



AIFM – The Essentials

Asset management and funds

“Highly professional team that
continuously exceeds expectations”

The Legal 500

INTRODUCTORY REMARKS

The Alternative Investment Fund Managers Directive (the “AIFMD”) has brought about enhanced regulatory oversight of Alternative Investment Fund Managers (“AIFMs”) managing or marketing alternative investment funds (“AIFs”) within the EU. The new regulatory architecture applies to non-UCITS fund managers including hedge, private equity, real estate, infrastructure and commodity funds.

COMPETENT AUTHORITY

The Malta Financial Services Authority (the “MFSA”).

REVISED LEGAL FRAMEWORK

A. Primary Legislation:

The Investment Services Act (as amended) (Cap. 370 of the laws of Malta).

B. Subsidiary Legislation:

- (i) Investment Services Act (Marketing of Alternative Investment Funds) Regulations;
- (ii) Investment Services Act (Alternative Investment Fund Manager) (Passport) Regulations;
- (iii) Investment Services Act (Alternative Investment Fund Managers) Regulations; and
- (iv) Investment Services Act (Alternative Investment Fund Manager) (Third Country) Regulations.

C. MFSA Rules:

The investment Services Rules for: (i) Investment Services Providers; (ii) Alternative Investment Funds; (iii) Professional Investor Funds; and (iv) Retail Collective Investment Schemes

SINGLE-MANAGER REQUIREMENT

Each AIF must have a single Licence Holder as AIFM. In the case of self-managed AIFs, it shall be the AIF itself which shall be considered to be the manager (unless the AIF’s directors appoint an external AIFM). Importantly, where an AIF employs more than one service provider to perform management functions (as is the case where an AIF has both a manager and a sub-manager) one of the managers must be clearly delineated as AIFM for the purposes of compliance with the AIFMD.

LICENSING AND AUTHORISATION

Under the new regime, an applicant for an AIFM license will have to *inter alia* furnish the Malta Financial Services Authority with the following information:

Mandatory Information on the AIFM:

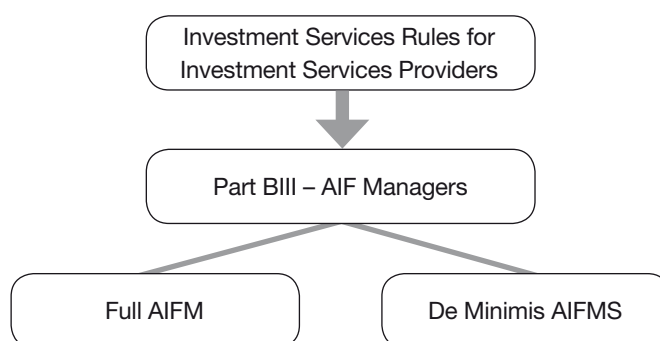
- the persons conducting the business of the AIFM and the shareholders or members, who have qualifying holdings in the AIFM (and the amount of their holdings);
- information on the AIFMs remuneration policies;
- any arrangements made for the delegation and sub-delegation of functions to third parties; and
- the organization structure of the AIFM.

Mandatory Information on the AIF:

- information on the investment strategies and the AIFM’s leverage policy;
- information on where the master AIF is established in the case of feeder AIFs;
- the rules or instruments of incorporation of each AIF the AIFM intends to manage; and
- information on the arrangements made for the appointment of the depositary.

The MFSA will inform an applicant of the outcome of its decision within three months and will only grant authorization where it is satisfied that: (i) the AIFM’s business is carried on by persons of good repute; (ii) the AIFM has sufficient capital and own funds; and (iii) the qualifying shareholders of the AIFM are suitable towards ensuring sound and prudent management.

THE REGULATION OF AIFMS



Where an AIFM exceeds the de minimis thresholds, it shall be subject to all the requirements imposed by the AIFMD as transposed into local law. The AIFM would be required to be in possession of a category 2 Investment Services Licence and would be required to *inter alia* comply with the requirements listed hereunder:

INITIAL CAPITAL AND OWN FUNDS

The initial capital requirement differs between internal and external AIFMs. Whilst internally managed AIFs must have an initial capital amounting to at least €300,000, the amount of own funds requirement for external AIFMs is that of €125,000. Where the value of the portfolios of AIFs managed by the AIFM exceed EUR 250 million, the AIFM must maintain a supplemental amount of own funds equivalent to 0.02% of the amount in excess thereof (subject to a maximum ceiling of €10M).

Without prejudice to the aforesaid, the initial capital shall never be less than one quarter of the firm's fixed overheads. AIFMs must also maintain additional own funds to cover professional liability risk. Alternatively, they may hedge against this risk by holding adequate professional indemnity insurance.

DELEGATION

An AIFM may delegate certain of its functions to a third party, provided that the MFSA is duly notified of the intention to delegate. However, the entire delegation structure must be objectively justified and must not be such as to render the AIFM a letter-box entity. The AIFM will therefore continue to be responsible for the proper performance of the delegated functions. It will also be required to fulfil certain other requirements, such as the ability to demonstrate that the delegate is qualified and capable of undertaking the functions in question, that it was selected with all due care and that the AIFM is in a position to effectively monitor the delegated activity, to give further instructions to the delegate and to withdraw the delegation with immediate effect when this is in the interest of investors. Delegation to third parties will not affect AIFM liability towards investors.

