

 **hedgeweek** guide to setting up

Alternative Investment Funds

July 2009

Europe & BVI 2009



British Virgin Islands **Ireland** **Luxembourg** **Malta**

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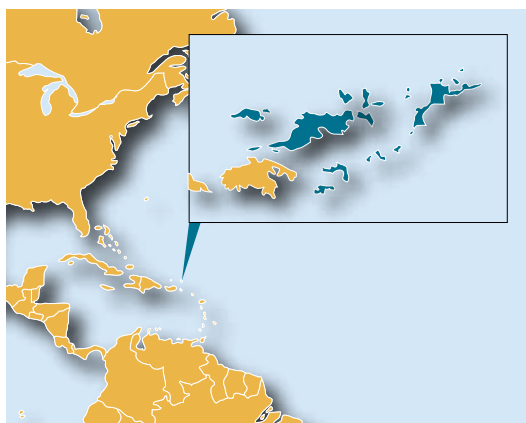
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Introduction

*The **Hedgeweek Guide to Setting up Alternative Investment Funds** is a unique online publication that is being made available to the 53,000-strong global hedge funds, real estate and private equity managers and service providers that read Hedgeweek and its family of alternative investment newsletters.*

The focus of the Guide is to help managers, promoters and their advisers decide where best to set-up their alternative investment funds.

The Guide draws together in one volume all the major current regulations covering the establishment of alternative investment funds in a comprehensive treatment of the subject covering the major jurisdictions globally.

The 2009 edition of this Guide covers the jurisdictions in and around Europe, and this year includes a key Caribbean jurisdiction, the British Virgin Islands.

We would like to thank the following firms who contributed expert articles and invaluable time and assistance in preparing comprehensive overviews of each of their jurisdictions in this second edition - Harney, Westwood & Riegels (BVI), Dillon Eustace (Ireland), Malta Financial Services Authority (Malta) and Chevalier & Sciales (Luxembourg).

We look forward to your feedback and participation in forthcoming editions of this Guide.

*Sunil Gopalan
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British Virgin Islands

FUND LEGISLATION

- Mutual Funds Act 1996

NUMBER OF FUNDS

As at 31 December 2008 (the latest available):

Overall:.....2953

NUMBER OF FUNDS BY CATEGORY

As at 31 December 2008:

Private:831

Professional:.....1894

Public:.....228

Only open ended funds are required to be registered or recognised and so no official figures exist for other types of funds.

There is currently no distinction in the licensing process between directly invested hedge funds and fund of hedge funds and so no official figures exist for the break down.

Domiciled and administered fund assets total:

No figures are available currently

Domiciled and administered fund assets by category:

No figures are available currently

REGULATOR

Financial Services Commission of the British Virgin Islands, Investment Business Division.

Contact: Broderick Penn, Director of Investment Business Division; Tel: 284-494-1324 or 284-494-4190; Fax: 284-494-5016

Address: British Virgin Islands Financial Services Commission, Pasea Estate, PO Box 418, Road Town, Tortola, VG 1110, British Virgin Islands.

SERVICE PROVIDERS

Law firms:.....7 multi-jurisdictional firms;
.....approximately 10 other BVI commercial firms;
Administrators:.....87 licensed;
Custodians:.....8 licensed;
Corporate service providers:.....117 licensed;
Accountants/auditors:.....7 international firms;
Trustees:.....98 general trust license holders;
Insolvency Practitioners:.....16 licensed.

Local stock exchange: No

Local fund industry body:

Mutual Fund Practitioners Association

Promotion agency for funds/financial sector:

BVI International Finance Centre

DOUBLE TAXATION TREATIES

None

TAX INFORMATION EXCHANGE AGREEMENTS

UK; USA; Australia; Norway; Finland; Sweden; Denmark; Greenland; Iceland; Faroe Islands; France

ALTERNATIVE FUND, MANAGER AND SERVICE PROVIDER INFORMATION

TYPES OF ALTERNATIVE FUND VEHICLE

Open-ended or closed-ended investment vehicles can be structured as a company, LP, unit trust, common contractual fund, umbrella fund or SPC (open-ended only)

Available types of corporate vehicle:

- Company Limited by Shares, including:
 - Restricted Purposes Company;
 - Segregated Portfolio Company (for recognised or registered funds and licensed insurance companies only);
 - Company Limited by Guarantee authorised to issue shares;
 - Company Limited by Guarantee not authorised to issue shares;
 - Unlimited Company authorised to issue shares; and
 - Unlimited Company not authorised to issue shares

TYPES OF REGULATORY FUND CATEGORY

Public; Private; Professional

AUDIT REQUIREMENT

- No statutory audit requirement save for registered Public Funds.
- No local audit sign-off requirement.

FINANCIAL STATEMENT REQUIREMENTS

All BVI mutual funds, i.e. all private, professional and public funds recognised or registered under the BVI Mutual Funds Act 1996, must submit a return in a prescribed form to the Financial Services Commission no later than 30 June in each year covering the calendar year ending 31 December of the previous year.

COST OF REGULATORY FEES

Private and Professional:.....US\$350 pa

Public:.....US\$500 pa

OVERALL COST OF FUND ESTABLISHMENT

Private and Professional:From US\$10,000
 plus disbursements for simple fund
 Public:From US\$20,000
plus disbursement for simple fund

REGULATORY APPROVAL TIME

Private and Professional: 3 - 5 days
 Public Fund:6 - 10 weeks

OVERALL ESTABLISHMENT TIME:

Private and Professional: Generally at least 2 weeks
 Public Fund: At least 10 - 14 weeks

The British Virgin Islands

By Harney, Westwood & Riegels

The British Virgin Islands is a leading jurisdiction for the formation of alternative investment funds, having approximately 2,800 funds registered or recognised under the Mutual Funds Act 1996 (the Act), the primary legislation governing the formation and operation of hedge funds in the British Virgin Islands. These funds are regulated by the Financial Services Commission (the Commission), the financial regulator in the British Virgin Islands, which was established by and whose powers primarily originate from the Financial Services Commission Act 2001.

The Act requires all investment funds falling within its definition of "mutual fund" to be recognised or registered with the Commission.

The Act further requires all managers and administrators of mutual funds to be licensed where the manager or administrator is incorporated in or carries on its business from the British Virgin Islands.

The Act defines a "mutual fund" as a company incorporated, a partnership formed, a unit trust organised or other similar body formed or organised under the laws of the British Virgin Islands or of any other country or jurisdiction which:

- a) collects and pools investor funds for the purpose of collective investment; and
- b) issues shares (defined as shares in the share capital of a company, an interest in a mutual fund partnership and a unit in a mutual fund unit trust) that entitle the holder to receive on demand or within a specified period after demand an amount computed by reference to the value of a proportionate interest in the whole or in a part of the net assets of the company,

the partnership, the unit trust or other similar body, as the case may be; and includes:

- i) an umbrella fund whose shares are split into a number of different class funds or sub-funds, and
- ii) a fund which has a single investor which is a mutual fund not registered or recognised under the Act.

Fund Vehicles

Sponsors and fund managers considering setting up investment funds in the British Virgin Islands may choose from the following range of possible vehicles:

- a BVI Business Company.
- a Limited Partnership.
- a Unit Trust.

The vast majority of British Virgin Islands investment funds are set up as companies limited by shares under the BVI Business Companies Act, 2004.

Categories of Fund

The three categories of regulated fund that are most commonly used are as follows:

- a **private fund**, which is a mutual fund whose constitutional documents specify that it will have no more than 50 investors or that the making of an invitation to subscribe for or purchase shares is made on a private basis;
- a **professional fund**, which is a mutual fund the shares in which are only made available to professional investors and the initial investment by a majority of the investors is not less than US\$100,000 (or equivalent); and

- a **public fund**, which is a mutual fund that is neither a private fund nor a professional fund.

Private funds must be recognised before they carry on business or manage or administer their affairs in or from within the British Virgin Islands. Private funds are currently not required to have their accounts audited or filed with the Commission.

Professional funds may carry on business or manage or administer their affairs for a period of up to 14 days without being recognised under the Act. Policy Guidelines suggest that a fund will be regarded as having commenced its business when a prospectus, or other document the purpose of which is to make an invitation to purchase or subscribe for shares of the fund, is published. Professional funds are currently not required to have their accounts audited or filed with the Commission.

Public funds must be registered before they carry on business. Public funds may not make an invitation to the public or any section of the public to purchase shares unless prior to such invitation they publish in writing a prospectus, approved by and signed on behalf of the fund's directors or similar governing body, and file a copy of that prospectus with the Commission.

A public fund is required to have a custodian who is functionally independent of the fund's manager or administrator and must also maintain adequate accounting records and prepare audited financial statements in respect of each financial year and keep such accounting records and financial statements available for examination by the Commission, any authorised person and all investors.

No restrictions on Strategy

There are no restrictions on the strategy a fund may pursue, provided it is not otherwise in breach of the laws of the British Virgin Islands, no limits on leverage taken by the funds and no rules imposed on funds as to how they value their assets.

Fund Annual Returns

All private, professional and public funds must submit a return to the Commission no later than 30 June in each year. The return requires funds to make disclosures to the Commission about their basic prudential and governance information and summary financial information including details of its asset allocation. The return does not require any information on the identity of investors or the specific investments within the fund's portfolio. The period which must be covered in the return relates to the calendar year ending 31 December of the previous year.

Public Fund Prospectus Requirements

Registered public funds are required to have a prospectus, which must be filed with the Commission. Every prospectus is required to provide full and accurate disclosure of all information as investors would reasonably require and expect to find for the purpose of making an informed investment decision. An investor in a public fund has a statutory right of action for rescission or damages in respect of any misrepresentation (which includes an omission to disclose required information) contained in the fund's prospectus.

Where the required information ceases to be accurate in a material particular, the fund must publish an amendment to the prospectus within fourteen days of the change occurring and file the same with the Commission.

Directors

The Commission requires that every public fund that is a company have at least 2 individuals as directors. In addition, the Commission has expressed a preference that all corporate private and professional funds seeking recognition have at least 2 individuals as directors of those funds.

Location of Functionaries

The Commission requires a fund wishing to be recognised or registered to submit an application which must include evidence of the fund's status together with details of each of the fund's functionaries (being the investment manager, investment advisor, administrator and custodian).

In considering an application for recognition or registration, the Commission has issued Policy Guidelines which require that the manager, investment advisor, administrator and custodian of a British Virgin Islands mutual fund be incorporated in either the British Virgin Islands, or a "recognised jurisdiction", which, for the purposes of the Mutual Funds Act, are currently as follows:

Australia	Italy
Bahamas	Japan
Belgium	Jersey
Bermuda	Luxembourg
Canada	Malta
Cayman Islands	Netherlands
France	Singapore
Germany	Spain
Gibraltar	Sweden
Guernsey	Switzerland
Hong Kong	United Kingdom
Ireland	USA
Isle of Man	

However, the Policy Guidelines also indicate that functionaries incorporated in other jurisdictions may be acceptable if the jurisdiction is regarded by the

Commission as having a prudent system of regulation and supervision of mutual funds business.

