



ICLG

The International Comparative Legal Guide to:

Public Investment Funds 2018

1st Edition

A practical cross-border insight into public investment funds

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Malta



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1 Registration

1.1 Are funds that are offered to the public required to be registered under the securities laws of your jurisdiction? If so, what are the factors and criteria that determine whether a fund is required to be registered?

The laws and regulations regulating public investment funds, or in the Maltese context, retail funds, are the following:

- UCITS V Directive and the implementing regulations and administrative provisions relating to UCITS funds.
- AIFM Directive and the implementing regulations and administrative provisions for retail alternative investment funds (AIFs).
- Rules for Retail Collective Investment Schemes issued by the MFSA.
- Rules for Alternative Investment Funds issued by the MFSA. This provides the regulatory framework for retail AIFs.
- Companies Act (Chapter 386 of the Laws of Malta) and all subsidiary legislation made under this chapter applicable to retail funds.
- Investment Services Act (Chapter 370 of the Laws of Malta) and all subsidiary legislation made under this chapter applicable to retail funds. This provides the statutory basis for the licensing and regulation of funds (see section 3).
- The Listing Rules – Admissibility Requirements for Collective Investment Schemes.

The above laws and regulations apply across the board to retail collective investment schemes, with the exception that closed-ended funds do not fall within the remit of the rules governing UCITS schemes, owing to the nature of this fund type which cannot be established on a closed-ended basis.

Under the Maltese fund framework, funds that are offered to the public must hold a licence issued by the MFSA, and the authorisation process is to be understood as being the applicable registration framework for such funds. Unless a Scheme satisfies the explicit categories set out in the Investment Services Act (Exemption) Regulations, then it must obtain an authorisation licence from the MFSA that confirms it is controlled by persons who have been deemed “fit and proper” by the Maltese Regulator, and that the Scheme shall be organised and controlled in a responsible manner and shall have adequate operational, administrative and financial procedures and controls to ensure compliance with all regulatory requirements. The exemptions from MFSA authorisation are limited, and include the following:

- where a Scheme involves participants, each of which carries on a business other than that which constitutes an investment service under the ISA, and enters into the scheme arrangement for commercial purposes related to that business;
- where the Scheme operates according to the principle of risk spreading or in respect of which the contributions of the participants and the profits or income out of which payments are to be made to them are pooled, but only if the general purpose of the Scheme is commercial and not for investment purposes; or
- where a Scheme is operated by a company for its own employees, former employees, their dependants, or for companies in the same group, in instruments issued by the company or other companies in the same group, or other instruments as may be approved by the authority.

Nevertheless, such exemptions are strictly interpreted, and are not automatically operative but their applicability must be determined in writing by the MFSA.

1.2 What does the fund registration process involve, e.g., what documents are required to be filed?

The first step to consider before applying for a licence for a Scheme in Malta is the legal form, which under the Maltese funds framework can be an investment company with variable share capital (SICAV), a unit trust, a contractual fund, a limited partnership, or an incorporated cell company. Once this has been determined, the investor must apply for a licence in terms of the ISA. The application process consists of three phases: the Preparatory Phase; the Pre-Licensing Phase; and the Post-Licensing Phase.

There are two main categories of retail collective investment schemes, which are:

- Undertakings for collective investments in transferable securities (UCITS) retail funds (UCITS funds). These are retail collective investment schemes established under Directive 2009/65/EC on undertakings for collective investment in transferable securities (UCITS) (UCITS IV Directive).
- Non-UCITS retail funds.

As a non-harmonised retail fund-type, retail non-UCITS funds are increasingly falling into disuse in Malta, with fund promoters preferring for the easier to distribute UCITS regime. Following the transposition of the AIFM Directive into Maltese law, retail non-UCITS funds now qualify as AIFs. In a circular issued by the MFSA on 26 May 2016, the MFSA confirmed that it will not accept any further applications for retail non-UCITS funds, and therefore, no further collective investment scheme licences will be issued under

this category. However, existing licence holders will be allowed to continue operating under the current regime.

In the majority of cases, Maltese retail collective investment schemes are of an open-ended nature.

However, unlike UCITS schemes, non-UCITS funds can be established as closed-ended funds.

