

INVESTMENT SERVICES RULES FOR ALTERNATIVE INVESTMENT FUNDS

PART A: THE APPLICATION PROCESS

1 REGULATION OF COLLECTIVE INVESTMENT SCHEMES IN TERMS OF THE INVESTMENT SERVICES ACT

- 1.01 Collective investment schemes including Alternative Investment Funds ('AIFs') are regulated by the Investment Services Act ('the Act') which provides the statutory basis for regulating collective investment schemes constituted in or operating in or from Malta. AIFs constitute a category of collective investment schemes which fall within the provisions of the Act.
- 1.02 The Act defines a "collective investment scheme" as any scheme or arrangement which has as its object, or as one of its objects, the collective investment of capital acquired by means of an offer of units for subscription, sale or exchange and which has the following characteristics:
- (a) the scheme or arrangement operates according to the principle of risk spreading; and either
 - (b) the contributions of the participants and the profits or income out of which payments are to be made to them are pooled; or
 - (c) at the request of the holders, units are or are to be repurchased or redeemed out of the assets of the scheme or arrangement, continuously or in blocks at short intervals; or
 - (d) units are, or have been, or will be issued continuously or in blocks at short intervals."
- 1.03 The Act also provides that an AIF that is not sold to retail investors and that does not have the characteristic listed in Rule 1.02(a) shall only be deemed to be a collective investment scheme if the scheme, in specific circumstances as established by regulations under this Act, is exempt from such requirement and satisfies any conditions that may be prescribed.
- 1.04 The Act also defines an "AIF" as "a collective investment scheme, including subfunds thereof, which raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors, and which does not qualify as a UCITS Scheme in terms of the UCITS Directive." In terms of the AIFMD, the following undertakings shall not be considered as AIFs:
- (a) a holding company;
 - (b) an institution for occupational retirement provision which is covered by Directive 2003/41/EC,
 - (c) employee participation schemes or employee savings schemes; and

(d) securitisation special purpose vehicles.

- 1.05 The exclusions referred to in Rule 1.04 and further exemptions can be granted from the requirement to obtain a collective investment scheme licence in terms of the Investment Services Act (Exemption) Regulations¹, the Investment Services Act (Recognition of Private Collective Investment Schemes) Regulations² and the Investment Services Act (Marketing of Alternative Investment Funds) Regulations³.
- 1.06 Private collective investment schemes will continue to be issued with a recognition certificate since these schemes fall outside of scope of the AIFMD.

¹ S.L. 370.02

² S.L. 370.06

³ S.L. 370.21

2 CRITERIA WHICH THE MFSA WILL APPLY IN CONSIDERING AN APPLICATION FOR A LICENCE AND ONGOING REGULATORY REQUIREMENTS

- 2.01 The MFSA will grant a collective investment scheme licence if it is satisfied that the scheme will comply in all respects with the provisions of the Act, the applicable Regulations and these Investment Services Rules. Furthermore, the MFSA must also be satisfied that the members of the governing body of the scheme are “fit and proper” persons to carry out the functions required of them in connection with the scheme.
- 2.02 In accordance with Article 6(3) of the Act, when considering whether to grant or refuse a licence, the MFSA will, in particular, have regard to:
- a. the protection of investors and the general public;
 - b. the protection to the reputation of Malta taking into account Malta’s international commitments;
 - c. the promotion of competition and choice; and
 - d. the reputation and suitability of the applicant and all other parties connected with the scheme.
- 2.03 In assessing a request for a collective investment scheme licence, the MFSA will consider the nature of the scheme and the nature of investors to whom it will be marketed. It will then look into the experience and track record of all parties who will be involved with the scheme. Such persons should be of good standing and should be competent. The MFSA reserves the right to refuse a licence if it does not approve a party involved with the scheme.
- 2.04 Even though the Act provides for the licensing of different categories of schemes, the MFSA applies the same standards relating to the “fit and proper” status of the applicant and its service providers.
- 2.05 The “fit and proper” test is one which an applicant and a licence holder must satisfy on a continuing basis. The MFSA assesses each case on its own merits and on the basis of the relevant circumstances.
- 2.06 Nonetheless, the onus of proving that it meets the required standards on an on-going basis rests on the applicant and/ or licensed scheme as the case may be. It is not the MFSA’s task to prove that an applicant is fit and proper either on licensing or thereafter.
- 2.07 In carrying out the ‘fit and proper’ test, the MFSA adopts a cumulative approach. It may decide that the scheme has failed the test after considering various circumstances, each of which on its own may or would not lead to that conclusion. For this reason, it is essential that the information provided to the MFSA is truthful and as complete as possible.