Manager's and Administrator's Licenses

An application for an administrator's or a manager's license must include a statement of the financial and human resources and administrative facilities available to the applicant for the competent and efficient conduct of its business. A licence will not be granted unless the Commission is satisfied that the applicant

- a) is a fit and proper person to be engaged in the business proposed;
- b) has available adequate knowledge, expertise, resources and facilities necessary for the nature and scope of the business proposed; and
- c) has appointed an auditor satisfying such conditions as may be prescribed by the Commission.

AML

All funds, managers and administrators must comply with the Anti-Money Laundering regulations of the British Virgin Islands.

Tax

British Virgin Islands based funds, managers and administrators are not required to pay any income taxes to the British Virgin Islands Government under the British Virgin Islands Income Tax Act. Furthermore, the investors in such entities will not have to pay any British Virgin Islands income taxes or capital gains taxes on payments those investors receive. Provided the entity has no employee in the British Virgin Islands, it will have no liability to British Virgin Islands payroll taxes.

Capital gains realized with respect to any shares of a fund are exempt from income tax in the British Virgin Islands and there are no estate, inheritance, succession or gift taxes payable in the British Virgin Islands with respect to any shares of a fund. ■



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Ireland

FUND LEGISLATION

- UCITS: European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations, 2003
- Non-UCITS investment companies: Part XIII of the Companies Act, 1990
- Non-UCITS unit trust: Unit Trusts Act, 1990
- Investment Limited Partnerships (non-UCITS): Investment Limited Partnerships Act, 1994
- Non-UCITS common contractual funds: Investment Funds, Companies and Miscellaneous Provisions Act, 2005

NUMBER OF FUNDS

- 4,941 Irish regulated funds as of March, 2009 (source: Financial Regulator)
- 5,749 non-Irish funds administered in Ireland as of March, 2009 (source: Irish Funds Industry Association)

NUMBER OF FUNDS BY CATEGORY

All data as of March 2009 and includes sub-funds (source: Financial Regulator)

UCITS.....	3,054
Non-UCITS.....	1,857
Retail Non-UCITS.....	526
Professional Investor Non-UCITS.....	212
Qualifying Investor Non-UCITS.....	1,119

There are no official statistics available on fund strategies

Domiciled and administered fund assets total:

As of March, 2009 there were €1,353,150,610,000 in total fund net assets administered in Ireland, comprising both Irish and non-Irish funds (source: IFIA).

Domiciled and administered fund assets by category:

There are no up-to-date official statistics available on

fund strategies as such. The numbers of Irish registered funds by regulatory category are provided above.

REGULATOR

The Irish Financial Services Regulatory Authority (commonly known as the "Financial Regulator"). The Financial Regulator is a constituent part of the Central Bank and Financial Services Authority of Ireland, formerly known as the Central Bank.

Address: Irish Financial Services Regulatory Authority, Financial Institutions and Funds Authorisation, PO Box 9138, College Green, Dublin 2, Ireland

SERVICE PROVIDERS

There are a large number of law-firms which provide legal services to the alternative investment funds industry here, both the leading commercial firms and smaller niche practices.

All of the main accountancy firms have large operations here.

There are approximately 50 fund administrators active in Ireland, many of which have affiliated custodian operations in Ireland, the majority of which would have alternative investment fund servicing capabilities.

There are no available statistics on Irish corporate service providers as generally these entities may not be required to be regulated in Ireland. Generally, fund administrators or specialised transfer agency companies would provide those services normally provided by corporate services providers, excluding company secretarial services which are also provided by corporate secretarial affiliates of the law-firms or certain independent firms.

Investment banks involved in prime brokerage do not typically provide this service out of Ireland and it is more commonly associated with other financial centres such as London and New York.

There are no official statistics on the number of placement agents in Ireland.

Local stock exchange:

The Irish Stock Exchange Limited

Local fund industry body:

Irish Funds Industry Association

Promotion agency for funds/financial sector:

Industrial Development Agency and Irish Funds Industry Association

DOUBLE TAXATION TREATIES

Ireland has forty six tax agreements, which provide for the elimination or mitigation of double taxation with the following countries: Australia, Austria, Belgium, Bulgaria, Canada, Chile, China, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Israel, Italy, Japan, Republic of Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, the Netherlands, New Zealand, Norway, Pakistan, Poland, Portugal, Romania, Russia, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, the United Kingdom, the United States of America, Vietnam and Zambia.

In addition Ireland has treaties with Macedonia and Malta which are both due to come into effect from 1st January 2010. Ireland also has treaties with both Turkey and Georgia which do not yet have effect.

Forty five out these tax treaties have exchange of information clauses that are based on the OECD Model Treaty. Switzerland is the only country without such a clause.

TAX INFORMATION EXCHANGE AGREEMENTS

Ireland has a tax information exchange agreement and agreement for affording relief from double taxation with the Isle of Man. There is one in negotiation with Jersey.

Under the European Savings Directive, all European Member States and a number of dependant territories are required to exchange certain information and/or impose a withholding tax on particular types of payments made to certain individuals. Andorra, Liechtenstein, Monaco, San Marino and Switzerland are not participating in automatic exchange of information but are exchanging information on a request basis. Their participation is confined to imposing a withholding tax. The other dependant territories that are participating are Anguilla, Aruba, British Virgin Islands, Cayman Island, Guernsey, Isle of Man, Jersey, Montserrat, Netherlands Antilles and Turks and Caicos Islands.

ALTERNATIVE FUND, MANAGER AND SERVICE PROVIDER INFORMATION

TYPES OF ALTERNATIVE FUND VEHICLE

- Open-ended or closed-ended investment company with fixed or variable capital
- Open-ended or closed-ended unit trust
- Open-ended or closed-ended common contractual funds
- Open-ended or closed-ended investment limited partnerships

Each of the above may be established as single or multi-portfolio funds. Investment companies and common contractual fund sub-funds have statutory ring-fencing. Each of the above may be established as single or multi-class funds.

Available types of corporate vehicle:

- Single portfolio company
- Segregated portfolio company (umbrella)
- Variable or fixed capital company

TYPES OF REGULATORY FUND CATEGORY

- UCITS (no minimum initial subscription requirement);
- Retail Non-UCITS (no minimum initial subscription requirement except for private equity funds, in respect of which it is €12,500);
- Professional Investor Non-UCITS (minimum initial subscription of €125,000);
- Qualifying Investor Non-UCITS (minimum initial subscription of €250,000, investor wealth tests and risk acknowledgement);

The following additional fund categories are not widely used either due to their tax status (non-designated funds) or the narrow investor requirements (collective investor funds);

- Non-designated funds (no minimum subscription requirement; only available as variable capital investment companies and may not be sold to the public; these are private investment fund vehicles and are subject to Irish corporation tax at a rate of 10%/12.5% on income/capital gains);
- Collective investor funds (available to life assurance

companies, pension funds and other collective investors; tax exempt, does not have to be sold publicly).

AUDIT REQUIREMENT

Yes, annual, local

FINANCIAL STATEMENT REQUIREMENTS

Yes, all semi-annual unaudited and annual audited. Corporate Qualifying Investor Funds do not have to prepare semi-annual unaudited accounts.

COST OF REGULATORY FEES

€2,200 per year for each fund plus €550 per sub-fund up to a maximum of €4,950. This is reviewed on an annual basis by the Irish Regulator.

OVERALL COST OF FUND ESTABLISHMENT

Legal costs will vary from law-firm to law-firm and depending on the type of fund and other factors. There is no up-front regulatory fee. There is a small government levy for incorporating corporate funds and other initial statutory filings.

REGULATORY APPROVAL TIME

Qualifying Investor Funds: 24 hours following filing of prospectus, constitutive document, principal service agreements, application request, completed regulatory application forms and various confirmations assuming promoter, investment manager, administrator, custodian and directors have already been approved by the Regulator and the application is within normal prescribed parameters and any derogation requests have been obtained in advance.

Professional Investor Non-UCITS: if promoter approval is required, this must be obtained generally before the fund application is submitted to the Regulator. The promoter approval will generally take between one and two weeks. Once promoter approval is obtained, and the fund application is submitted, the Regulator endeavours to respond to the initial application within two weeks and subsequent responses from the fund each time within one week. Normally, two to three sets of comments can be expected, depending on the nature of the fund, resulting in the application spending around four weeks in total with the Regulator.

Retail Non-UCITS: Similar to Professional Investor Fund above.

UCITS: Similar to Retail Non-UCITS, but in addition, self-managed UCITS and UCITS common contractual fund and unit trust management companies must be approved as part of the process of seeking regulatory approval for the UCITS, which generally can result in the addition of two to four weeks to the overall timing.

OVERALL ESTABLISHMENT TIME

In each case from a standing start (i.e. fund promoter, investment manager and directors have not been previously approved by the Irish regulator, but fund service providers have been chosen) to fund authorisation.

UCITS.....tends to take approximately 3 months

Non-UCITS
Retail approximately 2 months
Professional Investor Funds approximately 2 months
Qualifying Investor Funds.....1 month

Ireland

By Donnacha O'Connor, Dillon Eustace

Answers to frequently asked questions pertaining to setting up investment funds in Ireland

1. What if any are the investor restrictions (number, by category)?

Irish Funds are not required to have a minimum number of investors, however, on the whole, Irish regulated tax exempt funds must, depending on the category of fund, and the specific wording of the legislation, be offered directly or indirectly to the public or must be available to the public.

The following additional fund categories are not widely used either due to their tax status (non-designated funds) or the narrow investor requirements (collective investor funds):

- Non-designated funds (no minimum subscription requirement; only available as variable capital investment companies and may not be sold to the public; these are private investment fund vehicles and are subject to Irish corporation tax at a rate of 10%/12.5% on income/capital gains);
- Collective investor funds (available to life assurance companies, pension funds and other collective investors; tax exempt, do not have to be sold publicly).

2. What if any are the investor restrictions (minimum investment, qualifications, by category)?

UCITS must be offered in European Economic Area, but may also, but not alternatively, be offered elsewhere. UCITS and Non-UCITS established as common contractual funds may not be offered to natural person investors. Apart from that, there are no substantive Irish restrictions in relation to the nature or quality of UCITS investors outside of those related to contractual capacity.

