

Notified AIFs – Malta's New Fund Regime

A Legal Update from Dechert's Financial Services Practice

May 2016

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The following article summarises Malta’s proposed new Notified AIFs regime and provides a comparison with Irish and Luxembourgish alternatives. The new regime will, as with the proposed Luxembourg RAIF, provide a quicker time to market for new European funds. The route is available to managers who qualify as full scope EEA AIFMs (within the meaning of the Alternative Investment Fund Managers Directive (2011/61/EU) (“AIFMs” and “AIFMD” respectively)).

Under the new regime, the AIFM will make a notice filing with the Malta Financial Services Authority (“MFSA”) in accordance with the relevant rules. Rather than there being separate regulation of both the fund and the AIFM, the MFSA will rely on the regulated status of the AIFM to ensure compliance with applicable law and regulations and appropriate standards of conduct by the fund.

The framework of the new regime is set out in a notice entitled “Framework Applicable to the Notification of AIFs” (the “**Framework Document**”). The MFSA intends to issue new regulations under the Investment Services Act 1994 (the “**Act**”) and updated Investment Services Rules for Investment Services Licence Holders which qualify as AIFMs (the “**Rules**”) during the second quarter of 2016. The MFSA anticipates receiving requests to include AIFs on the List of Notified AIFs from June 2016.

Requirements for Notified AIFs

Who may establish a Notified AIF?

A Notified AIF must be managed and notified to the MFSA by a full-scope AIFM, authorised and regulated under AIFMD. The AIFM must be in possession of an AIFM license granted by the MFSA in accordance with the Act, or a management passport under Article 33 of AIFMD.

What form may a Notified AIF take?

A Notified AIF may be established in any form which may be used to establish a fund under Maltese law (including investment companies, partnerships, contractual funds, unit trusts and incorporated cells of incorporated cell companies). A Notified AIF can be either open-ended or closed-ended.

Any special voting rights attached to any founder shares (or similar interests) must be exercised by the AIFM.

To whom can a Notified AIF be marketed?

Notified AIFs may be marketed to professional¹ and/or qualifying investors² in Malta and elsewhere, subject always to the promotional rules applying in those jurisdictions where the Notified AIF is being offered. Notified AIFs will benefit from the marketing passport under AIFMD.

¹ Professional Investors are investors which are considered to be professional clients or may, on request, be treated as professional clients within the meaning of the Markets in Financial Instruments Directive (2004/39/EC).

² Qualifying Investors, are investors that fulfil the following criteria:

- (a) invest 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) declare in writing to the AIFM and the AIF that they are aware of and accept the risks associated with the proposed investment; and
- (c) satisfy at least one of the following:
 - (i) 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) an unincorporated body of persons or association which has net assets in excess of EUR 750,000 or the currency equivalent;
 - (iii) a trust where the net value of the trust’s assets is in excess of EUR 750,000 or the currency equivalent; or

What types of funds are ineligible to be Notified AIFs?

The Notified AIF regime will not be available to AIFs that:

- (a) are self-managed;
- (b) are managed by non-EEA AIFMs (until the granting of third country passport rights under AIFMD);
- (c) are loan funds; or
- (d) invest in non-financial assets as specified by the MFSA.

A Maltese collective investment scheme holding a license under the Act is also unable to become a Notified AIF.

What are the disclosure requirements for Notified AIFs?

The prospectus of a Notified AIF must be drafted in accordance with the appropriate *pro forma* template to be published by the MFSA and must contain minimum prescribed disclosures, including a disclaimer advising that the Notified AIF is not regulated by the MFSA, together with the disclosures required under Article 23(1) and, where relevant, Article 23(2) of AIFMD.

The minimum requirements are set out in the Framework Document published by the MFSA and include disclosures customarily included in a fund's offering document.

The form of disclaimer and the full list of the requirements included in the Framework Document are set out in the appendix to this article.

The Notification Process for Notified AIFs

How may an AIF be notified to the MFSA?

The AIFM must submit a notification pack to the MFSA within thirty calendar days of the governing body of the AIF approving the prospectus. The notification pack must include:

- (a) the prospectus; and
- (b) declarations and self-certifications of the AIFM and the AIF's governing body. These include:
 - (i) a resolution by the governing body of the AIF certifying that the prospectus is drafted in accordance with the applicable *pro forma* template and includes the minimum required content;
 - (ii) 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;
 - (iii) 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 AIFMD; and

(iv) 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) a senior employee or director of service providers to the Notified AIF.

