

Funds in Malta

Professional Investor Funds

Under Maltese law, collective investment schemes that qualify as Professional Investor Funds (“PIFs”) are subject to a significantly lighter and more flexible regime than retail funds. Hedge funds, funds of funds, private equity funds, and property funds, would be typical examples of funds that may benefit from being set up as a PIF in Malta.

The Investment Services Rules for Professional Investor Funds, issued by the Malta Financial Services Authority (“MFSA”), cater for a regulatory framework that is both robust and adaptable, allowing managers and promoters to innovate and to develop new products to meet the changing needs of the market. The level of regulation depends on the type of investors targeted, as a distinction is made between PIFs promoted to Experienced Investors, PIFs promoted to Qualifying Investors and PIFs promoted to Extraordinary Investors.

The main advantages of Malta as a fund domicile

We feel that the following are the principal advantages which give Malta a competitive edge in terms of choice of fund domicile:

- (i) the level of costs involved (in terms of registration and licensing fees as well as professional fees) is relatively low and very competitive;
- (ii) Malta’s single regulator and supervisor, the MFSA, is approachable and seeks to provide a timely and efficient service (their response time tends to be short and applications are usually processed fast);
- (iii) PIFs can be self-managed without the need to appoint a third party manager. Furthermore, PIFs do not need to appoint a manager, custodian, administrator or any other service provider who is licensed in or who has otherwise exercised passport rights into Malta (where all underlying investments will be held abroad and the respective services will be provided from outside Malta). It is sufficient for them to appoint any service provider licensed in a recognised jurisdiction for this purpose (including EU/EEA States and jurisdictions with which the local regulator has entered into bilateral or multilateral MOUs). Therefore clients have the flexibility of continuing to use the services of any external service provider licensed in any such jurisdiction with which they are accustomed to work.

Having said that, should clients so desire, the necessary human and other resources to adequately cater for and provide such fund-specific services and generally all legal, accountancy/audit and other professional services which may be required by funds are also available locally, with a number of local and foreign credit institutions and investment firms having a presence and operating in Malta.

(iv) it is also possible for a fund to invest in underlying assets through special purpose vehicles. SPVs can and have often proved to be an efficient tool in tax planning for the funds (particularly to benefit from a double tax treaty between Malta and the relevant jurisdiction where the assets are held or to provide the connecting factor between Malta and such jurisdiction where no double tax treaty has been concluded between the two countries, by establishing the SPV in a jurisdiction having a DTT with both jurisdictions), as well as in respect of asset acquisition and holding structures.

The regulatory regime applicable to PIFs, while sufficiently sound to afford the appropriate level of protection to professional investors (and to protect Malta's reputation) is very flexible so as to allow fund promoters to structure their set-ups in the way it best suits their needs and desires. Furthermore, the MFSA continues to update and tweak the local rules in view of maintaining the country's competitiveness in the financial services sector. For instance, the increasing demand for Islamic financial instruments and local stakeholders' drive to secure a presence in this niche market, has spurred a consultation process conducted by the MFSA on how the Maltese regime applicable to collective investment schemes, investment services providers, credit institutions and financial institutions can accommodate Islamic funding structures and financing vehicles. In particular with regards to PIFs, the MFSA has indicated that *Shariah* compliant funds (such as equity, commodity, *Ijarah* and *Murabahah* funds) may be set up in the form of a Maltese PIF.

Licensing requirements

Collective investment schemes, including PIFs, require a collective investment scheme licence in terms of the Investment Services Act (Chapter 370 of the Laws of Malta) to issue or create any units or carry on any activity in or from within Malta, or, if the scheme is formed in accordance with or existing under the laws of Malta, to issue or create units or carry on any activity in or from within a country, territory or other place outside Malta.

A PIF may be set up as an investment company with variable share capital (SICAV), an investment company with fixed share capital (INVCO) limited partnership, unit trust or common contractual fund. Usually, clients opt for the corporate form (SICAV) for various reasons (including our detailed regulation of the corporate form under our companies legislation which is largely based on UK company law).

A collective investment scheme may be structured as a multi-fund (umbrella) scheme, with a number of sub-funds thereunder, constituted by one or more different classes of shares (which could be denominated in different currencies), each sub-fund having its own investment objectives, policies and restrictions. The assets and liabilities of each sub-fund are considered to constitute a separate patrimony distinct from the assets and liabilities of (and ring-fenced from the creditors of) the other sub-funds.

The application for a licence to operate a PIF must be made to the MFSA. The MFSA may only license a PIF if it is satisfied that the PIF will comply in all respects with the relevant legislation, regulations and rules and that its directors and officers, or in the case of a unit trust

or limited partnership, its trustee(s) or general partner(s) respectively, are fit and proper persons to carry out the functions required of them in connection with the scheme.