There are no Irish restrictions in relation to the offering of Irish Non-UCITS retail funds other than as provided above in relation to common contractual funds. Non-UCITS Professional Investor Funds are required to impose a minimum initial subscription requirement of €125,000 otherwise there are no Irish restrictions. Non-UCITS Qualifying Investor funds are required to apply a minimum initial subscription requirement of €250,000 and investors must meet a wealth test on a self-certification basis; natural persons must have minimum net worth (which excludes main residence and household goods) in excess of €1,250,000 and non-natural persons must own

or invest on a discretionary basis at least €25,000,000 or have beneficial owners which are qualifying investors in their own right.

In relation to Professional Investor Funds and Qualifying Investor Funds, an exemption from the minimum initial subscription requirement and, in the case of Qualifying Investor Funds, the investor criteria, is available to directors of the fund, the investment management company, directors of the investment management company, the promoter and its affiliates, and employees of the investment management company who are directly involved in the fund's management or are senior employees with experience in the provision of investment management services.

All Qualifying Investor Fund investors must certify in writing to the fund that they meet the minimum criteria listed above and that they are aware of the risk involved in the proposed investment and of the fact that inherent in such investments is the potential to lose the entire sum invested.

Please see "1" above in relation to non-designated funds and collective investor funds.

3. Is there a requirement for an Irish fund's sponsor (promoter) to be approved by the Irish Regulator?

Before the Irish Regulator will accept an application for the authorisation of an Irish investment fund, the Regulator must be satisfied that the fund sponsor or promoter is of good repute, has a minimum level of financial resources and a relevant track-record in collective investment schemes. With limited exceptions, the promoter is required to be regulated by a supervisory authority recognised by the Irish Regulator. Promoters are required to have audited shareholder funds of not less than €635,000. The requirements are essentially the same for all categories of Irish fund though for retail funds, experience in the distribution of retail funds or access to a retail distribution network will be an additional consideration.

4. Is there a requirement for the investment manager of an Irish fund to be approved by the Irish Regulator?

Before the Irish Regulator will accept an application for the authorisation of an Irish investment fund,

the proposed discretionary investment management company(ies) of the fund must be cleared in advance. Acceptable investment management firms include those which are regulated under the Markets in Financial Instruments Directive (MiFID) (Directive 2004/39/EC) and non-EU firms regulated by a supervisory authority recognised by the Irish Regulator.

In relation to Irish UCITS, the investment managers must be authorised or registered for the purpose of asset management and must be subject to prudential supervision. In addition, where a non-EU investment manager is proposed to be appointed, there must be a form of co-operation agreement in place between the Irish Regulator and the supervisory authority of the third country that regulated the investment manager.

5. What are the custodian/depository bank requirements for an Irish fund?

The assets of Irish regulated funds must be entrusted to a trustee (depository) for safe-keeping. The trustee must be a credit institution authorised in Ireland, an Irish branch of an EU credit institution or an Irish incorporated company which is wholly owned by an EU credit institution (or equivalent from a non-EU jurisdiction) provided that the liabilities of the Irish company are guaranteed by its parent.

The prescribed role of the custodian is to ensure, as a general rule, legal separation of non-cash assets and to ensure that certain core aspects of the management of the fund are carried out in accordance with applicable legislation, regulatory conditions and the fund's constitutive documents, for example, valuation, sale, issue, repurchase and cancellation of fund units. In addition, the trustee must enquire into the conduct of the management company, investment company or general partner in each annual accounting period and reporting thereon to the fund's unitholders.

6. What are the local Director requirements?

Both UCITS and non-UCITS investment companies are required to have a minimum of two Irish resident Directors on their boards. Common contractual funds and unit trusts are required to have an Irish management company and such management companies are required to have at least two Irish resident Directors on their boards. Investment limited partnerships are required to have an Irish General Partner and such entity is required to have at least two Irish resident Directors on its board. The board of Directors of a fund or its management company/general partner cannot have Directors in common with the board of the trustee company of the fund. All Directors appointed to such entities must be approved in advance by the Irish Regulator pursuant to a fitness and probity regime applicable to all regulated

financial services sectors in Ireland on the basis that the Regulator is satisfied that each has appropriate expertise and integrity and is of good repute. The names and biographies of the directors must appear in the fund's Prospectus. Resignations of Directors from Irish funds and their management companies/general partners must be notified immediately to the Financial Regulator.

7. What are the Prospectus/offering document/constitutive document requirements?

All UCITS and Non-UCITS must issue a prospectus, which must be dated, and the essential features of which must be kept up to date. Investors must be offered a copy of the Prospectus, free of charge, prior to subscribing for units in the relevant fund. Any changes to the Prospectus must be made by prior approval of the Regulator or, in the case of Qualifying Investor Funds, provided that the changes fall within certain parameters, prior notification to the Regulator. Any material changes to the Prospectus must be notified to investors in the fund's subsequent periodic reports. The overriding regulatory consideration is that the Prospectus should contain sufficient information to enable investors to make an informed decision whether to invest in the fund. In particular, the investment objectives and policies of a fund must be clearly described in the prospectus with sufficient information to enable investors to be fully aware of the risks they are entering into. Separate prospectuses may be issued by funds established as umbrella funds in respect of each of their sub-funds. Separate prospectuses may not be issued in respect of separate share classes, except in the context of Qualifying Investor Funds provided that the Prospectuses are consistent with the other Prospectus(es) for the fund/sub-fund of an umbrella fund (except in relation to that information which is class specific).

8. Are Irish funds required to be licensed?

Broadly speaking, units of Irish investment funds that are available for public participation may not be sold or purchased nor may sales or purchases be solicited without the fund having sought and obtained authorisation of the Irish Regulator under domestic funds legislation.

9. What are the regulatory requirements before an Irish fund can launch?

Before an Irish investment fund can launch, the fund must be in possession of a written authorisation from the Irish Regulator pursuant to the relevant Irish legislation. There are no minimum capitalisation requirements except in the case of UCITS investment companies which have not appointed Irish UCITS management companies, which must have a minimum capital of €300,000 prior to authorisation by the Regulator.

10. What ongoing regulatory requirements apply to Irish funds?

The ongoing core regulatory requirements can be broken down into:

Disclosure

Please see "7" above in relation to the Prospectus.

Each fund must issue annual audited financial statements and semi-annual financial statements, comprising a balance sheet, income statement (in the case of the annual audited financial statements only), a portfolio statement and statement of changes in the composition of the portfolio during the period and any significant information which will enable investors to make an informed judgement on the development of the fund and its results.

Valuation and pricing

Fund assets must be valued on the basis of market prices where available or, where unavailable, generally at probable realisation value calculated by a competent third party appointed by the fund or its management company/general partner with the objective of achieving fair value, the appointment of which is approved by the trustee. The valuation rules must be set out in the fund's Prospectus and must be set out, or referred to, in the fund's constitutive document. The calculation of the fund's net asset value, including the updating/confirmation of the prices of the underlying securities must be carried out in Ireland by staff located in Ireland, in the absence of a derogation from the Regulator. Valuation rules must be applied consistently throughout the life of a fund. The valuation policy is ultimately the responsibility of the board of Directors of the fund/management company/general partner.

Client asset protection; independent custody of assets

The applicable rules are outlined in "5" above.

Trustee as fiduciary of investors

The applicable rules are outlined in "5" above.

Portfolio regulation

The Regulator imposes diversification requirement and concentration requirements on Irish UCITS, non-UCITS retail funds and Professional Investor Funds.

A retail Non-UCITS' general investment restrictions prohibit it from investing more than 10% of its net asset value in securities which are not listed or traded on an approved market, more than 10% of net asset value in the securities of any one issuer, no more than 10% of its net asset value in any class of security issued by a single issuer and net maximum potential exposure through efficient portfolio management techniques and borrowings cannot exceed 25% of net asset value.

There are exceptions and specific restrictions for retail Non-UCITS funds of funds including funds of unregulated funds, feeder funds, real estate funds, private equity funds and managed futures funds.

In the case of Professional Investor Funds, the standard investment and borrowing restrictions applicable to retail Non-UCITS can be disapplied to the extent agreed with the Regulator. As a general rule of thumb, the quantitative limits are doubled.

The Regulator disapplies all but a small number of normally insignificant restrictions in relation to Qualifying Investor Funds.

Duty to act in investors' best interest and to avoid conflicts of interest

The fund's prospectus must contain a description of the potential conflicts of interest which could arise between the management of the fund and the fund, with details, where applicable, of how these are going to be resolved.

Any transaction carried out with a fund by a promoter, manager, trustee, investment adviser and/or associated or group companies of these must be carried out as if effected on normal commercial terms negotiated at arms length and transactions must be in the best interests of the investors.

Regulatory Reporting

The fund must submit a monthly report within ten days of its effective date, setting out the fund's net asset value, net asset value per unit and net subscription and redemptions in the fund's units during the month. The annual and semi-annual financial statements of the fund must be submitted to the Financial Regulator within four and two months respectively of the balance sheet date.

Reporting to investors

The annual audited financial statements and semi-annual unaudited financial statements must be made available to investors free of charge upon request and must be available for inspection at a specified location. Qualifying Investor Funds in the form of investment companies are not required to produce semi-annual unaudited financial statements.

Changes to the Fund

Any change to the Prospectus or any material service agreement of the fund is subject to approval by the Regulator. Any change to the investment policy of the fund as disclosed in the prospectus must be notified in advance to investors enabling them to redeem their units in the fund prior to the implementation of the change. Material changes to the investment policy of the fund or any change to the fund's investment objective are subject to prior investor approval.

Enforcement

The Irish Regulator has comprehensive powers of enforcement. The Regulator enforces on the basis of periodic reporting requirements, a requirement for the Directors/management company/general partner and trustee to deal with the Regulator in an open and co-operative manner and inspections, the frequency of which is based on risk assessment or on complaint. The

Financial Regulator has independent statutory powers of enforcement that are not dependent upon judicial action.

11. What are the regulatory requirements applicable to service providers to Irish funds?

All Irish investment funds are required to appoint an Irish Administrator (or Irish management company) which will perform certain minimum activities in Ireland such as the calculation of the net asset value of the fund and its dealing price, maintenance of the books and records of the fund and maintenance and updating of the fund's shareholder register.

Irish investment funds are also required to appoint a trustee. The trustee must have its registered office within Ireland or have established a place of business in Ireland if its registered office is in another Member State of the European Union. The trustee fiduciary duties may not be delegated to a third party and must be performed by the trustee appointed in Ireland. The custody functions may however be delegated to a custodian located (inside or) outside of Ireland.

All Irish funds are required to appoint an investment manager (or Irish management company) that will be responsible for the investment management of the Irish fund's assets. The conditions applicable such companies' clearance to act by the Irish Regulator as described in "4" above.