- (iv) 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.

Pro forma declarations and self-certifications will be provided for in the Rules.

How long will it take to register a Notified AIF?

The MFSA will **within 10 business days** from the date a duly completed notification pack is filed, include the AIF in the List of Notified AIFs which will be maintained by the MFSA. At this point, the prospectus can be dated and the Notified AIF can commence business.

The same process for notifying a new Notified AIF will apply to notifying an additional sub-fund of a Notified AIF.

Continuing Obligations for Notified AIFs

What does a Notified AIF need to do if it changes its Prospectus?

A Notified AIF will need to submit a notification to the MFSA of any amendments to its prospectus within 30 days of the governing body approving the amended prospectus.

The notification pack must include:

- (a) the prospectus (clean and blackline); and
- (b) a certification by the Notified AIF's governing body that, *inter alia*, the prospectus continues to be compliant with the minimum disclosure requirements and the *pro forma* template. Where there is a material change to the prospectus (e.g. a change in investment objective or an adverse change in fees), the AIFM must also ensure that the Notified AIF gives investors at least one month's prior notice of the change and, in respect of open-ended funds, gives investors the opportunity to redeem without incurring fees or other penalties.

The MFSA will acknowledge the updated prospectus **within 10 business days** of receipt, at which point the updated prospectus can be dated and will become effective.

What are the other continuing obligations in respect of a Notified AIF?

- **Due Diligence** - The AIFM will have an ongoing obligation to carry out due diligence on the members of the AIF's governing body and its service providers. This will include initial due diligence prior to submitting a notification request and further due diligence at least annually. Records must be retained for not less than six years. The AIFM must resign if at any point it is not satisfied that any member(s) of the AIF's governing body are not compliant with the MFSA's standards of fitness and probity and the position is not rectified promptly. The MFSA may verify compliance with these requirements. An adverse finding in relation to any appointment may lead to the removal of the AIF from the List of Notified AIFs.
- **Anti-Money Laundering** - The AIFM must also ensure that a money laundering reporting officer is appointed on behalf of the Notified AIF (this may be the Notified AIF's administrator) and certain anti-money laundering and know your customer reporting is required. The Notified AIF will remain responsible for compliance with Malta's anti-money laundering regulations.

Removal from the List of Notified AIFs

Who can remove the Notified AIF from the List of Notified AIFs?

The MFSA may remove a Notified AIF from the List of Notified AIFs at its sole discretion.

The AIFM may also request that the Notified AIF be removed from the List of Notified AIFs, and must do so in certain circumstances to be specified in the Rules, including, *inter alia*, in the following circumstances:

- (a) upon expiration of the duration of the AIF or its winding up;
- (b) where the custodian has given notice of termination or becomes insolvent (and has not been replaced);
- (c) where the AIFM has given notice of termination or is insolvent; and
- (d) where any member of the AIF's governing body or any service provider fails to comply on an ongoing basis with the required standards of fitness and properness (and has not been replaced).

What happens once the AIF is removed from the Notified AIF List?

Upon removal from the List of Notified AIFs, the AIF must be wound up and the AIF must then be liquidated or otherwise terminated in accordance with the requirements of Maltese law.

Comparison of the Notified AIF with the Luxembourg RAIF and the Irish QIAIF

Ireland has had in place the Qualifying Investor Alternative Investment Fund vehicle (the "QIAIF") since July 2013, at which point the existing Qualifying Investor Fund regime was augmented to comply with the requirements of AIFMD. Unlike the Notified AIF, the QIAIF is a regulated fund product. The Central Bank of Ireland (the "Central Bank") operates a 24-hour authorisation process for QIAIFs from the filing of an application to approval assuming the fund is certified to meet Irish requirements by a local law firm such as Dechert.

At the end of December 2015 Luxembourg announced the launch of a new form of AIF, the reserved alternative investment fund (the "RAIF"). The RAIF, like the Notified AIF, does not require the authorisation of the Luxembourg regulator, the Commission de Surveillance du Secteur Financier, and is only indirectly regulated under AIFMD.

The table below provides an overview comparison of the Notified AIF, RAIF and QIAIF, Europe's three leading cross border "quick to market" fund products.

	<i>Notified AIF</i>	<i>RAIF</i>	<i>QIAIF</i>
Licensed and Supervised Fund	✗	✗	✓
Timing	Notification effective <u>within</u> 10 business days of filing.	Effective Immediately.	Authorised within 24 hours of filing with the Central Bank.
	The AIFM must make material change notification to its home regulator (to be accepted or rejected within one month; possibility to extend for an additional month).		
External EEA AIFM Required	✓	✓	✗
Variety of Legal Structures	✓	✓	✓
Domestic Service Providers Required	Auditor and local director.*	Depositary, administrator and auditor.	Two local directors, local depositary, auditors and,

	<i>Notified AIF</i>	<i>RAIF</i>	<i>QIAIF</i>
			in practice, local administrator.
Specific Prospectus Requirements	Form of prospectus specified and minimum contents requirements.	No prescribed contents, although constitutional document must refer to RAIF status.	Minimum contents requirements.
Broad Asset Eligibility	✓	✓	✓
Amendments to Prospectus	Amended prospectus to be filed with MFSA along with board declarations approving the change. Approved <u>within</u> 10 business days.	No CSSF involvement.	Amended prospectus to be filed with Central Bank. 24 hour approval process.

*A depositary is required for a Notified AIF, but it can be a credit institution, registered and authorised in the European Union. It is currently expected that a Maltese authorised depositary will be required from 22 July 2017.

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* The authors would like to thank Matthew Duxbury for his contribution to this update.

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Appendix

The Prospectus for a Notified AIF will need to have the following minimum contents under the Notified AIF regime:

- (a) a disclaimer on the front page stating the AIF is not authorised by the MFSA in the form provided in the Rules (see below);
- (b) information concerning the AIF, including name and type of AIF;
- (c) the date of establishment of the AIF and information on the duration of the AIF;
- (d) sub-funds and/or AIF's unit classes;
- (e) the AIF's investment objectives, policies and restrictions and how these may be changed;
- (f) the manner in which the value of the AIF's units (NAV) may be calculated;
- (g) a detailed description of the valuation methodology for the AIF's assets particularly for hard to value assets;
- (h) where the AIF is established as a SICAV, the amounts of authorised and paid up share capital;
- (i) the manner in which accounting records will be maintained and distributed;
- (j) information regarding the AIFM;
- (k) information on the depository and its responsibilities towards the AIF;
- (l) identification of the AIF's auditor;
- (m) identification of the AIF's legal advisors in any relevant jurisdiction;
- (n) information regarding the AIF's other service providers such as the administrator, prime brokers and investment advisors (as applicable);
- (o) a description of all entities involved in the implementation of the investment policy;
- (p) subscription and redemption procedures;
- (q) fees and expenses regime (specifying which costs are borne by the AIF, the AIFM and the investors);
- (r) disclosure on conflicts of interest;
- (s) disclosure of side letters;
- (t) disclosure of any dealing commission arrangements;
- (u) risk warnings and a clear indication of the principal risks associated with investing in the AIF;
- (v) any listing, where relevant;
- (w) the manner and content of periodic and regular investor reporting, including a description of the manner in which reporting will be provided to investors on a regular basis regarding the AIF's performance and commission sharing arrangements; and
- (x) an explanation regarding the AIF's winding up, liquidation or dissolution procedures.

The disclaimer required on the front page of the Prospectus is as follows:

“XXXXX Fund is a Notified AIF under the Investment Services Act (List of Notified AIFs) Regulations. The Fund has been entered onto the List of Notified AIFs on the basis of a notification submitted by the AIFM confirming that:-

- (a) the AIFM is in possession of either:
- (i) a licence granted by the MFSA under the Investment Services Act; or
 - (ii) a management passport under Article 33 of AIFMD; and
- (b) the governing body of the Fund has approved the prospectus.

The entry of the xxxxxx Fund on the List of Notified AIFs is not an endorsement, guarantee or statement of approval by the MFSA nor is the MFSA responsible for the contents of this document or the selection or adequacy of its governing body or service providers.

The MFSA has made no assessment or value judgment of the soundness of the Fund or for the accuracy or completeness of statements made or opinions expressed with regard to it.

The MFSA has not reviewed or approved the Fund's investment objective, policy or investment universe. Any person making statements to the contrary may be prosecuted under the Maltese Criminal Code [Chapter 9 – Laws of Malta]. Investors must rely solely upon their own and their advisors' due diligence in making any decision to invest.

Thank You

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