The following are the documents which must be filed with the MFSA during the application process for a UCITS licence:

- a. the application form;
- b. the application fee as prescribed in the Investment Services Act (Fees) Regulations;
- c. the Instruments of Incorporation (Memorandum and Articles of Association in the case of a SICAV), deed of partnership in the case of a limited partnership, trust deed/deed of constitution (either by public deed or private writing) in the case of unit trust or contractual fund;
- d. the resolution of the governing body of the Scheme;
- e. the personal questionnaire forms of directors, founder shareholders (which hold more than 10% of the voting shares), general partners, portfolio manager/investment manager, risk manager, compliance officer, money laundering reporting officer, and where applicable, investment adviser of the Scheme;
- f. the investment management agreement, depository agreement, investment advisory agreement and administration agreement;
- g. the Prospectus;
- h. the Key Investor Information Document (KIID); and
- i. the detailed marketing plan.

1.3 What are the consequences for failing to register a fund that is required to be registered in your jurisdiction?

In terms of Article 4 of the ISA, it is an offence for a Scheme to issue or create any units or to carry any activity in or from Malta unless it holds a valid licence. However, the ISA is flexible in its operation, and allows certain steps to be taken for the incorporation of the fund as may be required prior to seeking authorisation from the MFSA, without this being an offence.

Upon conviction for such failure, persons guilty of failing to properly register a fund that is required to be so registered could be liable to a fine of up to a maximum of €466,000 or to a term of imprisonment not exceeding four years, unless such fine or term of imprisonment is otherwise imposed through other regulations made under the ISA framework.

1.4 Are there local residency or other local qualification requirements that a fund must meet in order to register in your jurisdiction? Or are foreign funds permitted to register in your jurisdiction?

Yes, some local residency requirements do apply to funds regulated by the MFSA. In order for a Scheme to be licensed in Malta, it is a general licence condition for it to be operated in or from Malta, as agreed with the MFSA. Maltese non-UCITS schemes and Maltese UCITS schemes must be formed in accordance with or existing under the laws of Malta. Overseas non-UCITS schemes which would like to actively market or promote their units in Malta, whether directly or through intermediaries, are deemed to be “carrying on an activity in Malta”, and must therefore hold a licence under the ISA. Such overseas Schemes must maintain local points of contact for investors and for the MFSA; for instance, through the appointment of an investment services licence holder as its local representative. Foreign

funds might otherwise be registered in Malta when operating as UCITS schemes already authorised by another European regulatory authority in another EU or EEA Member State, and who may then exercise their passport rights, rather than obtain a standalone MFSA licence, once they are “carrying on an activity in Malta”.

2 Regulatory Framework

2.1 What are the main regulatory restrictions and requirements that a public fund must comply with in the following areas, if any? Are there other main areas of regulation that are imposed on public funds?

i. Governance

The “Corporate Governance Manual for Directors of Investment Companies and Collective Investment Schemes” provides general guidance to a director on how to implement good corporate governance practice for an investment fund, including some thoughts on typical issues that affect fund directors. This Manual applies to all collective investment schemes set up in Malta, and the guidance set out in this Manual is not intended to be exhaustive and should not be followed as a simple road map. Directors of a fund should use this Manual to develop their own “best” corporate governance practice to fit the particular context of the fund and its board.

Fund directors are not (normally) executives, much less compliance officers, of the fund and will normally have to delegate or rely on the performance of operational and monitoring functions by the various service providers to the fund. The fund directors need to be satisfied that the delegation is to the appropriate service providers, clear about what they have delegated to those service providers and how they are supervising and controlling their activities.

ii. Selection of investment adviser, and review and approval of investment advisory agreement

A UCITS may, but is not required to, appoint a third-party investment adviser. An investment adviser does not have any discretion with respect to the investment and re-investment of the assets of the UCITS. The investment adviser must be licensed but need not be licensed in Malta.

If the investment adviser is licensed in Malta, the MFSA will request that all service providers, including the investment adviser, have been officially engaged by the fund promoter. It is the Board of Directors’ responsibility to ensure that the relevant investment advisory agreement has been drawn up and entered into prior to engaging an investment adviser.

iii. Capital structure

Capital requirements will depend on whether the structures are Externally Managed or Self-Managed. The initial capital required for an Externally Managed UCITS Scheme is €125,000, whereas the capital requirements for a Self-Managed structure amount to €300,000 (and its NAV is expected to exceed such amount on an ongoing basis).

iv. Limits on portfolio investments

The principal investment restrictions relevant to UCITS funds are as follows:

- UCITS funds cannot invest more than 5% of their assets in transferable securities or money market instruments issued by the same body. This 5% limit can be raised to a maximum of 10% of the fund’s assets if the total value of securities held in bodies in which it invests more than 5% is less than 40%. However, this limitation does not apply to deposits and over-the-counter (OTC) derivative transactions made with financial institutions subject to prudential supervision.

- UCITS funds cannot invest more than 10% of their assets in transferable securities and money market instruments other than those admitted to a stock exchange or that are dealt in on a regulated market.
- UCITS funds can only transact using financial derivative instruments if the transaction in the financial derivative instrument does not cause them to diverge from the investment objectives set out in its prospectus.

The principal investment restrictions relevant to retail AIFs are as follows:

- The AIF cannot enter into cross sub-fund investments.
- No more than 20% of the AIF's assets can be invested in any one collective investment scheme.
- Retail AIFs cannot invest more than 10% of their assets in securities issued by the same body or hold more than 10% of any class of security issued by any single issuer.
- No more than 10% of the AIF's assets can be kept on deposit with any one body. However, this limit can be increased to 30% for money deposited with a credit institution licensed in Malta or in any other EEA state, or with any other credit institution approved by the MFSA.
- Investments in securitisations can only be made if the originator, sponsor or original lender has disclosed to the AIF manager that it retains, on an ongoing basis, a material net economic interest, which in any event must be no less than 5% (this restriction applies to all AIFs, not just retail AIFs).
- The AIF cannot carry out uncovered sales of securities or other financial instruments.

v. Conflicts of interest

The Scheme has an obligation to act honestly, fairly and with integrity, in the best interests of its investors/shareholders and of the market. Such action should include avoiding conflicts of interest where this is possible and, where it is not, ensuring by way of disclosure, internal procedures or otherwise that investors are treated fairly. During board meetings, where a member considers that he/she has or may have a conflict of interest:

- that person should declare that interest to the other members, either at the meeting at which the issue in relation to which he/she has an interest first arises, or if the member was not at the date of the meeting interested in the issue, at the next meeting held after he/she became so interested;
- unless otherwise agreed to by the other members, a member should avoid entering into discussions in respect of any contract or arrangement in which he/she is interested and should withdraw from the meeting while the matter he/she is interested in is being discussed;
- the interested member should not vote at a meeting in respect of any contract or arrangement in which he/she is interested, and if he/she is interested and if he/she shall do so, his/her vote shall not be counted in the quorum presented at the meeting; and
- the minutes of the meeting should accurately record the sequence of such events.

vi. Reporting and recordkeeping

Reporting: A Maltese UCITS (or its investment manager) is expected to draw up the annual reports for each financial year (which must be audited) within four months of the end of the respective period and half-yearly reports within two months which must be published and submitted to the MFSA. The Maltese UCITS is also required to draw up the statistical returns to be submitted to the Central Bank of Malta. The MFSA's approval is required before any amendments are made to the annual or interim reports. UCITS funds must also provide the KIID free of charge and clearly specify where and how the offering documentation and the financial reports can be obtained by the investors.

With regards to non-UCITS retail funds, the rules are generally the same as for UCITS funds.

Retail AIFs must provide to investors the annual reports on request. AIFs must send the following to the MFSA: an annual audited financial report accompanied by a report by the custodian on whether the AIF has been managed in accordance with the limitations imposed on the investment and borrowing powers of the AIF by its offering documentation and its licence conditions. Retail AIFs are also required to provide any statistical returns requested by the Central Bank of Malta.

Record keeping: All retail funds have a duty to maintain all minutes of any meetings, which should accurately record the sequence of events. The Scheme is required to keep accounting and other records; in particular, regarding the whole process of the investment management function and its monitoring, as are necessary to enable it to comply with the rules issued by the MFSA and to demonstrate that compliance has been achieved. Records are to be retained in Malta and made available for the MFSA's review as the need arises. Records shall be retained for a minimum period of 10 years.

vii. Other

There are no other main regulatory restrictions and requirements to be aware of.