Irish Professional Investor Funds and Qualifying Investor Funds are entitled to appoint prime brokers. Prime brokers must be regulated to provide prime brokerage services and each prime broker or its parent company must have financial resources of not less than €200 million and a credit rating of not less than A1/P1.

12. What is the regulatory procedure in getting an Irish fund licensed?

All fund authorisations must be obtained pre-launch. Post-authorisation changes to fund documentation require the approval of the Regulator.

To obtain this authorisation, the fund, or in the case of a unit trust, common contractual fund or limited partnership, its management company or general partner, must apply to the Irish Regulator in writing. In the case of UCITS and Non-UCITS retail and Professional Investor Funds, this application is initially made in draft form.

In the case of Qualifying Investor Funds, application is made on the business day prior to the proposed date of authorisation and no formal review of the documentation is undertaken by the Regulator.

In all cases, before making an application, the proposed promoter of the fund must have been cleared by the Irish Regulator, as must the proposed investment manager. Non-discretionary investment advisers are not required to be cleared by the Irish Regulator. The

Directors of the proposed fund must be approved in advance by the Regulator. Any management company or general partner being appointed must be approved in advance by the Regulator. In the case of a UCITS, the risk management procedures of the UCITS relating to the fund's use of derivatives must be approved in advance and must the fund's management company or, if it is not appointing a management company, the fund's business plan. The proposed Administrator and Custodian of the Fund must be in possession of the relevant license or approval from the Regulator, and this will be an approval under investment services legislation or banking regulation. Any derogations from the regulatory requirements that a fund requires must be obtained in advance of submitting the formal application for authorisation.

13. What is the role of the service providers in authorisation/ongoing regulation?

Authorisation;

UCITS, retail Non-UCITS and Professional Investor Funds are authorised by application from the fund, or in the case of a unit trust, common contractual fund or limited partnership, its management company or general partner as appropriate. The custodian and administrator will be required to make certain certifications to the Regulator as part of the authorisation process.

In the case of Qualifying Investor Funds, which are effectively authorised by means of a self-certification process, the fund/management company/general partner makes the formal application, which is undertaken by its Irish legal advisers; the trustee certifies that the information contained in the application, as it relates to the trustee, is accurate.

Ongoing;

The Irish Administrator/management company will be generally be responsible for carrying out the minimum activities referred to in "11" above and for preparing the regulatory reporting and financial statements referred to at "10" above.

The Custodian will prepare the report referred to in "5" above for inclusion in the fund's annual audited financial statements.

The Administrator, Custodian and management company are each expected to deal in an open and co-operative manner with the Regulator and to participate in such meetings as the Regulator considers necessary to review its operations and its business developments.

14. What leverage restrictions apply to Irish funds?

UCITS; UCITS have a "global exposure" limit that is applicable to the UCITS' use of derivatives and have the choice whether to use a simple but conservative

method of calculating global exposure, i.e. the so-called commitment approach, or an advanced risk-measurement methodology, (Value-at-Risk (VaR)), to determine global exposure. VaR may be calculated using an acceptable proprietary or commercially available model. The commitment approach methodology is normally used by non-sophisticated and the latter by sophisticated users of derivatives. The commitment approach calculates risk exposure based on the marked to market value of the underlying assets to which the derivative contract refers, and this risk exposure may not represent more than 100% of the net asset value of the UCITS. If VaR is used, the UCITS may not have an exposure greater than 20% of the net asset value (known as "absolute VaR") based on a confidence level of 99% and a holding period of twenty days or a lesser holding period (for example, one day) may be agreed subject to the scaled down VaR limit (for example, 5%), or the UCITS may not have a VaR greater than twice the VaR of a relevant benchmark or a corresponding, derivative-free portfolio (known as "relative VaR"). The degree of exposure that a UCITS has may be reduced by the use of allowable position netting and hedging positions.

- Retail Non-UCITS; 25% of net asset value other than managed futures which in respect of which leverage is controlled by a margin to equity restriction of 50%;
- Professional Investor Funds; 100% of net asset value;
- Qualifying Investor Funds; unlimited

In each case, the extent of leverage must be disclosed in the Prospectus of the Fund.

15. What is the tax status of Irish funds in Ireland?

A fund that is authorised in Ireland is not subject to Irish tax on its income or gains with the exception

of non-designated funds in respect of which please see "1" above. There are no Irish withholding taxes on distributions to investors provided they have made the appropriate tax declaration of non-Irish residence to the fund. There are no Irish withholding taxes on distributions made to certain categories of Irish investors. There is no stamp duty or subscription tax is payable in Ireland on the issue, transfer, repurchase or redemption of units in a fund. Many of the key services provided to Irish funds (g. fund administration, investment management, etc) are exempt from Irish VAT.

16. What tax applies to Irish investment managers?

Generally 12.5% on fee income derived from investment management services.

The Irish tax authorities impose a 20% withholding tax on dividends and other profit distributions. However there are significant exemptions under domestic law from this withholding tax in relation to (i) payments made to persons resident in EU Member States and tax treaty countries and (ii) payments made to companies resident outside the EU or a non-tax treaty country provided more than 50% of the recipient company is ultimately controlled by persons resident in a treaty country or EU member state (other than Ireland), once certain declarations are put in place.

17. What are the asset valuation rules applicable to Irish funds?

These are described in "10" above. ■

Donnacha O'Connor, partner, Dillon Eustace, tel: +353 1 667 0022; email: donnacha.oconnor@dilloneustace.ie.

We can...

...see the wood

Dillon Eustace provides innovative advice on alternative investment products such as single and multi-strategy hedge funds, FoHFs, and UCITS alternatives.

With the largest alternative investment legal team in Ireland and benefitting from experience from all sectors of the industry, Dillon Eustace advises international and domestic asset managers, banks, prime brokers and other service providers on all aspects of alternative investment products including product design, launch, listing, tax and compliance.

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Luxembourg

MAJOR FUND LEGISLATION AND CIRCULARS

- Law dated 20 December 2002 (2002 Law) relating to undertakings for collective investment and amending the law of 12 February 1979 concerning the value added tax as amended;
- Law dated 13 February 2007 (SIF Law) relating to Specialised Investment Funds;
- CSSF Circular 02/80 relating to funds pursuing alternative investment strategies;
- CSSF Circular 91/75 relating to undertakings for collective investment;
- Grand-ducal regulation of 8 February 2008, concerning certain definitions of the law of 20 December 2002 relating to undertakings for collective investment (as amended).

NUMBER OF FUNDS

Overall.....3,425 funds

By category

Total FCP..... 1,936

Total SICAV..... 1,471

Total Others..... 18

Total.....3,425

2002 Law, Part I

FCP..... 1,209

SICAV..... 640

Others..... 0

Total..... 1,849

2002 Law, Part II

FCP..... 302

SICAV..... 383

Others..... 8

Total..... 693

SIF

FCP.....425

SICAV..... 48

Others..... 10

Total.....883

(situation as for 31/05/09)

ADMINISTERED FUND ASSETS

Total

FCP.....565,674

SICAV..... 1,049,842

Others.....3,753

Total..... 1,619,269

2002 Law, Part I

FCP..... 408,897

SICAV..... 834,811

Others.....0,000

Total.....1,243,508

2002 Law, Part II

FCP..... 81,956

SICAV..... 152,600

Others..... 1,070

Total..... 235,626

SIF

FCP.....75,021

SICAV.....62,431

Others.....2,683

Total.....140,135

(in bn EUR, situation as for 31/05/09)

REGULATOR

Commission for the Supervision of the Financial Sector (CSSF), 110 route d'Arlon, L-2991 Luxembourg.

DOUBLE TAXATION TREATIES

With 52 countries (as at June 2008): South Africa; Germany; Austria; Belgium; Brazil; Bulgaria; Canada; China (P.R.); Korea (Republic of); Denmark; Spain; Estonia; United States of America; Finland; France; Greece; Hong Kong; Hungary; Mauritius; Indonesia; Ireland; Iceland; Israel; Italy; Japan; Latvia; Lithuania; Malaysia; Malta; Morocco; Mexico; Mongolia; Norway; Uzbekistan; Netherlands; Poland; Portugal; Czech Republic; Romania; United Kingdom; Russia; San Marino; Singapore; Slovakia; Slovenia; Sweden; Switzerland; Thailand; Trinidad & Tobago; Tunisia; Turkey; Vietnam.

There are currently 22 new double taxation treaties under negotiation or awaiting for approval by the Luxembourg Parliament (i.e. Albania; Argentina; Armenia; Azerbaijan; Bahrain; Barbados; Cyprus; Georgia; India; Kazakhstan; Kuwait; Kirghizstan; Lebanon; Moldavia; Macedonia; Pakistan; Qatar; Serbia and Montenegro; Syria; Ukraine; United Arab Emirates; United Kingdom (new convention under discussion)).

ALTERNATIVE FUND, MANAGER AND SERVICE PROVIDER INFORMATION

TYPES OF ALTERNATIVE FUND VEHICLE

Open-ended investment company

- Investment company with variable capital (société d'investissement à capital variable) (SICAV);
- Investment company with fixed capital (société

d'investissement à capital fixe) (SICAF).

Close-ended investment company

- Close-ended SICAF;
- Common Contractual Fund (similar to unit trust in UK law)
- Common fund (fonds commun de placement) (FCP).

AVAILABLE TYPES OF CORPORATE VEHICLE

Under the 2002 Law

SICAVs under the 2002 Law must be set up as public limited companies (S.A.s).

Under the SIF Law

SICAV / SICAF may be set up as a:

- Public limited company (S.A.)
- Partnership limited by shares (S.C.A.)
- Private limited liability company (S.à.r.l.)
- Co-operative organised as an S.A.

AUDIT REQUIREMENT

- Audit requirements governed by Article 113 of the 2002 Law and Circulars 02/77 and 02/80
- Luxembourg regulation requires that all Luxembourg Funds be audited at least annually by a Luxembourg auditor, approved by the CSSF (for certain funds semi-annually)
- The auditor must be a member of the Luxembourg Institute of Auditors (Institut des Réviseurs d'entreprises - IRE)

FINANCIAL STATEMENT REQUIREMENTS

2002 Law

- Audited annual financial statement (is to be published within 4 months of the financial year end, and be available 15 days prior to the annual general meeting of shareholders)
- Unaudited semi-annual financial statement is to be published and sent to the CSSF within 2 months of the period end

SIF Law

- Audited annual financial statement (must be available to investors within 6 months of the end of the financial year)

REGULATORY FEES

CSSF fees

Funds set up under the 2002 Law

- EUR 2,650 for a single compartment fund
- EUR 5,000 for a multiple compartment fund

Funds set up under the SIF Law

- EUR 1,500 for a single compartment fund
- EUR 2,650 for a multiple compartment fund

OVERALL COST OF FUND ESTABLISHMENT

Regulatory fee:

Funds set up under the 2002 Law

- EUR 2,650 for a single compartment fund
- EUR 5,000 for a multiple compartment fund

Funds set up under the SIF Law

- EUR 1,500 for a single compartment fund
- EUR 2,650 for a multiple compartment fund

Luxembourg and EU-domiciled UCIs

- Listing fee: EUR 1,250
- Visa fee (for EU-domiciled funds other than in Luxembourg): EUR 1,250
- Maintenance fee

EUR 1,875 for 1st line of quotation

EUR 1,250 for 2nd line of quotation

EUR 875 for 3rd line of quotation

EUR 500 for the 4th and following lines of quotation

Non EU-domiciled UCIs

- Listing fee: EUR 2,500
- Visa fee: EUR 2,500
- Maintenance fee
 - EUR 2,500 for 1st line of quotation
 - EUR 1,875 for 2nd line of quotation
 - EUR 1,250 for 3rd line of quotation
 - EUR 625 for 4th and following line of quotation

REGULATORY APPROVAL TIME (BY THE CSSF)

Funds set up under the 2002 Law

4/8 weeks.

