beneficiaries alleging de facto control, akin to trust 'sham' doctrines.

In principle, the transfer of assets to a foundation is irrevocable, thereby reinforcing the founder's long-term commitment to the foundation's mission. Foundations are therefore often preferred by families or individuals who not only want to transfer assets but also convey lasting ethical or social values. Trusts, on the other hand, are often perceived as more individualistic instruments, primarily focused on safeguarding the financial interests of the settlor and their beneficiaries.

The Foundation Charter remains accessible for public inspection via the Statutory Register of Foundations maintained at Companies House, Gibraltar. The Registered Trust Act 1999 has also made a provision for the registering of a trust deed where such registration is required by the deed and for the keeping of an index of the names of such trusts.

THE FLEXIBILITY OF THE GIBRALTAR FOUNDATIONS OVER THE CIVIL LAW FOUNDATIONS

The common law legal system underpinning Gibraltar's foundations regime has significantly shaped their nature, process

of creation, governance, and control to distinguish them from those created in civil law countries. The common law tradition defined by the primacy of case law and private autonomy contrasts sharply with the prescriptive rules and administrative oversight characteristic of civil law systems such as the French system. This divergence reflects not just technical differences but fundamentally opposed legal philosophies: one based on freedom of contract and legal individualism, the other on state supervision and the primacy of the public interest. This difference especially becomes apparent in the regulation of not-for-profit foundations, rather than private benefit foundations, as few civil law jurisdictions know non-charitable private benefit foundations.

One of the most notable distinctions is the way in which foundations acquire legal personality. In Gibraltar, foundations do not need the approval of a public authority to obtain legal status, which allows greater flexibility, speed, security and better adaptation to the founder's intentions, which will not be subject to approval requirements.

In France, on the other hand, some types of foundations can only exist once they have been expressly recognized, by ministerial decree in the case of non-profit *Fondations d'Utilité Publique* or authorization from the Prefecture in respect of the setup of the *Fondations d'entreprise*, also not-for-profit foundations. This more rigid approach, which takes on its full meaning in the context of *Fondations d'Utilité Publique*, reflects the government's intention to retain control over the use of certain types of foundations, by ensuring that they serve defined collective objectives.

The way in which the Foundation's objectives are defined also reflects the fundamental divergence between the two traditions. In Gibraltar, founders are free to pursue private, philanthropic, or charitable aims without the necessity of proving a general interest. Foundations may thus pursue a wide array of purposes.

In many civil law systems, by contrast, foundations are subject to the principle of speciality. Their objectives must be lawful, specific, and—in many cases—aligned with the public interest, as far as not-for-profit foundations are concerned. Any deviation from the original purpose can jeopardize their legal status.

In matters of governance, common law jurisdictions such as Gibraltar offer notable flexibility. Subject to the provisions of the Act, founders are free to design the internal structure of their foundation—including leadership, oversight, and control mechanisms—without being bound to a predetermined model. The foundation's constitution can be adapted over time in response to evolving needs or founder preferences.

Conversely, civil law systems such as France, from the very beginning, impose strict requirements on corporate governance on not-for-profit *Fondations d'Utilité Publique* and *Fondations d'Entreprise*. This mandatory framework is designed to ensure that the foundations' operations remain consistent with their stated purpose and that there is transparency vis-à-vis the supervisory authorities. In France, moreover, the standard statutes published by the 'Conseil d'Etat' serve as models for officially recognized public interest foundations.

The financial regime governing foundations also differs markedly. In Gibraltar, there is no requirement for a minimum

initial endowment. Furthermore, the rules governing dissolution are relatively relaxed, founders may determine how residual assets are to be distributed, provided this complies with general legal principles.

Most of the civil law foundations must be endowed from their inception with sufficient assets to ensure their longevity. In the event of dissolution, the law in the case of not-for-profit foundations typically prescribes that remaining assets be allocated to a cause aligned with the general public interest.

Gibraltar foundations enjoy a high degree of independence from the government and public authorities. Their main obligations typically include the filing of annual accounts and periodic reporting.

In contrast, most civil law systems impose rigorous state supervision, in particular on not-for-profit foundations. Foundations, in many cases, are also subject to ongoing financial monitoring, often involving the submission of audited accounts. This oversight ensures that funds are used in accordance with the foundation's purpose and in the wider public interest.

THE COURTS' APPROACHES

Part VI of the Act grants the Supreme Court of Gibraltar, in its Chancery jurisdiction (comparable to its supervisory authority over trusts), the power to hear matters involving foundations registered under the Act, as well as other foundations, provided they meet the qualifying criteria. The Court is vested with broad jurisdiction to adjudicate on a variety of issues, including, but not limited to, the validity, interpretation, and legal effect of constitutional documents, and the nature and scope of beneficial rights.

To date, there have been no judgments of the Supreme Court of Gibraltar or any other superior court interpreting the Gibraltar Foundations Act or the constitutional documents of a foundation. However, as a common law jurisdiction, Gibraltar recognizes the persuasive authority of decisions of other Commonwealth and offshore common law courts.