- 2.08 When arriving at its decision as to whether an Applicant has met the required standards, the MFSA will take account both of what is said and of what ought to have been disclosed⁴. It should be noted that it is an offence to provide inaccurate, false or misleading information to the MFSA.
- 2.09 In general terms, there are three criteria which must be met, to satisfy the "fit and proper" test: (a) **integrity**; (b) **competence**; and (c) **solvency**.
- 2.10 Integrity requires that the scheme, its officers and its service providers are acting honestly and in a trustworthy fashion.
- 2.11 Competence means that the persons responsible for running the scheme must be able to demonstrate an acceptable amount of knowledge, professional expertise and experience. The degree of competence required will depend upon the job being performed. The MFSA will take into account the qualifications, experience and skills of those involved.
- 2.12 Solvency involves ensuring that proper financial controls and management of liquidity and capital is applied.

Licenceable activities for self-managed AIFs

- 2.13 A self-managed AIF may only be authorised to provide the licensable activities which consist in the internal management of the AIF as provided hereunder:
- [i] investment management functions which the self-managed AIF shall at least perform consisting in (a) portfolio management and (b) risk management
 - [ii] other functions that a self-managed AIF may additionally perform in the course of the collective management of an AIF:
 - (a) Administration
 - legal and fund management accounting services;
 - customer inquiries;
 - valuation and pricing, including tax returns;
 - regulatory compliance monitoring;
 - maintenance of unit- /shareholder register;
 - distribution of income;
 - unit/ shares issues and redemptions;
 - contract settlements including certificate dispatch;
 - record keeping.
 - (b) Marketing;

⁴ For example in respect of a person's criminal record.

- (c) Activities related to the assets of AIFs, namely services necessary to meet the fiduciary duties of the self-managed AIF, facilities management, real estate administration activities, advice to undertakings on capital structure, industrial strategy and related matters, advice and services relating to mergers and the purchase of undertakings and other services connected to the management of AIFs and the companies and other assets in which it has invested.
- 2.14 Self-managed AIFs shall, make a direct or indirect offering or placement of units or shares of AIFs to investors in any Member State or EEA State in accordance with the provisions of the Investment Services Act (Marketing of AIFs) Regulations.

3 ALTERNATIVE INVESTMENT FUNDS**➤ European Venture Capital Funds and European Social Entrepreneurship Funds**

3.01 The AIFM may establish the AIF as a European venture capital fund in terms of Regulation (EU) No 345/2013⁵ and in this regard opt to use the designation ‘EuVECA’ in relation to the marketing of the qualifying venture capital funds in the Union.

3.02 Similarly, the AIFM may establish the AIF as a European social entrepreneurship fund in terms of Regulation (EU) No 346/2013⁶ and in this regard opt to use the designation ‘EuSEF’ in relation to the marketing of the qualifying social entrepreneurship funds in the Union.

3.03 In the cases referred to in Rules 3.01 and 3.02, the AIFM shall be guided by the provisions of Regulations (EU) No 345/2013 and 346/2013 prescribing rules for the marketing of qualifying venture capital funds/ social entrepreneurship funds to eligible investors across the Union, for the portfolio composition of the qualifying venture capital funds/ social entrepreneurship funds and for the eligible investment instruments and techniques to be used by qualifying venture capital funds/ social entrepreneurship funds.

➤ European Long-Term Investment Funds

3.04 The AIFM may establish the AIF as a European long-term investment fund (ELTIF) in terms of Regulation (EU) No 2016/760⁷. In such case, the AIFM shall be guided by the provisions of the aforementioned regulation in relation to the authorisation, investment policies and operating conditions of these schemes.

➤ Investor base for AIFs

⁵ Regulation (EU) No 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds

⁶ Regulation (EU) No 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds

⁷ Regulation (EU) No 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds

3.05 The AIFM and/or any appointed intermediary may sell the AIF (hereinafter referred to as the 'Scheme') to retail investors, professional investors and, where permitted to qualifying investors:

Provided that where the AIFM intends establishing the scheme as a European venture capital fund, European social entrepreneurship fund or as a European long-term investment fund, it shall be guided by the provisions of the applicable EU Regulations prescribing the investor base of these funds.

3.06 The establishment of AIFs targeting retail investors is regulated in the Parts A and BI of the Investment Services Rules for Retail Collective Investment Schemes.

3.07 The scheme may only be marketed with a passport in jurisdictions outside Malta if the AIFM satisfies the relevant provisions prescribed in the Investment Services Act (Alternative Investment Fund Manager) (Passport) Regulations⁸ or the Investment Services Act (Marketing of Alternative Investment Funds) Regulations.

3.08 The marketing of an AIF in jurisdictions outside Malta to investors other than professional investors as defined in this Rulebook is not automatic and may be allowed subject to national provisions applicable in the respective jurisdiction as prescribed in Article 43 of the AIFM Directive.

Investor base - Professional investors

3.09 A 'professional investor' is defined in Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments.

3.10 Annex II of Directive 2004/39/EC provides that a professional client /investor is a client who possesses the experience, knowledge and expertise to make its own investment decisions and properly assess the risks that it incurs. In order to be considered a professional investor/client, it shall comply with the criteria listed in the following Rules.

⁸ S.L. 370.22

3.11 The following shall all be regarded as professionals in all investment services and activities and with respect to all the financial instruments prescribed in Schedule 2 to the Investment Services Act:

(I) entities which are required to be authorised or regulated to operate in the financial markets. The list below should be understood as including all authorised entities carrying out the characteristic activities of the entities mentioned: entities authorised by a Member State under a Directive, entities authorised or regulated by a Member State without reference to a Directive, and entities authorised or regulated by a non-Member State:

- (a) credit institutions;
- (b) investment firms;
- (c) other authorised or regulated financial institutions;
- (d) insurance companies;
- (e) collective investment schemes and management companies of such schemes;
- (f) pension funds and management companies of such funds;
- (g) commodity and commodity derivatives dealers;
- (h) locals;
- (i) other institutional investors.

(II) large undertakings meeting two of the following size requirements on a company basis:

- (a) balance sheet total: EUR20,000,000
- (b) net turnover: EUR40,000,000
- (c) own funds: EUR2,000,000

(III) national and regional governments, public bodies that manage public debt, Central banks, international and supranational institutions such as the World Bank, the IMF, the ECB, the EIB and other similar international organisations;

(IV) other institutional investors whose main activity is to invest in financial instruments, including entities dedicated to the securitisation of assets or other financing transactions.

3.12 Investors other than those referred to in Rule 3.07 including public sector bodies and private individual investors may also elect to be treated as professional investors within the meaning of Annex II to Directive 2004/39/EC.

3.13 Prior to accepting any investment, the Scheme should be in receipt of a completed “Professional Investor Declaration Form” in which the investor confirms that he/ she has read and understood the mandatory risk warnings and describes why he/ she

is a Professional Investor. A Proforma of a Professional Investor Declaration Form is provided in Appendix VI to Part B of these Rules.

Investor base - Qualifying investors

3.14 In terms of the MFSA's regulatory regime applicable to collective investment schemes, an AIF can be promoted to qualifying investors as defined and outlined in Rule 3.11.

3.15 A "qualifying investor", is an investor that fulfils the following criteria:

- (a) invests a minimum of EUR 100,000 or its currency equivalent in the AIF which investment may not be reduced below this minimum amount at any time by way of a partial redemption;
- (b) declares in writing to the fund manager and the AIF that it is aware of and accepts the risks associated with the proposed investment; and
- (c) satisfies at least one of the following:
 - (i) is a body corporate which has net assets in excess of EUR 750,000 or which is part of a group which has net assets in excess of EUR 750,000 or, in each case, the currency equivalent thereof;
 - (ii) is an unincorporated body of persons or association which has net assets in excess of EUR 750,000 or the currency equivalent;
 - (iii) is a trust where the net value of the trust's assets is in excess of EUR 750,000 or the currency equivalent;
 - (iv) is an individual whose net worth or joint net worth with that of the person's spouse, exceeds EUR 750,000 or the currency equivalent; or
 - (v) is a senior employee or director of a service provider to the AIF.