Funds set up under the SIF Law

No prior authorisation required.

Luxembourg

By Chevalier & Sciales

Why Luxembourg?

The Grand Duchy of Luxembourg became in a few decades one of the leading locations for investment funds, being today the world's second fund centre, overtaken only by the USA. Since 1959, when the first fund was established, the investment fund industry hugely expanded, counting 3,425 funds at the end of May 2009. This success originated with the authorities' encouraging attitude to foreign capital and investment, and was considerably strengthened by its prime location in the heart of Europe – close to the main markets targeted by investment funds – by its highly qualified multilingual workforce, as well as by its political, economic and social stability. An appropriate tax regime and the enactment of a favourable and well-defined legislation resulted in Luxembourg consolidating in recent years its position as an international investment fund distribution hub, with around EUR 1.6 trillion (about US\$ 2.2 trillion) in net assets at the end of May 2009.

Legal and regulatory framework

The ground breaking Law of 20th December 2002 shaped the Luxembourg investment fund market, differentiating between undertakings for collective investment in transferable securities (UCITS, Part I of the 2002 Law) and undertakings for collective investment (UCIs, Part II of the 2002 Law). Following the enactment in February 2007 of the Law relating to Specialised Investment Funds (the 'SIF Law'), the Luxembourg investment funds are now divided into three categories:

- Undertakings for Collective Investment (UCIs, 693 in May 2009);
- Undertakings for Collective Investment in Transferable Securities (UCITS, 1849 in May 2009); and
- Specialised Investment Funds (SIFs, 883 in May 2009).

UCITS

UCITS are designed for retail investors, and benefit from the European Passport, enabling them to be freely marketable throughout the EU countries with a minimum of formalities. Transferable securities are defined in Article 1 of the 2002 Law as either shares or other securities equivalent to shares, bonds and other forms of securitised debt, or any other negotiable securities which carry the right to acquire such transferable securities by subscription or exchange. In this context, four categories of funds are excluded from Part I of the 2002 Law:

- Funds of the closed-ended type;
- Funds which raise capital without promoting the sale of their units to the public within the European Union or any part of it;
- Funds the units of which, under their constitutional documents, may be sold only to the public in countries which are not member of the European Union; and
- Categories determined by the CSSF, for which the investment policy rules laid down in Chapter 5 of the 2002 Law are inappropriate in view of their investment and borrowing policies.

UCIs

In contrast, UCIs established under Part II of the 2002 Law may only market their units in other EU countries after complying with the specific conditions stipulated by the authorities in the country concerned. The criterion defining whether a UCI is subject to Part I or Part II of the 2002 Law is the planned investment objective, as Part I of the 2002 Law applies only to UCI the sole objective of which is the investment in transferable securities, whereas a UCI may invest in activities such, inter alia, alternative investments (i.e. Hedge Funds), venture capital, and real estate.

SIFs

The SIF Law replaces the legal framework previously applicable to institutional UCIs (the '1991 Law') by providing for a separate statutory regime specifically designated for investment funds dedicated to sophisticated investors. The SIF is a lightly regulated and tax efficient fund which gives an on-shore alternative to consider (as compared to traditional off-shore jurisdictions such as the Cayman Islands or the BVI) when deciding on the jurisdiction for setting up a fund and the type of fund vehicle to use. Investment funds created under the SIF Law are subject to each country's distribution rules.

Regulatory body

The regulatory body is the Commission for the Supervision of the Financial Sector, the CSSF, which authorises and monitors all Luxembourg registered funds. Its annual regulatory fees will be, under the 2002 Law, EUR 2,650 for a single compartment fund (instead of EUR 1,500 under the SIF Law), and EUR 5,000 for a multiple compartment fund (instead of EUR 2,650 under the SIF Law).

Constitution of a fund / Legal structures available

Investment funds may take the form of an open-ended legal entity (investment company with variable capital, SICAV, 1,459 in April 2009) a closed-ended legal entity (investment company with fixed capital, SICAF, 18 in March 2009), or of a common contractual fund which has a management company (FCP, 1,938 in April 2009). All those different entities may create sub-funds, each with a different investment policy. In this context, each compartment will be deemed to be a separate entity, which implies that the assets of a compartment are exclusively available to satisfy the rights of investors in relation to that compartment.

SICAV / SICAF

A SICAV is a limited liability company whose capital is at any time equal to its net assets, and no formalities are required for increases and decreases in capital, whereas a SICAF is a limited liability company with fixed capital, open-ended only if the investors can buy and sell shares at their request and at a price equal to the net asset value per share.

FCP

In contrast, a FCP is a co-proprietorship whose joint owners are only liable up to the amount they have contributed. A key feature to be noted is that a FCP is deprived from a legal personality and must therefore be managed by a Luxembourg management company, whereas SICAVs can be managed by their Board of Directors. UCITS in the form of FCPs are managed by management companies under the conditions laid down in Chapter 13 of the 2002 Law, whereas Chapter 14 of the 2002 Law lays down the conditions under which management companies are ruling UCIs and SIFs.

Choosing a legal structure

The choice of whether to create a fund as a FCP or as an investment company is mainly based on tax considerations, as a FCP is tax transparent, this concept of transparency being guaranteed in the Luxembourg tax legislation. Marketing and operational considerations are also relevant in this vehicle as a FCP, being domiciled in Luxembourg, benefits from the high standard of service provided by managers, custodians, legal and tax professionals present in Luxembourg. In contrast, the two other forms, because of their flexibility, are more often reserved for funds investing in transferable securities or derivatives, and for funds where shareholders/unit-holders need to purchase or redeem their shares/units freely. Interestingly, the cultural background of each country seems to influence the choice as whether to create a fund as a FCP or as an investment company, as the FCPs are traditionally widely used in Germany, especially compared to a country like France, where investors prefer to have recourse to SICAVs.

Formation expenses

The formation expenses will consist for all funds in a fixed capital duty amounting to EUR 75, notary fees, legal fees, a CSSF filing duty, fixed, for 2002 Law UCIs, at EUR 2,650 for a single market UCI and EUR 5,000 for a multiple compartment UCI. In contrast, the CSSF filing duty has been fixed, for SIF Law UCIs, at EUR 1,500 for a single compartment UCI and EUR 2,650 for a multiple compartment UCI. The formation expenses may also comprise, if a listing to the Stock Exchange is contemplated, its admission fee, fixed at EUR 1,250.

Minimum capitalisation

The minimum capitalisation required under both Laws, namely EUR 1,250,000, must, in the case of a SIF, be reached within 12 months from the approval by the CSSF, in contrast with 6 months in the case of an investment fund set up under the 2002 Law.

Regulatory control

If it is subject to a continuous control by the CSSF, a fund set up under the SIF Law does not need its prior approval for being incorporated, while it is still a condition *sine qua non* for funds set up under the 2002 Law. If there is no more a requirement for a fund established under the SIF Law to have a promoter, the directors of the fund will still be subject to the CSSF approval. This implies that the directors must have good repute and justify of adequate experience.

To comply with the setting-up requirements, investors will benefit from the financial facilities offered by the high-profiled Luxembourg economic environment, counting 150 banks registered as of 31 May 2009 which offer their services in this field.

Investors' eligibility

Investment funds set up under the 2002 Law are available to public distribution. Hence, no restriction applies upon eligible investors, whereas the SIF Law introduces a qualified investor scheme. In this context, SIFs are reserved for well-informed investors who are able to understand and assess the risks associated with investments in such a fund, well-informed investor meaning either an institutional investor, a professional investor, or any other investor who has declared in writing that he is an informed investor and either invests a minimum of EUR 125,000 or has an appraisal from a bank, an investment firm or a management company certifying that he has the appropriate expertise, experience and knowledge to adequately understand the investment in the fund.

Investment restrictions

Under the broad principle of risk spreading, all funds are subject to different rules restricting the scope of

their investment policy. Those rules are quite restrictive towards UCITS, somewhat lighter concerning UCIs, and much lighter when it comes to SIFs.

UCITS

The 2002 Law provides for numerous restrictions upon investments by UCITS, restrictions which have been clarified in recent regulatory developments:

- Circular CSSF 07/308 lays down rules for the implementation of a risk management framework, relating, *inter alia*, to the conduct to be adopted by UCITS with respect to the use of derivative financial instruments. Those rules, rendered necessary following the extension, in the 2002 Law, of the list of financial instruments in which UCITS may invest, precise that a UCITS must self-assess itself as either 'sophisticated' or 'non-sophisticated'. A sophisticated UCITS, being in the obligation of entrusting to a developed risk management unit, is able to make a significant use of derivative financial instruments. In contrast, non-sophisticated UCITS, with a much less developed risk management unit, can make use of derivative financial instruments only for hedging purposes. This Circular also specifies some valuation rules stating, *inter alia*, that overall risk exposure related to financial derivative instruments should not exceed the total net asset value, the net asset value being the total value of the fund's portfolio less its liabilities. Consequently, the UCITS' overall risk exposure may not exceed 200% of the NAV on a permanent basis;
- The Grand-ducal regulation of 8th February 2008 clarifies the notion of UCITS as provided in the 2002 Law, in light of the Commission Directive 2007/16/EC; and
- The Circular CSSF 08/339 (as amended by Circular 08/380) displays the guidelines given by the CESR in relation to eligible assets for investment by UCITS, and in this context provides additional provide additional clarifications relating to eligible assets for investment by UCITS covered by Directive 85/611/EEC, as amended. As a result, the range of financial instruments that a UCITS may invest in was expanded to include transferable securities and money market instruments, bank deposits, fund of funds, financial derivatives and, finally, index tracking funds.