REMUNERATION

AIFMs must establish and maintain remuneration policies which are consistent with sound and effective risk management. Such policies shall regulate all categories of staff whose professional activities have a material impact on the risk profiles of AIFs they manage, namely: (i) senior management, (ii) risk takers, (iii) persons attributed control functions, and (iv) employees receiving a remuneration that takes them into the same remuneration bracket as senior management and risk takers. The MFSA has confirmed that the remuneration rules will only apply to the AIFM and not to any delegate of the AIFM.

In determining their remuneration policies, AIFMs should have regard to the remuneration policies and guidelines contained in Appendix 12 of the Investment Services Rules for Investment Services Providers (which can be accessed by [clicking here](#)). These contain rules on the regulation of the variable component comprising the remuneration disbursed. In effect, this is aimed at curbing excessive risk taking.

CONFLICTS OF INTEREST

The AIFMD imposes general obligations on AIFMs to act in the best interests of the AIFs they manage and treat all AIF investors fairly. Broadly speaking, these are similar to those obligations contained in MiFID. AIFMs shall maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to identify, prevent, manage and monitor conflicts of interest which can adversely affect the interests of the AIFs and their investors. Where conflicts of interest cannot be avoided, they shall be clearly disclosed.

RISK MANAGEMENT AND LIMITS ON LEVERAGE

AIFMs are required to, functionally and hierarchically, separate the functions of risk management from the functions of portfolio management and to implement adequate risk management systems in order to gauge, manage and monitor all risks relevant to each AIF investment strategy. In so doing regard shall be had to annex 14 of the Investment Services Rules for Investment Services Providers (which can be accessed by [clicking here](#)). The AIFM is also bound to set a maximum limit to the measure of leverage that may be employed on behalf of each AIF under management.

LIQUIDITY MANAGEMENT

AIFMs shall, for each AIF that they manage which is not an unleveraged closed-ended AIF, employ an appropriate liquidity management system and adopt procedures which enable them to monitor the liquidity risk of the AIF and to ensure that the liquidity profile of the investments of the AIF complies with its underlying obligations. AIFMs shall regularly conduct stress tests, under normal and exceptional liquidity conditions, which enable them to assess the liquidity risk of the AIFs and monitor the liquidity risk of the AIFs accordingly. AIFMs shall ensure that, for each AIF that they manage, the investment strategy, the liquidity profile and the redemption policy are consistent.

CUSTODIANS

Aside from the AIFMs, the AIFMD has fully re-defined the role and responsibilities of depositaries, requiring each and every AIF to have a single depositary. The latter will be responsible:

- To ensure the proper functioning of the AIFs cash flows and guarantee that all payments made by or on behalf of the investors has been received;
- To ensure the proper safekeeping of the financial instruments and/or assets of the AIF; and
- To carry out a number of other monitoring and oversight tasks.

The depositary will be liable to the AIF and to its investors for any loss of the financial instruments and/or assets which are held under its custody due to negligence or intentional failure.

Although the AIFMD requires the depositary for EU funds to be located in the same EU Member State of the fund, the MFSA has negotiated a derogation which will allow funds established in Malta to appoint a credit institution situated in another Member State until 22 July 2017. This should facilitate the process for fund managers to establish a presence in Malta. In respect only of certain types of funds that do not feature any redemption rights during the period of 5 years from the date of initial investment, the MFSA may allow the appointment as Custodian of any registered professional providing sufficient guarantees.

PASSPORTING

The AIFMD provides a harmonized framework for the cross-border management and marketing of AIFs within the EU via an AIFM passport. Similar to the position applicable to retail schemes licensed under the UCITS Directive, AIF managers shall be able to market their funds in all Member States through a single authorisation process.

However, the marketing passport will initially only be available to EU managers marketing EU funds. It is only in 2015 that the EU marketing passport will be available to EU AIFMs marketing third country AIFs and AIFs marketed in the EU by third country AIFMs. This feature of the AIFMD could trigger a number of third country AIFMs to establish a European base in order for them to benefit from the EU passport from an earlier date.

During this intermittent period, Malta will be looking to re-domicile a number of foreign funds onshore. This target is facilitated by the ease with which Maltese legislation allows for the re-domiciliation of funds under the Continuation of Companies Regulations.

TRANSITIONAL PERIOD

A one year transitory period is available for existing fund managers and self-managed funds to upgrade their licence into full AIFMs/self-managed AIFs or de minimis AIFMs. Existing licence holders are to complete and submit self-assessment forms by 31 March 2014.



MALTA

- Robust legal system, based on UK and EU law and in tune with the business world
- Member of the EU: easy access to 28 member states through the EU marketing passport
- Reputable regulator while being easily accessible and sensitive to the particular requirements of applicants
- Tax efficiency: favourable tax regime and extensive double tax treaty network
- Skilled and highly qualified workforce and service providers
- English is an official language
- Currency is the Euro

For more information, please contact :



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