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SPECIAL REPORT

MALTA 2011

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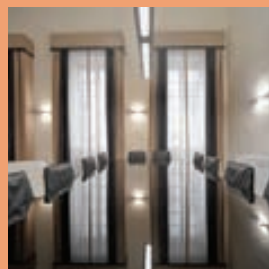
Malta advances its position as an international financial services centre

INVESTMENT

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TICKING ALL THE RIGHT BOXES

LARAGH CASSAR OF CAMILLERI PREZIOSI DISCUSSES MALTA AS A BASE FOR PRIVATE EQUITY FUNDS AND HOW THE MALTA FINANCIAL SERVICES AUTHORITY OFFERS A SUFFICIENT REGULATORY OVERVIEW



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In structuring the setting up of funds in Malta, advisors and promoters spend substantial time discussing the most appropriate vehicle to be used. This discussion generally revolves around what options the legislative framework provides, the expectation of potential investors, the type and location of the underlying investments, the methodology utilised to realise a return on the investment as well as the location and regulatory status of the fund and its service providers.

Traditionally, investment funds set up in Malta have used the investment company with variable share capital vehicle and, to a large extent, these structures continue to be commonly used. This is primarily due to the fact that advisors, regulators and competent authorities are accustomed to the nature and permutations of such a vehicle. The investment company, while providing a suitable structure for most types of funds, might not always be the most appropriate or commonly used vehicle from an international perspective. For instance, in jurisdictions traditionally known to attract private equity funds, such as the UK and the US, the structure used to date is the limited partnership, a structure which has its grounds in the historical evolution of private equity funds generally.

The limited partnership is, and has been for a while, an available structure for the fund community in Malta. The Maltese Companies Act regulates, among other matters, the use of limited liability companies (including investment companies with variable or fixed share capital) and limited partnerships. Until recently, however, the use of limited partnerships in the context of funds was restricted to limited partnerships the capital of which is divided into shares. Nevertheless, pursuant to recent amendments to the Companies Act, limited partnerships that do not divide their capital into shares may now be used as a fund vehicle. Through such amendments, limited partnerships are largely brought in line with the legislative

framework already applicable to investment companies with variable share capital.

A limited partnership under Maltese law operates under the partnership name and has its obligations guaranteed by the unlimited and joint liability of one or more general partners and by the liability, limited to the amount, if any, unpaid on the contribution of one or more limited partners. It is not permissible for the limited partner to perform any act of administration or transact on behalf of the limited partnership except by virtue of a power of attorney specific to an act or transaction, the contravention of which exposes the limited partner to expulsion and to unlimited liability.

MULTI-CLASS AND MULTI FUND PARTNERSHIPS

Within the particular context of fund structures, limited partnerships may also be constituted as multi-class partnerships or multi-fund partnerships. In the latter case, the capital is, or is capable of being, divided into different classes of units or shares being offered as different units or shares not constituting sub-funds. On the other hand, it is also possible for a limited partnership to be constituted as a multi-fund partnership where the different units or shares constitute distinct sub-funds of the partnership. In each case, the units may be issued with different currencies. As is the case with multi-fund investment companies, the sub-funds of a limited partnership are allocated assets and liabilities which are distinct from other assets and liabilities allocated to other sub-funds. The fact that the assets and liabilities of each sub-fund are deemed,

by operation of the law and the deed of partnership, to have separate and distinct patrimonies amongst them is often crucial to potential investors in order to ensure that their investment is adequately ring-fenced. Furthermore, the recent amendments to the Companies Act have also sought to ease the operational aspects of a limited partnership, with a view to creating a level playing field with investment companies.

While amendments to the Maltese Companies Act

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were required to make the Maltese limited partnership vehicle more attractive to the fund community, the regulatory regime of funds already contemplated the use of limited partnerships for funds, including private equity funds. The most appropriate form of licensing regime available in Malta for private equity funds is the professional investor fund (PIF) targeting extraordinary investors. The regulatory framework seeks to ensure a sufficient level of regulatory overview by the Malta Financial Services Authority (MFSA) without impinging upon the flexibility that each specific fund may require to suit the needs of the professional investor community. The minimum amount of investment required in this fund is €750,000 or \$750,000 and each investor is required to certify that he or she has the necessary level of experience to be considered an extraordinary investor. The appointment of a general partner of a PIF must be approved by the MFSA. However, if a general partner is already regulated in a recognised jurisdiction, the due diligence carried out in his respect is reduced substantially. The rules require a general partner to be either a person which is locally licensed as a fund management company, a person resident outside Malta who is of sufficient standing and repute and who provides fund management services, any other entity of sufficient standing and repute as approved by the MFSA,

or any other individual who satisfies the fit and proper test. In the latter two cases, the MFSA requires that an acceptable fund manager be also appointed.

The PIF for extraordinary investors does not have any regulatory imposed restrictions on its investments, its borrowing or leverage powers and are not required to appoint a custodian or prime broker provided proper arrangements for the safekeeping of its assets are maintained by the fund. Such types of PIFs are generally subject to a faster licensing process and benefit from reduced disclosure requirements. The promotion of such funds may be made only to extraordinary investors. However, if active promotion of the same is to be made using mass media, the advertisements are to state that the fund is only available to persons that qualify as extraordinary investors rather than the general public.

A SOLID OFFERING

Malta's success in the fund community has been evidenced largely as a result of the middle-tier PIF, that is PIFs targeting qualifying investors who have a lower amount of minimum investment but who benefit from a higher level of regulation, albeit substantially less than a retail fund. To my mind, Malta ticks all the right boxes and ought to offer an adequate set up and licensing regime to private equity funds. ■

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