Non-UCITS Part II Funds

If there are no restricted eligible assets for a UCI, its investment policy is subject to the CSSF approval, and specific rules are laid down in Circular IML 91/75 (as amended by Circular CSSF 05/177), whilst others are specifically applicable to UCIs pursuing alternative investment strategies. Those rules are laid down in Circular CSSF 02/80 which states, *inter alia*, that:

- Aggregate commitment in terms of short selling may not exceed 50% of assets, and no more than 10% of

the same type issued by the same issuer may be sold short;

- Borrowings must not exceed 200% of the net assets; and
- Counterparty risk, defined as the difference between the value of assets given as guarantee and the amount borrowed, cannot represent more than 20% of the UCI's assets per lender.

SIFs

Specialised investment funds set up under the SIF Law are not required to comply with any detailed investment restrictions or leverage rules, the SIF Law merely stating that a SIF should apply the principle of risk diversification. This principle provides that the collective investment of funds must be made in assets "in order to spread the investment risks". The CSSF clarified in its Circular 07/309 that:

- A SIF may not invest more than 30% of its assets or commitments to subscribe securities of the same type issued by the same issuer;
- Short sales may not result in the SIF holding a short position in securities of the same type issued by the same issuer representing more than 30% of its assets; and
- When using financial derivative instruments, the SIF must ensure, via appropriate diversification of the underlying assets, a similar level of risk-spreading. However, it should be noted that the CSSF may, upon appropriate justification, grant exemptions to these rules on a case-by-case basis.

Reporting and audit requirements

Prospectus

Funds are also in the obligation to issue a prospectus containing information concerning the fund and its management company (presentation, economic and commercial information...). The Law of 10th July 2005 on prospectus for securities specified that the obligation to publish a full prospectus shall not apply to undertakings for collective investment of the closed-ended type, meaning funds excluded from Part I of the 2002 Law. In this context such a fund is still in the obligation to publish a simplified prospectus. According to the 2002 Law, both the simplified and the full prospectus must include the information necessary for investors to make an informed judgment of the investment proposed to them, and especially of the risks attached thereto. The simplified prospectus is however somewhat more basic, as it must be structured in such a way so as to be easily understood by the average investor.

Issuing document

In line with a somewhat lighter regulatory regime than UCIs governed by the 2002 Law, funds subject to the SIF law are only required to produce an 'issuing document',

displaying, with no minimum content, the information necessary for investors to be able to make an informed judgment about the investment proposed to them. The issuing documents and any modifications thereto must be communicated to the CSSF.

Financial statement

A final obligation is to publish regularly a financial statement, which must describe adequately the

financial situation of the fund. It must be audited by a Luxembourg authorised independent auditor, member of the Luxembourg Institute of Auditors (Institut des Réviseurs d'Entreprises - IRE), who is suitably qualified in terms of relevant experience. This auditor is in the obligation, if any information provided to investors does not truly describe the financial situation of the fund, to report promptly to the CSSF. The same obligation applies

General chart

	UCITS III (Part I of the 2002 Law)	Other UCIs (Part II of the 2002 Law)	SIF under SIF Law
Prior approval of CSSF needed for incorporation	Yes	Yes	No
Control by CSSF	Yes	Yes	Yes
European Passport	Yes	No	No
Eligible assets	<ul style="list-style-type: none"> - Transferable securities - Bank deposits - Money market instruments - Fund of funds - Financial derivatives - Index tracking funds 	Unrestricted, but subject to CSSF approval	Unrestricted
Eligible investors	Unrestricted	Unrestricted	Well-informed investors <ul style="list-style-type: none"> - Institutional investors - Professional investors - Investors who confirm in writing that they adhere to the status of well-informed investors and either (i) invest a minimum of EUR 125,000 or (ii) benefit from an assessment made by a credit institution, an investment firm or a management company certifying their capacity to appraise the contemplated investment in the fund
Need for a promoter	Yes	Yes	No
Investment restrictions	<ul style="list-style-type: none"> - Provisions of the 2002 Law - Provisions of the Circular CSSF 08/339, investment possible in: <ul style="list-style-type: none"> - Transferable securities - Deposits - Money market instruments - Liquid financial assets - Other undertakings for collective investment 	<ul style="list-style-type: none"> - Circular IML 91/75 (as amended by Circular CSSF 05/177) - UCIs pursuing alternative investment strategies (Circular CSSF 02/80), relating to short sales, borrowing and investment restrictions in UCIs 	Compliance with risk-diversification rules: <ul style="list-style-type: none"> - SIF may not invest more than 30% of its assets or commitments to subscribe securities of the same type issued by the same investor - Short sales may not result in the SIF holding a short position in securities of the same type issued by the same issuer representing more than 30% of its asset - When using financial derivative instruments, the SIF must ensure, via appropriate diversification of the underlying assets, a similar level of risk-spreading
Tax Treatment	<ul style="list-style-type: none"> - No income tax - Annual subscription tax of 0.05% of the NAV - Fixed capital duty of EUR 75 - No WHT on dividend distributions and interest payments 	<ul style="list-style-type: none"> - No income tax - Annual subscription tax of 0.05% of the NAV - Fixed capital duty of EUR 75 - No WHT on dividend distribution and interest payments 	<ul style="list-style-type: none"> - No income tax - Annual subscription tax of 0.01% of the NAV - Fixed capital duty of EUR 75 - No WHT on dividend distributions and interest payments
Issue and redemption of securities	For a SICAV or a FCP, requirement that the issue, redemption or repurchase price be based on NAV	For a SICAV or a FCP, requirement that the issue, redemption and repurchase price be based on NAV	<ul style="list-style-type: none"> - No requirement that the issue, redemption or repurchase price be based on NAV - Can issue shares at a pre-determined fixed price - Can repurchase shares below NAV
Disclosure of portfolio	Yes	Yes	No

if the auditor becomes aware during the audit that any fact or decision is liable to constitute a material breach of the Law or regulations, or to affect the continuous functioning of the UCI.

A difference to draw between the 2002 Law and the SIF Law is that the obligation to publish a financial statement is only annual in the case of a SIF, whereas an investment fund subject to the 2002 Law must publish such an audited financial statement annually and semi-annually. A confidentiality feature in the case of a SIF is also to be pointed out, as a SIF does not necessarily have to disclose details of the portfolio in addition to the information necessary for investors to make an informed judgment about the evolution of the activity of the fund, and there is no more a requirement to publish the net asset value per share, as it is the case for UCITS and UCIs.

Taxation of funds

A first point to make is that Luxembourg UCITS, UCIs and SIFs do not pay Luxembourg income and capital gain taxes, nor is a stamp duty on share issues or transfers to be paid.

However, in addition to a fixed capital duty of EUR 75 to be paid upon incorporation, some funds are also subject to an annual subscription tax. Under the SIF Law this annual subscription tax has been fixed at 0.01% of net assets, compared to 0.05 % for funds under the 2002 Law. It is however only of 0.01% for UCIs whose exclusive policy is the investment in money market instruments or deposits with credit institution. Other funds, such as certain institutional cash funds and pension pooling funds, are exempted from this subscription tax, no matter under which Law they are set up under. It should be noted that investors may invest in a SIF by means of equity or debt, hence benefiting from an effective tax optimisation, and that there is no debt-equity ratio to be respected in the case of a SIF.

In order to avoid double taxation, Luxembourg has signed double taxation treaties with 52 countries, and 21 others are under negotiation or awaiting approval of the Luxembourg Parliament or the foreign country. The object of such agreements is to eliminate or reduce withholding taxes on foreign income or capital gains. However, it has to be emphasised that only 27 of these treaties are applicable to SICAVs, whether in the form of a UCITS, UCI or SIF.

Stock Exchange Listing

Both Luxembourg funds (UCITS, UCIs and SIFs) and foreign funds may be listed on the Luxembourg Stock Exchange (LSE). A few conditions have been imposed for a foreign fund to be listed on the LSE, mainly that the fund promoter must be of good repute, have adequate

professional experience, and that the functions of investment manager, management company, custodian and transfer agent must be carried out by a separate entity.

The Stock Exchange maintenance fee has been fixed at EUR 1,875 for the 1st line of quotation, EUR 1,250 for a 2nd one, EUR 875 for a 3rd one, and EUR 500 for the 4th and the following lines of quotation.

Conclusion

The Luxembourg investment fund industry, largely benefiting from its location in a strong financial centre, is now an internationally recognised label for investment funds. The greatest asset of Luxembourg is undoubtedly political voluntarism, demonstrated by a constant anticipation of the need of investors – either in the transposing of European legislation or in the shaping of national legislation – in order to create a stable, protective, and favourable environment according to the expected development of the market.

This continuous pragmatism on the part of the Luxembourg authorities, exemplified by the way the CSSF dealt with the global financial turmoil, is invaluable when shepherding investors in days of global uncertainty.

Lastly, the increasingly important issue of transparency is covered by national and European regulations and provides new investors with an especially protective framework, especially when compared to traditional off-shore jurisdictions. The European Commission has indeed recently proposed a Directive on Alternative Investment Fund Managers (AIFMs), which intends to introduce a harmonised regulatory framework for AIFMs within the EU and provides for a broadening of the disclosure requirements generally expected for such managers. ■

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CHEVALIER & SCIALES
Law Firm

Chevalier & Sciales is a dynamic firm of highly trained lawyers supported by administrative staff and focused mainly on Investment Funds (UCITS and SIFs), Securitizations, Corporate Law and Private Equity. Chevalier & Sciales has been consistently recommended by the major law firm directories such as Legal Week, Practical Law Company, the World's Guide to the Leading Investment Funds Lawyers and the Legal 500 for Investment Funds, Corporate and M&A and Banking and Finance.

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MEMBER OF THE INTERNATIONAL LEGAL NETWORK WORLDLINK FOR LAW





Malta

FUND LEGISLATION:

- Investment Services Act, (Cap. 370 - Laws of Malta);

NUMBER OF FUNDS

Domiciled and administered fund assets by category:

Professional Investor Funds (PIFs):	251
UCITS:	51
Non-UCITS Local	40
Non-UCITS Foreign	72
Net Asset Value of Locally Based Collective Investment Schemes:	EUR9 billion.

REGULATOR

Malta Financial Services Authority (MFSA), Notabile Road, Attard BKR 3000, Malta, tel. (+356)21441155; email. communications@mfsa.com.mt

SERVICE PROVIDERS

Recognised Fund Administrators

There are 15 firms in possession of recognised fund administrator certificate:

- Apex Fund Services (Malta) Limited
- Benchmark Advisory Limited
- Calamatta Cuscheri Fund Services Limited
- Custom House Global Fund Services
- Global Capital Financial Management Limited
- HSBC Global Asset Management (Malta) Limited
- HSBC Securities Services (Malta) Limited
- Praxis Fund Services (Malta) Limited
- SGGG Fexco Fund Services (Malta) Limited
- Somerset Management (Malta) Limited
- TMF Fund Administrators (Malta) Limited
- TMF Fund Services (Malta) Limited

- Union Capital Management Limited
 - Valletta Fund Management Limited
 - Valletta Fund Services Limited
- Custodians/Trustees of Collective Investment Schemes**

- HSBC Bank (Malta) plc
- Bank of Valletta plc
- Custom House Global Fund Services
- Sparkasse Bank Malta plc
- Mediterranean Bank plc

Lawyers, Accountants and Auditors

There are 55 law firms in Malta although only around 10 undertake fund-related work.