2.2 Are investment advisers that advise public funds required to be registered and/or regulated in your jurisdiction? If so, what does the registration process involve?

An investment adviser must hold a licence in Malta (or in an equivalent EU/EEA jurisdiction) to be able to provide investment advice. Investment advice is defined in the First Schedule to the ISA as: *"Giving, offering or agreeing to give, to persons in their capacity as investors or potential investors or as agent for an investor or potential investor, a personal recommendation in respect of one or more transactions relating to one or more instruments"*.

One essential component of the definition is a "personal recommendation", which is in turn defined as a suggestion which is portrayed as suitable for the person to whom it is addressed, or which is based on a consideration of the circumstances of the recipient. There is an exception to the effect that a recommendation issued exclusively through distribution channels or to the public does not constitute a personal recommendation.

If set up in Malta, the prospective investment adviser would need to go through an application process with the MFSA, which is made up of a due diligence process and the drawing up and submission of a number of documents, such as a detailed Business Plan, financial projections and supporting documents, to the MFSA for review. Moreover, the individuals involved would need to fill in a personal questionnaire to enable the MFSA to carry out a due diligence exercise on these individuals.

2.3 In addition to the requirements above, are there additional regulatory restrictions and requirements imposed on investment advisers that advise public funds?

Investment advisers are required to observe high standards of integrity and fair dealing, act with due care, skill and diligence, and take reasonable steps to ensure their customers, in a comprehensive and timely manner, receive the information they need to enable them to make balanced and informed decisions, and be ready to provide them with a full and fair account of their responsibilities.

3 Marketing of Public Funds

3.1 What regulatory frameworks apply to the marketing of public funds?

The applicable regulatory framework for UCITS is Subsidiary Legislation 370.18 on the Investment Services Act (Marketing of UCITS) Regulations, 2011, which provides the statutory basis for regulating and marketing UCITS operating in or from Malta. These regulations apply to Maltese UCITS wishing to market their units in an EU Member State or an EEA State or a European UCITS wishing to market their units in Malta, in terms of the UCITS Directive. If a Maltese UCITS proposes to market its units in another EU Member State, it must first submit a notification letter of its intention to the competent authority and enclose the following documents with the notification letter: the latest version of the constitutional document and its Prospectus; and, where appropriate, its latest annual report, half-yearly report and the KIID.

The MFSA has also issued the National Rules for Marketing of European UCITS Schemes in Malta, which set out the regulatory requirements for a European UCITS Scheme wishing to market its Scheme in Malta.

3.2 Is licensure with a regulatory authority required of persons (whether entities or natural persons) engaged in marketing activities? If so: (i) are there commonly available exceptions that may be relied on?; and (ii) describe the level of substantive regulation applied to licensed persons.

Retail funds can be marketed either by the fund itself or by external fund managers. In the case of fund managers, the manager must be either be:

- a European investment service provider licensed under Directive 2004/39/EC on markets in financial instruments (MiFID); or
- in possession of a licence under the ISA.

3.3 What are the main regulatory restrictions and requirements in the following areas, if any, that must be complied with by entities that are involved in marketing public funds?

i. Distribution fees or other charges

Any distribution fees or charges must be disclosed in the Prospectus of the Scheme.

ii. Advertising

Any advertisements and related promotional activities must be approved by the MSFA. The MFSA will verify that the marketing information complies with the ISA. Marketing communications should be clearly identifiable as such and must be fair, clear and not misleading. Any marketing communication comprising an invitation to purchase units of a Scheme that contains specific information about a Scheme shall not make statements that contradict the signification of the information contained in the Prospectus and, where applicable, the KIID.

All marketing communications and investment advertisements issued directly by the Scheme shall indicate that a Prospectus exists, and where the KIID is available, it shall specify where and in which language such information or documents as well as any updating documents may be obtained by investors or potential investors or how they may obtain access to them.

iii. Investor suitability

Licensed Maltese open-ended and closed-ended retail funds can market their units to the general public in Malta. No licence requirement is triggered when these funds are sold on a reverse solicitation or reverse inquiry basis.

iv. Custody of investor funds or securities

The custody is within the remit of the depositary appointed by the Scheme.