3.16 The minimum investment requirement is EUR 100,000 or its currency equivalent. The total amount invested may not fall below this threshold unless this is the result of a fall in the net asset value. Provided that the minimum threshold is satisfied, additional investments – of any size – may be made. The minimum investment requirement applies to each individual "Qualifying Investor". In the case of joint holders, the minimum investment requirement is EUR 100,000 or the currency equivalent.

3.17 Prior to accepting any investment, the Scheme should be in receipt of a completed "Qualifying Investor Declaration Form" in which the investor confirms that he/ she has read and understood the mandatory risk warnings and describes why he/ she is a Qualifying Investor. A proforma of a Professional Investor Declaration Form is provided in Appendix VI to Part B of these Rules.

4 APPLICATIONS FOR A COLLECTIVE INVESTMENT SCHEME LICENCE

➤ The application process

4.01 When submitting an application for a collective investment scheme licence under the Act, the applicant shall ensure that the appropriate application form⁹ is completed and submitted together with all the supporting documentation.

4.02 The application requirements which must be satisfied by an AIF are summarised below.

4.03 There are three phases to the application process namely (i) Phase One being the preparatory phase; (ii) Phase two being the pre-licencing phase; and (iii) Phase three being the post-licencing phase.

4.04 **Phase one** consists of the following steps:

a. The MFSA recommends that the applicant/promoters complete the application form and submit it with the supporting documents as specified in the application form itself. The application form must be signed by the applicant who shall be responsible for the submission of all the relevant information. The application form and the supporting documentation will be reviewed and comments provided to the applicant generally within three weeks from submission of the application documents. The supporting documentation is listed in Schedule A. Nonetheless, the MFSA reserves the right to request such additional information as it may require when processing an application for a licence.

b. The MFSA may ask for more information and may make such further enquiries as it considers necessary. Applicants are to note that the MFSA will send all correspondence regarding the application directly to the Applicant.

c. The MFSA carries out the necessary due diligence checks at this stage.

d. The MFSA will consider the nature of the proposed scheme and will apply the Rules included in Part B of this Rulebook which represent the ongoing requirements to which the scheme will be subject, if and when licensed.

4.05 **Phase two** consists of the following steps:

(a) Once the MFSA concludes the review of the application and supporting documents, it will issue its 'in principle' approval for the issue of a licence.

⁹ Schedule A to Part A of these Rules

The 'in principle' approval is valid for a period of **three months** during which, the applicant will be required to finalise any outstanding matters. Should the three months elapse without the satisfactory resolution of all pre-licencing outstanding issues, the 'in principle approval' issued will cease to have effect.

- (b) Once any outstanding matters have been finalised, the application form and the supporting documentation are endorsed by the members of the governing body of the scheme and resubmitted to MFSA.
- (c) The MFSA will proceed with the issue of a licence as soon as all pre-licensing issues are resolved.

4.06 During **phase three**, the applicant may be required to satisfy a number of post-licensing matters prior to formal commencement of business.

➤ ***Applications for the licensing of additional sub-funds of an existing AIF***

4.07 A licensed AIF constituted in the form of an umbrella fund wishing to establish additional sub-funds, is ordinarily required to submit the following documents:

- i. formal notification to the MFSA of its intention to apply for a licence in favour of the sub-fund;
- ii. a confirmation from the governing body of the AIF signifying its intention to apply for a licence in favour of the sub-fund;
- iii. a final draft of the revised offering document/ offering supplement¹⁰;
- iv. the appropriate application fee; and
- v. a draft copy of the approval by the governing body of the AIF of the revised offering document/ offering supplement (as applicable).