There are around 40 accountancy and auditing firms listed by the Malta Institute of Accountants. These include the 'big four'.

Local Stock Exchange:

Malta Stock Exchange, Garrison Chapel, Castille Place, Valletta VLT 1063, Malta: CEO: Mr Mark Guillaumier

Local fund industry body:

Malta Funds Industry Association (MFIA) c/o Level 6, The Mall Offices, The Mall, Floriana, VLT 16, Malta.

Promotional bodies for funds/financial sector:

Malta Funds Industry Association (MFIA) c/o Level 6, The Mall Offices, The Mall, Floriana, VLT 16, Malta, and FinanceMalta, Garrison Chapel, Castille Place, Valletta VLT 1063, Malta

DOUBLE TAXATION TREATIES

Malta has an extensive double taxation treaty network. The following are the agreements currently in force with the respective countries:

Albania, Australia, Austria, Barbados, Belgium, Bulgaria, Canada, China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Ireland, Italy, Korea, Kuwait, Latvia, Lebanon, Libya, Lithuania, Luxembourg, Malaysia, Morocco, Netherlands, Norway, Pakistan, Poland, Portugal, Romania, San Marino, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland¹, Syria, Tunisia, United Arab Emirates, United Kingdom, United States of America².

TAX INFORMATION EXCHANGE AGREEMENTS

Tax information exchange provisions are included in the Double Tax Treaties. (See above)

Memoranda of Understanding with other Regulators:

The Malta Financial Services Authority (MFSA) has signed over 30 bilateral or multilateral Memoranda of Understanding or other agreements with other regulatory authorities. These MoUs cover regulatory co-operation and exchange of regulatory information in a number of sectors. A full list of these agreements may be found on www.mfsa.com.mt (Memoranda of Understanding)

Footnotes:

1. Agreement limited to profits derived from the operation of ships or aircraft in international traffic. Full agreement signed but not yet in force.
2. Agreement limited to profits derived from the operation of ships or aircraft in international traffic. Full agreement negotiated and in the process of being signed.

ALTERNATIVE FUND, MANAGER AND SERVICE PROVIDER INFORMATION

TYPES OF FUND VEHICLE

- Open-ended investment company (SICAV)
- Close-ended investment company (INVCO)
- Unit Trust
- Mutual fund
- Limited Liability Partnership

Available types of corporate vehicle:

Segregated fund and portfolio structures are available under the Companies Act.

Types of licences available:

Collective Investment Scheme (single or divided into sub-funds), authorised as:

- a Professional Investor Fund – of which there are 3 Categories: (i) Experienced Investor Fund, (ii) Qualifying Investor Fund, (iii) and Extraordinary Investor Fund
- a Maltese UCITS Scheme;
- a Maltese Non-UCITS Scheme (retail);
- an Overseas Non-UCITS Schemes (retail)

Funds may be licensed both as self-managed funds or funds managed by a licensed third party manager.

AUDIT REQUIREMENT

- Yes

FINANCIAL STATEMENT REQUIREMENTS

Directors are required by law to prepare financial statements for each financial period in accordance with the IFRS (International Financial Reporting Standard) requirements.

REGULATORY FEES

Collective Investment Schemes (Maltese UCITS Schemes, Maltese Non-UCITS Schemes and Overseas Based Non-UCITS Schemes)

	Application Fee	Annual Fee
Scheme	€2000	€2500
Up to fifteen sub-funds (per sub-fund).....	€450	€400
Sixteen sub-funds and over (per sub-fund)€250	€250	€150

European UCITS Schemes

	Application Fee	Annual Fee
Scheme	€2000	€2500
Up to fifteen sub-funds (per sub-fund).....	€450	€450
Sixteen sub-funds and over (per sub-fund)€250	€250	€150

Professional Investor Funds

	Application Fee	Annual Fee
Preliminary indication of acceptability	€600	Nil
Scheme	€1500	€1500
Additional sub-funds (per sub-fund).....	€1000	€500

REGULATORY APPROVAL TIME

The MFSA is used to working within agreed timeframes and deadlines. These may vary according to circumstances such as the prompt submission of information and feedback required from the fund promoter and the nature and complexity of the funds and the verification process. However the following are indicative response times:

Collective Investment Schemes (Retail UCITS/Non-UCITS):

The MFSA will review the draft application form and the

supporting documentation and will provide feedback within three weeks from submission of the application documents.

Professional Investor Funds for Experienced or Qualifying Investors: The MFSA will review within seven business days from receipt of the application documents.

Professional Investor Funds for Extraordinary Investors: The MFSA will review within three business days.

ALTERNATIVE INVESTMENT FUNDS

Alternative investment funds, including hedge funds, may be licensed as Professional Investor Funds (PIFs)

The Investment Services Rules for Professional Investor Funds classify these funds into three types, depending on the experience and sophistication of the end investor and the level of protection required.

INVESTOR RESTRICTIONS

Experienced Investor Funds:..... Min investment €15,000

Qualifying Investor Funds:..... Min investment €75,000

Extraordinary Investor Funds:..... Min investment €750,000

The total amount invested may not fall below this threshold unless this is the result of a fall in the net asset value.

In the case of an umbrella fund comprising of sub-funds each of which is set up as a Professional Investor Fund, the minimum investment threshold may be applicable on a per scheme basis rather than on a per sub-fund basis.

INVESTMENT ADVISOR

The role of the investment advisor is that of providing financial advice to the scheme/fund or its Manager with regards to the investment and re-investment of the assets of the Scheme/Fund. The Investment Advisor will not have any discretion with respect to the investment and re-investment of the assets of the Scheme/Fund.

Professional Investor Funds are generally not required to appoint a third party Investment Adviser.

FUND MANAGER

In the case of Professional Investor Funds, where a third party Manager is to be appointed and the proposed Manager is established in Malta, the Manager should be in possession of a Category 2 Investment Services Licence issued in terms of Article 6 of the Act and should be duly licensed and authorised by the MFSA to provide management services to collective investment schemes.

The MFSA expects the Manager to exercise care and diligence in the selection of a Sub-Manager and to assume responsibility for the acts of the Sub-Manager

CUSTODIAN/DEPOSITORY BANK REQUIREMENTS

An experienced investor PIF should appoint a third party Custodian responsible for the safe keeping of the assets of the PIF and for undertaking monitoring duties over the PIF's Manager. Qualifying and extraordinary investor PIFs are not required to do so.

The Custodian may be:

- an entity holding a Category 4 licence under the Investment Services Licence issued under the Investment Services Act, 1994;
- an entity authorised to provide such services in an

EU/EEA Member State; or

- an entity of sufficient standing and repute and having the experience and expertise deemed necessary to act as Custodian.

The Minimum Initial Capital Requirement in the case of Custodians/Depositories is €125,000.

DIRECTOR REQUIREMENTS

Every public company is legally bound to have at least 2 directors whereas private companies must have at least 1 director.

PROSPECTUS/OFFERING DOCUMENT

A Professional Investor Fund promoted to Experienced or Qualifying Investors is required to draw up an Offering Document which should at least include the prescribed information.

A Professional Investor Fund targeting Extraordinary Investors may either draw up an Offering Document or a Marketing Document which should at least include the minimum specified information.

FUND ONGOING REGULATION REQUIREMENTS

Once licensed, the fund is subject to ongoing supervisory and general reporting requirements.

SERVICE PROVIDER CONDITIONS

The Investment Services Act prescribes that any person wishing to carry out an investment service in Malta needs a licence in terms of the Act. Service Providers generally include, amongst others, a Manager, a Custodian, an Administrator and an Investment Adviser.

A Professional Investor Fund may appoint any Service Provider as it may deem necessary – although PIFs promoted to Experienced Investors are required to appoint a Custodian. Service Providers should be established and regulated in a Recognised Jurisdiction. Recognised Jurisdictions include EU and EEA Members, and signatories to a Multilateral MoU or Bilateral MoU with the MFSA covering the relevant sector of financial services. The MFSA may, in the following scenarios, also accept Service Providers which may not be established and regulated in a Recognised Jurisdiction:

- where the Service Provider is the subsidiary of a firm that is regulated in a Recognised Jurisdiction, that retains control of its subsidiary and undertakes to provide all the necessary information to the MFSA; or
- where the MFSA considers that the Service Provider is subject to regulation to an equal or comparable level in the jurisdiction concerned.

In the latter case, it is recommended that prior to the submission of an Application for a PIF Licence, the promoters submit an application for preliminary indication of acceptability of a PIF as outlined below.

The Authority expects all services providers to be ‘fit and proper’ that is to be able to show high degrees of competence, integrity and solvency.

REGULATORY PROCEDURE:

Professional Investor Funds - Preliminary Indication of Acceptability

The promoter of a Professional Investor Fund may apply for a preliminary indication of acceptability on the basis of the proposed structure of the PIF and service

providers. In such case, the MFSA will review the proposed structure of the PIF and its prospective Service Providers and will inform the applicant whether the proposed structure of the PIF and its Service Providers are acceptable to the MFSA. This does not substitute the application for a PIF Licence.

APPLICATIONS FOR A COLLECTIVE INVESTMENT SCHEMES LICENCE/ PROFESSIONAL INVESTOR FUND LICENCE

When submitting an application for a licence under the Investment Services Act, the promoter should ensure that the appropriate Application Form is completed.

Phase One – Preparatory

The MFSA recommends that the promoters meet up with the regulatory authority to describe their proposal. This meeting should take place prior to the actual submission of the application.

After preliminary discussions, the promoters should submit a draft Application Form, together with the supporting documents specified in the Application Form itself. The ‘fit and proper’ checks – which entail following up the information which has been provided in the Application documents – begin at this stage.

The MFSA will consider the nature of the proposed Scheme/Fund and a decision will be made regarding which “Standard Licence Conditions” (SLCs) should apply. The licence conditions represent the ongoing requirements to which the Applicant will be subject, if and when licensed.

Phase Two – Pre-Licensing

Once the review of the draft Application and supporting documents has been completed, the Authority will issue its ‘in principle’ approval for the issue of a licence. At this stage, the Applicant will be required to finalise any outstanding matters. A licence will be issued as soon as all pre-licensing issues are resolved.