When legal questions arise concerning foundations, courts approach them very differently depending on whether they operate within a civil law or common law system. These divergences are not merely procedural or technical; they reflect fundamental distinctions in judicial philosophy, the role of statutory law, and the degree of autonomy granted to individuals to establish legal arrangements.

Analysing both systems helps illuminate how each treats the legal and operational aspects of foundations.

In civil law countries, such as France, judges rely mainly on codified laws and the overriding principle of the public interest to resolve disputes. Judicial reasoning is typically deductive and systematic, starting from a general rule of law and applying it logically to the facts, often referred to as legal syllogism.

In this context, foundations are examined primarily through their founding documents, the objectives defined by the founder, and the conditions imposed at the time of creation. For example, in France, foundations recognized as being of '*d'Utilité Publique*' must strictly adhere to their stated purpose.

Any deviation from this mission can have serious consequences, including the potential loss of legal recognition. In civil law systems, judges thus focus narrowly on compliance

with the law, with limited flexibility to reinterpret or adapt the law to specific circumstances.

In common law jurisdictions, on the other hand, judicial reasoning is mainly inductive and rooted in precedent (*stare decisis*). Judges assess the facts in detail, take account of previous decisions and deduce legal principles from them. This approach allows greater flexibility and better adaptation to changing social and economic realities.

In the case of foundations, common law courts will give priority to discerning the founder's intention, often within the broader framework of the law of trusts and equity. While they will generally respect the terms of the foundation, they will intervene where the council and guardian fail in their duties, particularly in cases of bad faith, mismanagement or deviation from fiduciary responsibilities. The emphasis is not on rigid application of the rules, but rather on achieving equitable outcomes tailored to the specific facts of each case.

When foundations encounter operational or legal difficulties, the different judicial philosophies produce markedly different responses.

For example, in civil law systems, if a foundation's original purpose becomes unattainable, it must seek judicial permission to change its purpose. Judges adhere closely to statutory frameworks and rarely deviate from codified requirements.

Common law courts, on the other hand, resolve such challenges by interpreting the foundation's governance instruments and assessing the conduct of its council members. If a breach of duty is identified, the courts can apply equitable remedies based on precedent, allowing tailor-made solutions to be found without being constrained by rigid legislative codes.

THE PROCEDURAL RULES GOVERNING JURISDICTION ALSO DIFFER SHARPLY BETWEEN THE TWO SYSTEMS

Civil law jurisdictions impose strict and inflexible rules on judicial competence. Foundations are often bound by the founder's conditions, with little room for case-by-case adjustment. Moreover, doctrines such as *forum non-conveniens*, which allow courts to decline jurisdiction in favour of a more appropriate forum, are typically rejected.

In contrast, common law systems offer significantly greater procedural adaptability. Courts may decline jurisdiction under the *forum conveniens* principle if another forum is deemed more suitable. Party autonomy is usually respected in matters of jurisdiction, making the system more conducive to cross-border operations. Furthermore, common law courts focus on the proximity of the dispute and the substantive interests involved, often treating certain jurisdictional matters as imperative and exclusive.

Finally, the two legal traditions also diverge in their supervisory mechanisms for foundation governance.

In civil law countries like France, public authorities play a significant role in oversight. Foundations are required to report to

regulatory bodies and to meet strict financial and operational standards. However, while this protects the public interest, it also restricts managerial discretion.

Conversely, in common law jurisdictions, courts oversee administrators primarily to ensure they act honestly, prudently, and in accordance with equitable principles. Judicial intervention is typically limited to situations of misconduct or failure to fulfil fiduciary duties, and is governed by flexible doctrines rather than fixed statutory obligations.

CONCLUSION

In summary, the Gibraltar Private Foundations Act of 2017 establishes a legal framework that effectively bridges the gap between common law trusts and civil law foundations. By enabling founders to create entities with separate legal personality and adaptable governance structures—while mandating local professional oversight—Gibraltar provides a robust option for international estate planning, asset management, and the pursuit of long-term objectives. This regime caters particularly well to individuals from civil law jurisdictions, who may find its foundation structure more familiar and its flexibility appealing, while still benefiting from the autonomy inherent in a common law system.

A comparative lens reveals key distinctions between foundations and trusts, as well as between common law and civil law approaches. Gibraltar foundations, with their emphasis on perpetuity and purpose-driven asset management, are well-suited for embedding enduring values or goals, such as philanthropy or intergenerational wealth transfer. Trusts, by contrast, excel in private wealth management, offering discretion and tailored support for individual beneficiaries. Meanwhile, the Gibraltar model stands apart from civil law foundations by prioritizing founder intent and judicial flexibility over the prescriptive oversight typical of jurisdictions like France, where state supervision ensures alignment with public interest.

Ultimately, the decision to opt for a foundation or a trust, and the choice of jurisdiction, hinges on the founder's specific priorities—whether control, longevity, transparency, or regulatory environment. Gibraltar's foundations, blending structural clarity with operational freedom, offer a distinctive alternative for those navigating the complexities of modern wealth management. As global demands for accountability and adaptability continue to shape legal structures, Gibraltar's approach positions it as a noteworthy player in the evolving landscape of European foundations.

AUTHOR BIOGRAPHY

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