➤ ***Applications for the approval of additional classes of shares/units of an existing AIF***

4.08 A licensed AIF constituted in the form of an umbrella (i.e. with sub-funds) or multi-class (i.e. without sub-funds) fund wishing to issue an additional class of shares/ units is ordinarily required to the documents listed hereunder. The additional class of shares/ units shall not constitute a distinct sub-fund of the AIF.

4.09 The documents required are the following:

- i. formal notification to the MFSA of its intention to issue additional classes of shares/ units;
- ii. a final draft of the revised offering document;
- iii. a draft copy of the approval of the governing body of the AIF of the offering document; and

¹⁰ as applicable;

- iv. a confirmation from the governing body of the AIF signifying its intention to issue additional classes of shares/ units.
- 4.10 The issue of additional classes of shares/ units within an existing AIF – so long as the additional classes of shares/ units do not constitute a distinct sub-fund of the AIF – is not subject to any application/ supervisory fees.
- ***Listing on a regulated market***
- 4.11 An AIF that has been granted or has applied for a collective investment scheme licence in terms of the Act may apply for admissibility to listing with the Listing Authority. The MFSA is the Listing Authority in terms of the Financial Market Act,
- 4.12 Where an application for admissibility to listing has been submitted concurrently with an application for a collective investment scheme licence, the documents submitted as part of the application for a collective investment scheme licence need not be resubmitted as part of the application for admissibility to listing.
- 4.13 In addition, provided the MFSA is informed of the AIF's intention to apply for admissibility to listing – once these documents have been approved by the MFSA, they will be deemed to be approved in relation to both the application for a collective investment scheme licence as well as in relation to the application for admissibility to listing.

5 MARKETING OF AIFs

Notification procedure

- 5.01 This section shall be read in conjunction with the Investment Services Act (Marketing of AIFs) Regulations.
- 5.02 This section proposes to provide an overview of the requirements applicable to self-managed Maltese AIFs wishing to market their units in another Member State or EEA State in terms of Directive 2011/61/EU.
- 5.03 Marketing of a Maltese AIF which is managed by an external AIFM is regulated by the provisions of the Investment Services Act (Marketing of AIFs) Regulations. Alternatively, an AIF shall refer to the Investment Services Act (Alternative Investment Fund Managers Passport) Regulations with regards to the provision of services in another EU/ EEA Member State whether by means of the establishment of a branch or on a remote basis under the freedom of services.

Notification requirements

- 5.04 A self-managed Maltese AIF may market its units or shares to professional investors in a Member State or EEA State other than Malta provided that prior to commencement of its marketing in a Member State or EEA State, the conditions prescribed hereunder are met.
- 5.05 A self-managed AIF shall submit to the MFSA a notification¹¹ which shall comprise the documentation and information prescribed hereunder:
- a) a notification letter, including a programme of operations concerning the self-managed AIF;
 - b) the AIF's prospectus or equivalent rules or instruments of incorporation;
 - c) identification of the depositary of the AIF;
 - d) a description of, or any information on, the AIF available to investors;
 - e) information on where the master AIF is established if the Maltese AIF is a feeder AIF;
 - f) any additional information concerning the disclosure obligations prescribed in Section 6 to Part B of these Rules;
 - g) an indication of the Member State or EEA State in which the self-managed AIF intends to market its units or shares;
 - h) information about arrangements made for the marketing of the self-managed AIF and, where relevant, information on the arrangements established to prevent units or shares of the AIF from being marketed to retail investors,

¹¹ Schedule 3 to Part A of these Rules.

including in the case where the AIF relies on activities of independent entities to provide investment services.

- 5.06 The MFSA commits itself, by not later than twenty working days after the date of receipt of a complete notification file, to transmit such file to the European regulatory authority of the Member State or EEA State where the self-managed AIF intends to market its units or shares. The MFSA will also enclose a statement to the effect that the self-managed AIF can adopt a particular investment strategy.
- 5.07 The MFSA will transmit the complete notification file only if the self-managed AIF complies with and will continue to comply with the provisions of the AIFM Directive.
- 5.08 Upon transmission of the notification file, the MFSA will, without delay, notify the Maltese AIF thereof and the latter may start marketing its units or shares in the host Member State or EEA State as from the date of such notification.

6 SURRENDER OF A COLLECTIVE INVESTMENT SCHEME LICENCE

- 6.01 The scheme shall inform the MFSA at an early stage of its intention to surrender its collective investment scheme licence. The MFSA may require the scheme to delay the surrender of its licence, or to wind-up such business in accordance with conditions imposed by the MFSA, in order to protect the interests of unit-holders.
- 6.02 The general procedure for surrendering a collective investment scheme licence is outlined below, although the MFSA reserves the right to impose additional requirements or vary them according to the particular circumstances of the case.
- 6.03 Following a notification to the MFSA of its intention to surrender its collective investment scheme licence, the scheme shall submit the following documentation to the MFSA:
- a) a formal request to the MFSA asking for its approval to surrender the collective investment scheme licence;
 - b) a resolution of the governing body of the scheme:
 - i. confirming the scheme's intention to surrender its licence, subject to the MFSA's approval and once the necessary formalities are finalised;
 - ii. confirming that the scheme has informed its auditor, depositary and relevant service providers of its intention to surrender its licence;
 - c) a shareholders' resolution confirming their approval of the proposed closure of the scheme (where applicable);
 - d) the scheme must give due notice to its unit-holders of its intention to surrender its licence (once the necessary formalities are finalised). A confirmation to this effect should be submitted to the MFSA.
- 6.04 Subsequently the scheme shall also submit:
- a) a confirmation from the scheme's administrator that there are no investors in the scheme;
 - b) a confirmation from the scheme's administrator that no complaints/ litigation are/is pending arising from any event which arose whilst there were investors in the scheme;
 - c) a confirmation from the scheme's administrator that the accruals and liabilities of the scheme have been cleared;
 - d) a confirmation from the depositary (where applicable) or administrator that the disbursement of the assets of the scheme has been completed in order; and
 - e) the original licence/s granted to it by the MFSA.

- 6.05 Once all requirements listed above are satisfied, the respective supervisory fees are settled, the scheme is delisted from any regulated market and passporting notifications have been withdrawn (as applicable), an internal process will be set in motion for approval of the surrender of the collective investment scheme licence.
- 6.06 The MFSA will convey its final decision to the scheme and will issue a public notice regarding the surrender of the scheme's licence.
- 6.07 Where the scheme consists of different sub-funds, and the licence which had been granted to the sub-fund is being surrendered, this section will nonetheless apply and references to 'the scheme' shall be deemed to refer to 'the sub-fund'.

7 FEES

- 7.01 The application fee is payable on submission of the application for a collective investment scheme licence and is not refundable.
- 7.02 Licenced collective investment schemes are required to pay the first annual supervisory fee on the date the licence is granted and annually thereafter upon the anniversary of the granting of the licence.
- 7.03 European AIFs are required to pay a notification fee upon notification to the MFSA of the intention to market their units in Malta. The first annual supervisory fee is payable on the commencement of such marketing and annually thereafter on the anniversary date of commencement of such marketing.
- 7.04 The applicable fees payable in terms of the Investment Services Act (Fees) Regulations are indicated in the following tables. The fees are subject to changes by regulations.

AIFs licenced pursuant to Article 4 of the Investment Services Act		
	Application Fee €	Annual Supervisory Fee €
Scheme	€2,000	€2,000
Per Sub-Fund (Fee is applicable per sub-fund up to 15 sub-funds). No annual supervisory fee will be payable from the 16 th scheme sub-fund upwards.	€1000	€600
Incorporated Cells (“ICs”) of RICCs pursuant to Article 9A of the Investment Services Act		
Per Incorporated Cell	€1000	€600
Per sub-fund (Fee is applicable per sub-fund up to 15 sub-funds). No annual supervisory fee will be payable from the 16 th scheme sub-fund upwards	€1,000	€600
European AIFs having their units marketed in Malta in terms of Regulation 5 of the Investment Services Act (Marketing of Alternative Investment Funds) Regulations		
	Application/Notification Fee	Annual Supervisory Fee
EU AIF	€2,500	€3,000
Per Scheme Sub-fund (No Annual Supervisory Fee will be payable from the 16 th Scheme sub-fund upwards)	€450	€500 up to 15 Scheme sub-funds (per sub-fund).