Phase Three - Post-Licensing/Pre-Commencement of Business

The Applicant may be required to satisfy a number of post-licensing matters prior to formal commencement of business.

LEVERAGE RESTRICTIONS

Qualifying Investor Funds and Extraordinary Investor Funds are not subject to any investment or borrowing (including leverage) restrictions other than those which may be specified in their Offering Document/Marketing Document.

Professional Investor Funds promoted to Experienced Investors are not subject to any investment restrictions. Whilst borrowing on a temporary basis for liquidity purposes is permitted and not restricted, borrowing for investment purposes or leverage via the use of derivatives is restricted to 100% of NAV.

VALUATION RULES

Valuation rules are normally dealt with in the offering prospectus.

TAX FRAMEWORK

Malta has an internationally accepted and EU-recognized tax regime, with an extensive network of bilateral tax treaties³. There are 51 of these treaties currently in force. These include all European Union Member States and

many other countries in North Africa, the Middle East and Asia, as well as Canada and Australia. The Treaty with the US has been signed and is expected to come into force in the near future.

TAXATION OF FUNDS

Collective Investment Schemes (fund vehicles) are exempt from tax on income and capital gains, so long as these are not investing in immovable property situated in Malta.⁴ There are no withholding taxes.

In the case of Value Added Tax, the activities of a CIS are considered exempt without credit for VAT purposes.

TAXATION OF INVESTMENT SERVICE PROVIDERS:

Malta's tax imputation system is designed to eliminate the double taxation of corporate profit and dividend in the hands of shareholders. All companies incorporated in Malta (including investment management, custody services and fund administration companies) pay a 35% income tax on company profits. Upon distribution of

dividends however shareholders are entitled to a refund of tax paid on the underlying profits. The amount of the tax refund to the shareholder is set at 6/7ths of the tax paid by the company on the underlying profit (5/7ths in the case of passive interest and royalties).

Footnotes:

3. *Malta is on the OECD White List as one of the jurisdictions that have substantially implemented the international tax standard. Malta's agreement on tax co-operation with the OECD in fact predates the OECD blacklist published in June 2000.*
 4. *Certain Malta-based funds, with a value of assets situated in Malta which amounts to at least 85% of the value of the total assets of the fund, may be taxed on their investment income at the rate of 35%.*
-

Malta

Based on information supplied by the Malta Financial Services Authority

Malta is an independent republic, gaining independence from the United Kingdom in 1964. It is a full member of the European Union (from 1 May 2004) and is one of the 15 members of the Eurozone.

The legal system is based on the continental civil law system and the Napoleonic Code, but over the last 200 years public and commercial law have been strongly influenced by the Anglo Saxon model. The official language is Maltese, although English is the most commonly used language in business while Italian is fluently spoken by a good part of the population.

Along with its recent growth in financial services, Malta has also gained a strong reputation as an efficient funds domicile that provides competitive access to the European market and beyond. The country is now home to over 400 funds including 250 alternative investment funds and a significant number of UCITS and retail funds. Hedge funds licensed in Malta range from single manager funds to funds of hedge funds and include large, mid-sized and small cap funds, as well as single and multi-strategy funds.

The fund servicing infrastructure continues to consolidate and expand with the arrival of more international services providers. Fund administrators

who have established operations in recent months include Custom House Global Fund Services, SGGG Fexco Fund Services and Praxis Fund Services, who have all commented favourably on the availability, quality and competitiveness of employees and the strength of professional services. Other administrators established in Malta include TMF, Apex, HSBC and Valletta Fund Services.

The asset management industry has also registered important gains with the recent arrival of a number of European managers, particularly from the Netherlands, Switzerland and the UK.

Regulatory Framework for Funds

Malta's regulatory framework is geared to ensure the highest standards of probity and transparency while allowing operators the freedom to compete and innovate. The industry is overseen by a single regulator, the Malta Financial Services Authority (MFSA), which was set up in 2002 to consolidate the work previously carried out by several agencies. The MFSA aims at combining a high standard of regulation with an efficient response to industry needs.

The Investment Services Act provides the statutory

framework for the licensing and supervision of investment services and collective investment schemes (CISs). The legislative framework is flexible enough to adapt to different business models within parameters set by Maltese and EU legislation.

The MFSA's Rulebook distinguishes between Retail Collective Investment Schemes and Professional Investor Funds:

- Retail Collective Investment Schemes include both UCITS and non-UCITS Schemes. These types of schemes are subject to strict regulatory requirements, based on the UCITS Directive (including the incorporation of the new eligible assets regime) which is fully transposed into the Maltese regulatory framework.
- Professional Investor Funds (PIFs) are governed by a customised version of the Rules and, by comparison to retail funds, benefit from a lighter form of regulation through the disapplication of certain provisions. The PIF framework is used by hedge funds and for other forms of alternative investment.

As legal structures go, PIFs may be set up as open-ended and closed-ended investment companies, investment partnerships or unit trusts. Alternatively they may be formed through other non-corporate investment instruments. They may be stand alone funds or they may incorporate a number of segregated sub-funds or managed accounts.

There are three separate categories of PIF, each having its own particular licence parameters depending on the level of sophistication of the end investor. The most commonly used type is the "Qualifying Investor Fund" (minimum investment €75,000). This type of fund has no investment or borrowing restrictions and may make unlimited use of leverage. Such funds need not appoint a custodian or prime broker provided adequate safekeeping arrangements are in place.

The "Extraordinary Investor Fund", in its turn, is typically suited for private equity investment. In this case, the minimum investment threshold is €750,000. In addition to the advantages enjoyed by qualifying investor funds, this type of PIF also benefits from customised disclosure requirements and even faster licensing turnaround times, particularly where the directors, service providers and founder shareholders originate from recognised jurisdictions.

At the other end of the scale, "Experienced Investor Funds" (minimum investment per investor €15,000) require the appointment of a custodian and can use leverage only up to 100% of NAV. However these types of PIFs are not bound by any of the investment restrictions that apply to retail funds.

PIFs that do not appoint a third party manager may be set up as self-managed funds. In such case, the

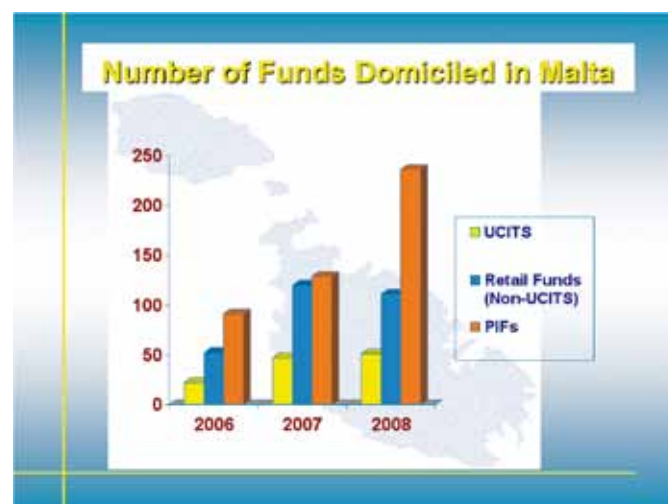
management of the assets will be the responsibility of the Board of Directors. The Board may in turn delegate certain functions to an in-house Investment Committee whose role is to monitor and review the investment policy, establish and review guidelines for investments and issue rules for stock selections, set up the portfolio structure and asset allocation and make recommendations to the Board of Directors. The day-to-day investment management of the PIF's assets may be delegated to a portfolio manager appointed by the Investment Committee. Self-managed PIFs must have a minimum capital of €125,000.

The turnaround time for a Qualifying Investor Fund could be as little as 7 days, while that for Extraordinary Investor Fund would be 3 days. Continuation provisions incorporated in the legislation also allow funds to re-domicile to and from Malta at the least possible cost while listing of funds on the Malta Stock Exchange is also an option.

A fund may set up Special Purpose Vehicles (SPVs) in any jurisdiction that is not blacklisted by the FATF, provided this is in line with the fund's objectives and policies as disclosed in the offering document. The fund's directors must also retain control on the Board of Directors of the SPV.

Service Providers

The regulatory framework for service providers is based primarily on the EU Markets in Financial Instruments Directive and the Capital Requirements Directive. Managers, Investment Advisers, Custodians and Prime Brokers establishing operations in Malta would need to apply for the appropriate licence under the Investment Services Act. On the other hand Fund Administrators intending to provide purely administrative services may apply to the MFSA for recognition certificate. Funds domiciled in Malta may also be serviced by



Source: Malta Financial Services Authority

administrators, managers or custodians authorised in other EEA or recognised jurisdictions.

Credit institutions, constituted and licensed in Malta, or exercising the freedom of establishment rights under EU legislation, as well as branches or subsidiaries of overseas credit institutions that are subject to prudential requirements equivalent to those applicable to Maltese credit institutions, are among the institutions that are eligible for a custody licence under the Investment Services Act.

Business environment

Malta is well positioned to continue making headway in financial services. As a domicile it is widely respected and provides a highly attractive business environment. Legal and accounting expertise is fully developed, underpinned by the presence of the major accountancy firms and traditionally strong links with City law firms. Advantages include a quality human resource; an internationally accepted tax regime with an extensive network of bilateral treaties; a unique legal system that combines the continental civil law system with Anglo Saxon commercial law principles; an excellent IT and communications infrastructure, and good air links with other financial centres and surrounding markets.

In a country whose professional resources are already well-supported by a deep pool of multilingual administrative staff, the funds industry is investing heavily in training at the specialised end. As a result Malta is fast becoming a serious alternative for fund promoters. It is moreover an established onshore jurisdiction forming an integral part of the EU single market in financial services.

Strongly biased in favour of quality rather than quantity, Malta is approaching critical mass as a fund domicile and this is drawing more managers and administrators to establish operations. The advent of the single management passport in the EU, the structural shift that is taking place in the financial services landscape and increased specialisation on the local scene are all factors that will influence Malta's development going forward. As a result, fund services – in particular custody and management services – are set to become stronger in the not too distant future.

International Benchmarking

- The World Economic Forum's Competitiveness Index 2008-2009 has ranked Malta 34th (out of 134 countries) for financial market sophistication, with a banking system that is the 10th soundest in the world.
- The Internal Market Scoreboard, published by the European Commission in January 2009, has placed Malta and Denmark in joint first position in the implementation of internal market directives – further evidence of the sound internal structures that are in place and confirmation of Malta's status as one of them most integrated economies in the EU.
- A European Commission Report on Trade and Foreign Investment Indicators published on 19 January 2009, places Malta among the top five EU performers with respect to foreign direct investment inflows as a percentage of GDP.
- Malta is on the OECD White List published following the G20 meeting in April 2009. ■