3.4 Are there restrictions on to whom public funds may be marketed or sold?

In connection with UCITS funds, there is no strict definition of what constitutes “marketing” in Malta. However, guidance from the Maltese Regulator indicates that a UCITS fund would not be considered as marketing its units or shares in Malta (and would therefore not be required to passport its authorisation) if any of the following are applicable:

- A Malta-resident investor requests and is provided with information on the UCITS (reverse solicitation).
- The units or shares are exclusively sold on a one-to-one basis in Malta by a Maltese or EEA authorised MiFID firm.
- The units or shares are not marketed in Malta on their own right but are available for linking to unit-linked policies of insurance marketed in Malta.

A UCITS which has exercised its right under the UCITS Directive and completed the relevant notification procedure is exempt from authorisation under the ISA, and can market its units or shares in Malta subject to compliance with local investment advertising rules (based on MiFID level II rules).

3.5 Are there other main areas of regulation that are imposed with respect to the marketing of public funds?

Funds authorised as UCITS benefit from an EU passport. This enables them to be sold in all EEA countries following a notification to that effect with the MFSA. However, the following types of marketing will require compliance with the local distribution or private placement rules (if any) in the relevant country or countries targeted:

- Marketing by alternative investment fund managers (AIFMs) of other types of funds to retail investors (such as retail AIFs).
- Marketing by AIFMs that do not have a passport under the AIFM Directive.

This is due to the fact that the pan-European passport under the AIFM Directive is only available for AIFs marketed to professional investors. Where the AIFM (whether EU or otherwise) intends to market the AIF (whether EU or otherwise) in Malta to retail investors, certain additional requirements must be met.

4 Tax Treatment

4.1 What are the types of entities that can be public funds in your jurisdiction?

Funds in Malta may take the form of the following legal entities:

- a SICAV in terms of the Companies Act (Chapter 386 of the Laws of Malta);
- an incorporated cell company in terms of the Companies Act (SICAV Incorporated Cell Company) Regulations, 2010;

- an investment company with fixed share capital (INVCO) in terms of the Companies Act;
- a limited partnership divided into shares in terms of the Companies Act;
- a unit trust in terms of the Trust and Trustees Act (Chapter 331 of the Laws of Malta); or
- a common contractual fund in terms of the Investment Services Act (Contractual Funds) Regulations, 2011.

4.2 What is the tax treatment of each such entity (both entity-level tax and taxation of investors in respect of allocations of income or distributions, as the case may be)?

The choice of legal form has an impact on the desired tax treatment of the fund. Malta's tax regime distinguishes between "prescribed" and "non-prescribed" funds, and makes no distinction between open-ended retail funds and closed-ended retail funds. The Collective Investment Schemes (Investment Income) Regulations (Subsidiary Legislation 123.51 of the Laws of Malta) define prescribed funds as being funds of a Malta-based Scheme that has declared that the value of the assets situated in Malta allocated to the fund is at least 85% of the value of the total assets.

Non-prescribed funds, on the other hand, are those funds within overseas-based schemes. Non-prescribed funds are exempt from the application of Maltese income tax on any income and gains other than for income derived from immoveable property situated

in Malta. Such income is subject to a 35% tax, and to a final withholding tax of 8% or 10% on income derived from the transfer of immovable property situated in Malta.

In other cases, tax is generally to be withheld from the income of a prescribed fund at the rate of 15% on interest payable on the business of banking under the Banking Act (Chapter 371 of the Laws of Malta), and at the rate of 10% for all other investment income.

The tax treatment of investors in respect of allocations of income or distributions made under a Maltese public fund is correlated with whether the investor shares are held by Malta-resident or non-resident investors. For Malta-resident investors, tax is withheld at source at the rate of 15% for the redemption of units in an investment scheme. Malta-resident transferors of units in a fund must declare capital gains realised on such transfers on their income tax return and pay tax on that at the rate applicable to them.

Any gains or profits accruing or derived by non-Malta resident persons on a transfer of any units in a collective investment scheme are exempt from income tax in Malta.

4.3 If a public fund, or a type of entity that may be a public fund, qualifies for a special tax regime, what are the requirements necessary to permit the entity to qualify for this special tax regime?

In order to maintain its classification as a non-prescribed fund and consequently qualify for the general exemption from taxation on investment income of the fund, funds must maintain their overseas status.



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