The PIF may appoint any service provider (e.g. investment manager, adviser, administrator, custodian or prime broker) it deems necessary. However, for Experienced Investor Schemes, the appointment of a Custodian is compulsory. The external service providers appointed by a PIF do not have to be established in Malta. Where all service providers are based outside Malta and the PIF has not appointed a local resident director (in the case of a scheme set up as an investment company), a local general partner (in the case of a scheme set up as a limited partnership); or a local trustee (in the case of a scheme set up as a unit trust / common contractual fund), the PIF has to appoint a Local Representative.

If one or more of the proposed service providers is not based in a Recognised Jurisdiction or is not the subsidiary of a firm that is regulated in a Recognised Jurisdiction¹ that retains control of its subsidiary and undertakes to provide all the necessary information to the MFSA, then the promoters should submit an application for preliminary indication of acceptability of a PIF.

It is possible for PIFs to be set up as self-managed funds, in which case the PIF would be subject to a minimum capital requirement (EUR125,000) and certain other supplementary licensing conditions. Self-managed PIFs have to establish an in-house Investment Committee, which is expected to hold the majority of its meetings in Malta. The Investment Committee may delegate the day-to-day investment management of the assets of the PIF to one or more officials, referred to as the Portfolio Manager/s, who will effect day-to-day transactions within the investment guidelines set by the Investment Committee and in accordance with the investment objectives, policy and restrictions described in the fund's Offering Document/ Marketing Document.

Redomiciliation

Foreign funds established as a company in jurisdictions permitting redomiciliation, may apply to be registered as being continued in Malta under the Companies Act, without the need to wind-up the company and to create a new entity.

Ongoing requirements

The rules applicable to PIFs are formulated as Standard Licence Conditions ("SLCs") established by the MFSA and set out in the Investment Services Rules for Professional Investor Funds. The MFSA may agree to disapply or amend these SLCs (where the circumstances justify such treatment, as long as investors are adequately protected) and/or to impose supplementary conditions.

PIFs are required to appoint a Compliance Officer, a Money Laundering Reporting Officer and an auditor approved by the MFSA. They are subject to certain minimum disclosure,

¹ A Recognised Jurisdiction is defined as including the EU and EEA Members as well as signatories to a Multilateral MoU or Bilateral MoU with the MFSA covering the relevant sector or financial services.

record keeping and reporting requirements. An overview of the main features of the Maltese regime applicable to each category, i.e. PIFs promoted to Experienced Investors (“Experienced Investor Funds”), PIFs promoted to Qualifying Investors (“Qualifying Investor Funds”) and PIFs promoted to Extraordinary Investors (“Extraordinary Investor Funds”) is given in the Annex.

Qualifying Investor Funds and Extraordinary Investor Funds are not subject to any investment or borrowing restrictions, whilst direct borrowing for investment purposes and leverage via the use of derivatives is restricted to 100% of NAV for Experienced Investor Funds. Where the main objective of a PIF is investing in immovable property, certain restrictions on leverage may apply in respect of Experienced Investor Funds and open-ended Qualifying Investor Funds.

If a PIF effects its investments through one or more special purpose vehicles (“SPVs”) owned or controlled via a majority shareholding of the voting shares either directly or indirectly by the PIF, the SPV(s) must be established in Malta or in a jurisdiction which is not an FATF blacklisted country. In principle, the PIF must through its directors or general partner(s) at all times maintain the majority directorship of any SPV.

Enhanced Flexibility

PIFs are permitted to use side pockets in order deal with situations where certain assets within the fund’s portfolio become illiquid or comparatively hard to value, subject to the conditions set out in the relevant Guidance Notes issued by the MFSA.

Regulations establishing the conditions applicable to drawdown arrangements, whereby investors commit themselves to subscribe for a maximum amount of units in the fund which will be issued at a discount, are currently in the pipeline.

Listing

A PIF that has been granted or has applied for a collective investment scheme licence may apply for admissibility to listing with the Listing Authority (the MFSA). The application for admissibility to listing may be made concurrently with the application for the collective investment scheme licence. At present, Malta has one recognised exchange: the Malta Stock Exchange.

Taxation

Malta offers a favourable tax regime for collective investment funds (“CIS”) (including PIFs and UCITS) and has a comprehensive Double Tax Treaty network.

For tax purposes, a distinction is made between prescribed and non-prescribed funds. Essentially, a fund in a locally based scheme that has assets situated in Malta constituting at

least 85% of its total asset value is classified as a Prescribed Fund; other licensed funds, including funds in an overseas-based scheme, are Non-prescribed Funds.

In the case of Prescribed Funds, the CIS qualifies for exemption from tax on income “other than income from immovable property situated in Malta and investment income” earned by the Prescribed Fund. The withholding tax on local investment income is 15% for bank interest and 10% for other investment income. There is no withholding tax on investment income received by Non-prescribed Funds (including overseas based CISs).

Foreign investors are not subject to Maltese income tax when they dispose of their investment or when they receive a dividend.

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