

# FACT SHEET 11 – HEDGE FUNDS & INVESTOR SCHEMES

## Moving your Funds home

Malta was one of the first European jurisdictions to introduce a specialised regime for professional investor funds (PIF) in 2000. Within five years the number of licence applications received by the Malta Financial Services Authority was more than double the number of licences it had issued in the previous four years.

The choice of Maltese domicile is based on a number of issues, namely:

- the efficiency and flexibility of the Malta Financial Services Authority
- EU membership as from 1<sup>st</sup> May 2004
- local and international stock exchange listing options
- an exemption from income tax and capital gains tax at fund level and at non-resident investor level quality support services
- low set-up and maintenance costs
- subject to certain conditions, it is not obligatory to appoint a Custodian provided the Directors ensure that there are nevertheless adequate safekeeping arrangements which need to be described in the Offering Document
- the possibility of 'self-managed' funds, i.e. the appointment of a third party fund manager is optional
- fund service-providers may be based in any MFSA recognized jurisdiction
- a fund manager may be established under the Maltese International Trading Company regime which will allow for example performance fees to be taxed at beneficial rates
- the possibility to redomicile a fund from another jurisdiction.

## Redomiciliations

Corporate redomiciliations to Malta are generally on the increase, especially for international trading and international holding companies, where Malta offers a number of advantages that were greatly enhanced by EU membership.

In its Annual Reports the Malta Financial Services Authority (MFSA) reports increasing number of companies formerly incorporated and registered outside Malta are transferring their domicile to Malta under the Continuation of Companies Regulations. Companies registered in

approved countries may re-domicile to Malta, subject to the approval of the authorities in their country of origin.

The registration of hedge funds, usually in the form of professional investor funds (PIFs) is also on the increase given the extreme efficiency of the MFSA, EU membership, local and international listing options and the exemption from income tax and capital gains tax at fund level and at non-resident investor level.

A fresh registration may not, however, be a suitable option for an existing fund, which would look at redomiciliation in order to continue under Maltese law with all its assets, liabilities, rights and duties.

The Continuation of Companies Regulations came into force on 26 November 2002 and redomiciliation is allowed from all the EU, EEA and OECD states, the Bahamas, Bermuda, the British Virgin Islands, the Cayman Islands, Gibraltar, Guernsey, the Isle of Man, Jersey and Mauritius, which have appropriate provisions in their laws.

In addition, the redomiciliation must also be provided for in the charter, statutes or memorandum and articles, or other instrument constituting or defining the foreign company.

The foreign company that is seeking redomiciliation must have existed for at least one year in the approved jurisdiction and be "similar in nature" to a Maltese company.

## Using the right vehicle

The typical corporate form of a Maltese fund is the company with variable share capital or SICAV, a tried, tested and flexible formula for the past 10 years for both retail and non-retail funds. In addition, the law also allows an investment company with fixed share capital or INVCO.

Needless to say, foreign funds constituted as investment partnerships or unit trusts do not qualify for redomiciliation as companies and it would be necessary (and still worthwhile) to reconstitute the fund in Malta fresh, whether as a SICAV or INVCO or, indeed, as a new investment partnership or unit-trust.

A Maltese SICAV must contain the word 'SICAV' in its name, followed by 'p.l.c.' to designate its status as a public limited company that can offer its shares for sale to the public.

The objects of the SICAV, being a type of collective investment scheme, must be the collective investment of capital acquired by means of an offer of units for subscription, sale or exchange.

The scheme must operate according to the principle of risk spreading and either

(i) the contributions of the participants and the profits or income out of which payments are to be made to them are pooled; or

(ii) 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

(iii) units are, or have been, or will be issued continuously or in blocks at short intervals.

A hedge fund is not subject to any investment or borrowing restrictions (except if it invests in immovable property).

### **Redomiciliation requirements**

Hedge funds that are incorporated as open-ended or closed-ended investment companies in Malta are not required to issue and register a prospectus under the Companies Act 1995.

However, an Offering Memorandum is required as part of the licence application to the securities unit of the MFSA. This document will describe the investment objective and policy, any borrowing and investment restrictions, the base currency, the accounting period, the risk factors, procedures for investor subscription and redemption, determination of the net asset value, fees, charges, expenses and taxation

### **How are the Funds structured ?**

The share capital of an open-ended investment company or SICAV is variable and with no par value. The value of the shares is always equivalent to the SICAV's net asset value.

With regards to redomiciliation, the foreign jurisdiction must allow this type of capital structure and, where necessary, the statutes of the foreign company must also allow it.

An alternative, if the foreign company has fixed share capital, is to convert it into a Maltese INVCO and subsequently to a SICAV.

The share capital may be expressed in any convertible foreign currency (though below, dollar figures have been used).

As a minimum, there must be at least two shareholders in a Maltese SICAV. If required under the foreign law, the consent of existing shareholders must be obtained in order to allow the switch.

The shareholders, both at the time of redomiciliation as well as new ones after registration in Malta, must, in the case of a hedge fund meet one or more of the 'qualified investor' criteria, namely:

- a body corporate or other entity which has net assets in excess of \$1m or a body corporate that is part of a group which has such assets;
- an individual whose net worth or joint net worth with that person's spouse, exceeds \$1m;
- a person who has reasonable experience in the acquisition and/or disposal of funds of a similar nature or risk profile, or of property of the same kind as the property, or a substantial part of the property, to which the fund in question relates;
- employees and directors of service providers to the PIF;
- relations and close friends of the promoters
- limited to a total of 10 persons per PIF;
- entities with (or which are part of a group with) \$5m or more under discretionary management or advice, investing on its own account or for the account of its clients.

### **Taxation of the Scheme**

Licensed Schemes are exempt from tax in Malta, with the exception of local investment income payable to a 'prescribed fund' (a Scheme investing at least 85% of its total investments in Malta-based securities) and provided such investment income is not paid by another Scheme. Investment income payable to a prescribed fund from corporate or government bonds attracts final withholding tax of 10%. Bank interest attracts 15% withholding tax.

### **Taxation of Resident Investors**

Capital gains arising on the disposal of units held by resident investors in a prescribed fund listed on the Malta Stock Exchange are exempt from tax in Malta.

On the other hand, capital gains arising on the disposal of units held in a 'non-prescribed fund' (a fund which is not a prescribed fund, and may be either Malta-based or overseas-based) which is resident in Malta, are subject to 15% withholding tax.

If the non-prescribed fund is a non-resident fund, a 15% withholding tax applies to capital gains only if the shares are disposed of through an authorised financial intermediary. When the disposal is not done through such intermediary the resident recipient is obliged to disclose the income in his tax return and will be taxed thereon at his normal rates.

A 15% withholding tax is levied when Maltese residents receive a distribution from the fund's foreign sourced income.

Furthermore, a distribution of profits which would not have been taxed at the fund level is also subject to a 15% withholding tax when paid to resident individuals and other persons which are not companies.

### **Taxation of Non-Resident Investors**

The distribution of income of a Scheme to foreign investors is not taxed in Malta.

There are also no Maltese capital gains taxes imposed on the disposal of units in both prescribed and non-prescribed funds.

The information contained in this fact sheet has been prepared by Busuttil & Micallef – Certified Public Accountants, Malta. It is of a general nature and is not intended to address particular circumstances of an individual or entity. The fact sheet is intended to provide the reader with an overview of the tax planning and other opportunities in Malta. This information is also subject to any changes that may occur to the relevant legislation.

No one should act upon this information without obtaining appropriate professional advice.