

Assessment of Malta's AIF fund structuring environment

By Dr Isabelle Agius

The transposition in Malta of the Alternative Investment Fund Managers Directive¹ ('AIFMD') strengthened the Maltese regulatory framework applicable to Alternative Investment Fund Managers ('AIFMs') and further reinforced the integrity of the financial system. Even though the AIFMD focussed on establishing a European framework aimed at regulating and supervising AIFMs, the Malta Financial Services Authority ('MFSA') went beyond the AIFMD and made provision for a structured framework for the regulation and supervision of Alternative Investment Funds ('AIFs').

Since July 2013, the authorisation and regulation of AIFs runs parallel with the authorisation and regulation of PIFs which were retained for de minimis AIFMs and third country managers. Furthermore, this specific product regulation enabled the MFSA to implement the Regulations (EU) No 345/2013 and 346/2013 on European venture capital funds and European social entrepreneurship funds respectively to the PIF and AIF regimes depending on whether the funds are managed by a full-scope AIFM or a de minimis AIFM.

The additional regulatory regime for AIFs further reinforced Malta's traditional dual layer of regulation regulating and supervising both service providers and collective investment schemes. Indeed, the transposition of the AIFMD in Malta effected the Investment Services Act² (the 'Act') which is the primary act regulating investment services providers and collective investment schemes, the regulations which are issued in terms of the Act and the Investment Services Rules which the Authority is empowered to issue for the better carrying out of the provisions of the Investment Services Act.



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On 1 April 2016, the Authority launched of the Notified AIF ('NAIF') regime. This regime marks a clear departure from the MFSA's concept of AIFs as regulated and supervised products and aims at providing AIFMs with a solution to market AIFs within the European Union in the shortest timeframe possible. This article proposes to provide an overview of the salient features of the NAIF regime.

Key facts for the establishment of a NAIF

A NAIF can be established in Malta in terms of the Investment Services Act (List of Notified AIFs) Regulations, 2016 and the Investment Services Rules for Investment Services Providers (the 'Rules').

The fund manager establishing and managing the NAIF may either be a full-scope AIFM authorised in terms of the Investment Services Act to provide manage AIFs or alternatively an EU AIFM which is in possession of a management passport under Article 33 of the AIFMD.

On the other hand, the NAIF can be either open-ended or closed-ended and established in any form which is available under Maltese Law namely investment companies i.e. SICAV³ or INVCO⁴, unit trusts, contractual funds or incorporated cells within an incorporated cell company. However, the NAIF regime will not be available to all collective investment schemes. Self-managed AIFs, property funds, loan funds and funds which invest in instruments and assets other than financial instruments listed in Section C of Annex I of MiFID⁵ cannot be established as NAIFs. Furthermore, collective investment schemes which are already licenced in terms of the Investment Services Act cannot convert to the NAIF Regime.

The investor base for NAIFs is restricted to professional investors and/or qualifying investors. The AIFM is required to adhere to the promotional rules applicable in the jurisdiction(s) where the NAIF is being marketed.

The notification process

The AIFM must submit to the MFSA a notification pack which includes a notification form with the required accompanying documentation within 30 calendar days from the date of resolution of the governing body of the AIF approving the prospectus. The same process is applicable in the case of notification of sub-funds of NAIFs. The accompanying documentation consists of the following:

- a prospectus containing the minimum contents required and drafted in accordance with the templates provided; prescribed in the Rules and duly compiled having regard to the appropriate pro-forma template provided;
- a resolution by the governing body of the AIF certifying that the prospectus has the minimum contents required and that it has been drafted in accordance pro-forma template;
- a self-certification by the AIFM that, having regard to any delegate manager(s) or advisers it has in place, it has the necessary competence and experience to manage the AIF and monitor effectively any delegate;
- a joint declaration by the AIFM and the governing body of the AIF by which each undertakes responsibility for the AIF, including, inter alia, the obligations arising under the AIFMD;
- a declaration by the AIFM confirming that it has carried out the necessary due diligence with regard to the service providers of the AIF and the governing body of the AIF. This declaration must include a statement that the AIFM is satisfied with the outcome of this due diligence exercise.

The MFSA will be including the AIF in the List of Notified AIFs within 10 working days from the date of filing of a duly completed notification pack.

Removal of the NAIF from the List of Notified AIFs

The MFSA retains the discretion to remove

the NAIF from the List of Notified AIFs. The Regulations further specify the following instances when the AIFM may request the Authority to remove a NAIF or a sub-fund of a NAIF from the List of Notified AIFs:

- upon expiration of the duration of the NAIF or its winding up;
- in any case where the custodian has given notice of termination under the custody agreement or is in liquidation or subject to bankruptcy proceedings or has had its license to provide custody services in respect of NAIFs suspended or cancelled;
- in any case where the AIFM has given notice of termination or is in liquidation or subject to bankruptcy proceedings or has had its licence to act as an AIFM suspended or cancelled and an eligible replacement AIFM has not been appointed within thirty (30) days from notice of termination;
- in all other cases as may be specified in the agreement between the NAIF and the AIFM as grounds for requesting removal of the NAIF from the List of NAIFs; and
- in all other cases as may be specified in the custody agreement between the NAIF or the AIFM on behalf of the NAIF and the custodian as grounds for requesting removal of NAIF from the List of Notified AIFs.

Upon removal from the List of Notified AIFs, the AIF must cease trading other than for the purpose of winding down the operations of the AIF or sub-fund and the AIF or sub-fund must then be liquidated or otherwise terminated in accordance with the requirements of Maltese law.

What's next?

All legislative texts, pro-forma templates and guidance notes have been finalised and are available for download from the Authority's website. The Authority will be welcoming the first notifications shortly. ■

Footnotes:

1. Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers.
2. Cap. 370 – Laws of Malta.
3. Investment Company with Variable Share Capital.
4. Investment Company with Fixed Share Capital.
5. Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments.