

## **INVESTMENT SERVICES RULES FOR PROFESSIONAL INVESTOR FUNDS**

### **PART A: THE APPLICATION PROCESS**

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#### **1. Investment Services Act, 1994**

##### ***1.1 Regulation of Professional Investor Funds (“PIFs”)***

The Investment Services Act, 1994 (hereinafter referred to as “the Act”) provides the statutory basis for regulating collective investment schemes constituted in or operating in or from Malta. PIFs are a special class of collective investment schemes which fall within the provisions of the Act. The following sections make reference to various parts of the Act but do not attempt to reproduce it, and therefore should not be treated as a substitute for reading the Act itself.

##### ***1.2 Definition of a Collective Investment Scheme***

As indicated above, PIFs constitute a special class of collective investment scheme. 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.

Provided that an alternative investment fund that is not promoted to retail investors and that does not have the characteristic listed in paragraph (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.”

##### ***1.3 Definition of Alternative Investment Fund***

An Alternative Investment Fund is defined as meaning ‘a collective investment undertaking, including the investment compartments thereof, which:

- (i) 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
- (ii) does not require authorisation pursuant to Article 5 of Directive 2009/65/EC.

## 2. Requirement for a Collective Investment Scheme Licence for Professional Investor Funds

Article 4 of the Act states:

- “4 (1) *Subject to the provisions of subarticle (3), no Collective Investment Scheme shall issue or create any units or carry on any activity in or from within Malta unless there is in respect of it a valid Collective Investment Scheme licence.*
- (2) *Subject to the provisions of subarticle (3), no Collective Investment Scheme formed in accordance with or existing under the laws of Malta shall issue or create any units or carry on any activity in or from within a country, territory or other place outside Malta unless there is in respect of it a valid Collective Investment Scheme licence.*
- (3) *No Collective Investment Scheme shall be precluded by the provisions of subarticle (1) from issuing or creating such units or from taking such steps as may be necessary for the incorporation or, as the case may be, the establishment of the scheme or from taking such steps as may be necessary for securing the authorisation of the scheme by the competent authority.”*

Subarticle 4(1) makes it illegal for any Scheme, including a Scheme set up as a PIF, to operate in or from Malta without having a licence.

Subarticle 4(2) makes it illegal for a Scheme including a PIF, to use Malta as a base without having a licence.

Subarticle 4(3) permits the initial steps in establishing a Scheme including a PIF, to be taken before a Licence has been obtained but the Scheme may not deal with investors before it is licensed.

Under Article 12(1)(i) of the Act, certain exemptions have been granted from the requirement to obtain a Collective Investment Scheme licence. For further details, reference should be made to the Investment Services Act (Exemption) Regulations, the Investment Services Act (Recognition of Private Collective Investment Schemes) Regulations, the Investment Services Act (Marketing of UCITS) Regulations and the Investment Services Act (Marketing of Alternative Investment Funds) Regulations.

### **3. Criteria which MFSA will apply in considering an application for a Licence**

The MFSA may only grant a Collective Investment Scheme licence to a PIF if it is satisfied to the extent that it can be, that the PIF will comply in all respects with the provisions of the Act, the relevant Regulations and these Rules and that its directors and officers, or in the case of a unit trust/common contractual fund or limited partnership, its Trustee(s) or General Partner(s) respectively, are fit and proper persons to carry out the functions required of them in connection with the PIF.

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.

The MFSA will consider the nature of the PIF and the nature of investors to whom it will be marketed. It will also look into the experience and track record of all parties who will be involved with the PIF. Such persons should be of good standing and should be competent. The MFSA has the right to refuse a Licence if it does not approve a party involved with the PIF.

Although the Act provides for the licensing of many different kinds of Schemes, the MFSA applies the same standards relating to the "fit and proper" status of the Applicant and its Service Providers. The "fit and proper" test is one which an Applicant and a Licence Holder must satisfy on a continuing basis. Each case is assessed on its own merits and on the basis of the relevant circumstances. The onus of proving that it meets the required standards on an on-going basis is on the Applicant and/or licensed PIF as the case may be. The MFSA's approach is cumulative. It may decide that a PIF has failed the test on the basis of considering various circumstances, each of which on its own may or would not lead to that conclusion. An open and honest relationship with the MFSA is essential. When arriving at its decision as to whether an Applicant has met the required standards, the MFSA will take account both of what was disclosed and what (for example in respect of a person's criminal record) ought to have been disclosed. It should be noted that it is an offence to provide inaccurate, false or misleading information to the MFSA.

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.

Integrity involves the PIF and its officers and its Service Providers acting honestly and in a trustworthy fashion.

Competence means that the persons responsible for running the PIF 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.

Solvency means ensuring that proper financial controls and management of liquidity and capital is applied.

#### **4. Categories of Professional Investor Funds**

The MFSA's regulatory regime for PIFs caters for three principal categories:

1. PIFs promoted to Experienced Investors (or Experienced Investor Funds);
2. PIFs promoted to Qualifying Investors (or Qualifying Investor Funds); and
3. PIFs promoted to Extraordinary Investors (or Extraordinary Investor Funds).

Unless otherwise indicated, all references to PIFs throughout these Rules shall be understood as referring to PIFs promoted to Experienced Investors, PIFs promoted to Qualifying Investors and PIFs promoted to Extraordinary Investors.

##### **4.1 PIFs promoted to Experienced Investors**

An "Experienced Investor", is a person having the expertise, experience and knowledge to be in a position to make his own investment decisions and understand the risks involved. An investor must state the basis on which he satisfies this definition, either

- a. by confirming that he/ she is:
  - i. a person who has relevant work experience having at least worked in the financial sector for one year in a professional position or a person who has been active in these type of investments; or
  - ii. a person who has reasonable experience in the acquisition and/or disposal of funds of a similar nature or risk profile, or property of the same kind as the property, or a substantial part of the property, to which the PIF in question relates; or
  - iii. a person who has made investments amounting to EUR100,000 or USD100,000 within the past 2 years at an average frequency of 3 per quarter;

OR

- b. by providing any other appropriate justification.

Persons who qualify as 'Professional Clients' in terms of the MIFID, automatically qualify as 'Experienced Investors'. The term 'Professional Client' is defined in the Glossary to these Rules.

In the case of 'joint holders', all holders should individually satisfy the definition of 'Experienced Investor' outlined above or jointly make investments amounting to EUR200,000 or USD200,000.

In relation to investments made by an entity holding on a nominee basis, the underlying investors considered to be the beneficial owners must individually satisfy the definition of "Experienced Investors".

The minimum investment requirement is EUR10,000 or USD10,000. In the case of PIFs licenced prior to 1<sup>st</sup> January 2010, the minimum investment requirement remains EUR 15,000 or USD15,000.

The total amount invested may not fall below this threshold unless this is the result of a fall in the net asset value of the PIF. The minimum investment requirement applies to each individual “Experienced Investor”. In the case of joint holders, the minimum investment requirement remains EUR10,000/EUR15,000 or USD 10,000/USD15,000 (as applicable).

In the case of an umbrella fund comprising of sub-funds each of which is set up as a Professional Investor Fund, the EUR10,000/EUR15,000 or USD10,000/USD15,000 requirement applies<sup>1</sup> may be applicable on a per scheme basis rather than on a per sub-fund basis. Thus, effectively an “Experienced Investor” may hold less than EUR 10,000/ EUR15,000 or USD10,000/USD15,000 in a sub-fund provided that his/ her total holding in such scheme is at least EUR 10,000/EUR15,000 or USD10,000/USD15,000.

Before an Experienced Investor Fund may accept any investment, it should obtain a completed “Experienced 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 an “Experienced Investor”. In the case of an entity holding on a nominee basis, the individual underlying investors must confirm that they are “Experienced Investors”. Alternative, the entity can satisfy itself that the underlying individual investors are “Experienced Investors” and give such a confirmation on their behalf.

In the case where the Experienced Investor is a company or partnership, such declaration is required from the Director(s)/ General Partner(s), whilst in the case of a trust, from the Trustee. The Experienced Investor Declaration Form is required for the prospective investor to demonstrate eligibility to be treated as an Experienced Investor and to exclude retail investors. A proforma of an Experienced Investor Declaration Form is provided in Appendix III to Part B of these Rules.

The Manager/Sales Agent or any third party selling units of the Experienced Investor Fund is bound to take reasonable steps to ensure that the investor has sufficient knowledge and understanding of the risks involved in investing in a PIF.

The Manager/Sales Agent or any third party selling units in an Experienced Investor Fund will be required to countersign the Experienced Investor Declaration Form signifying that he has satisfied himself/herself that the investor has sufficient knowledge and understanding of the risks involved.

If the Manager/ Sales Agent or any third party selling units of the Experienced Investor Fund is not satisfied that the investor has the necessary experience and knowledge in order to understand the risks involved, then the said Manager/ Sales Agent or any third party selling

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<sup>1</sup> As applicable.

units of the Experienced Investor Fund should state so in the Experienced Investor Declaration Form and confirm that he/ she has warned the investor accordingly. The investor shall also confirm in writing that he/ she has been warned in this regard.

Whilst the PIF or its Administrator may rely on the confirmation provided by the Manager/ Sales Agent or any third party selling units of the Experienced Investor Fund, it shall be precluded from processing applications for the issue of units in the PIF unless the Experienced Investor Declaration Form is duly completed as indicated above.

PIFs promoted to Experienced Investors are subject to the investment restrictions set out in Part BI of the Rules. Whilst borrowing on a temporary basis for liquidity purposes is permitted and not restricted, borrowing for investment purposes or leverage via the use of derivatives is restricted to 100% of NAV.

#### **4.2 PIFs promoted to Qualifying Investors**

A “Qualifying Investor”, is required to meet one or more of the following criteria:

1. a body corporate which has net assets in excess of EUR750,000 or USD750,000 or which is part of a group which has net assets in excess of EUR750,000 or USD750,000;
2. an unincorporated body of persons or association which has net assets in excess of EUR750,000 or USD750,000;
3. a trust where the net value of the trust’s assets is in excess of EUR750,000 or USD750,000;
4. an individual, or in the case of a body corporate, the majority of its Board of Directors or in the case of a partnership its General Partner who has reasonable experience in the acquisition and/or disposal of :-
  - 4.1 funds of a similar nature or risk profile;
  - 4.2 property of the same kind as the property, or a substantial part of the property, to which the PIF in question relates;
5. an individual whose net worth or joint net worth with that person’s spouse or civil partner, exceeds EUR750,000 or USD750,000;
6. a senior employee or Director of Service Providers to the PIF;
7. a relation or close friend of the promoters limited to a total of 10 persons per PIF;
8. an entity with (or which are part of a group with) EUR3.75 million or USD3.75 million or more under discretionary management, investing on its own account;
9. the investor qualifies as a PIF promoted to Qualifying or Extraordinary Investors;
10. an entity whether body corporate or partnership wholly owned by persons or entities satisfying any of the criteria listed above which is used as an investment vehicle by such persons or entities.

In the case of ‘joint holders’, all holders should individually satisfy the definition of “Qualifying Investor”.

In relation to investments made by an entity holding on a nominee basis, the underlying investors considered to be the beneficial owners must individually satisfy the definition of “Qualifying Investors”.

The minimum investment requirement is EUR75,000 or USD75,000. 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 EUR75,000 or USD75,000.

In the case of an umbrella fund comprising of sub-funds each of which is set up as a Professional Investor Fund, the EUR75,000 or USD75,000 requirement is applicable on a per scheme basis rather than on a per sub-fund basis. Thus effectively a “Qualifying Investor” may hold less than EUR75,000 or USD75,000 in a sub-fund provided that his total holding in the scheme is at least EUR75,000 or USD75,000.

Prior to accepting any investment, the PIF 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”. In the case of an entity holding on a nominee basis, the individual underlying investors must confirm that they are “Qualifying Investors”. Alternative, the entity can satisfy itself that the underlying individual investors are “Qualifying Investors” and give such a confirmation on their behalf.

In the case where the Qualifying Investor is a company or partnership, such declaration is required from the Director(s)/ General Partner(s), whilst in the case of a trust, from the Trustee. The Qualifying Investor Declaration Form is required for the prospective investor to demonstrate eligibility to be treated as a Qualifying Investor. A proforma of a Qualifying Investor Declaration Form is provided in Appendix III to Part B of these Rules.

PIFs promoted to Qualifying Investors are not subject to any investment or borrowing (including leverage) restrictions other than those which may be specified in their Offering Document.

#### **4.3 PIFs promoted to Extraordinary Investors**

An “Extraordinary Investor” is required to meet one or more of the following criteria:

1. a body corporate, which has net assets in excess of EUR7.5 million or USD7.5 million or which is part of a group which has net assets in excess of EUR7.5 million or USD7.5 million;
2. an unincorporated body of persons or association which has net assets in excess of EUR7.5 million or USD7.5 million;



3. a trust where the net value of the trust's assets is in excess of EUR7.5 million or USD7.5 million;
4. an individual whose net worth or joint net worth with that person's spouse or civil partner, exceeds EUR7.5 million or USD7.5 million;
5. a senior employee or Director of Service Providers to the PIF;
6. the investor qualifies as a PIF promoted to Extraordinary Investors;
7. an entity whether a body corporate or partnership wholly owned by persons or entities satisfying any of the criteria listed above which is used as an investment vehicle by such persons or entities.

In the case of joint holders, all holders should individually satisfy the definition of "Extraordinary Investor".

In relation to investments made by an entity holding on a nominee basis, the underlying investors considered to be the beneficial owners must individually satisfy the definition of "Extraordinary Investors".

The minimum investment requirement is EUR750,000 or USD750,000. 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 requirement is satisfied, additional investments – of any size – may be made. The minimum investment requirement applies to each individual "Extraordinary Investor". In the case of joint holders, the minimum investment requirement is EUR750,000 or USD750,000.

In the case of an umbrella fund comprising of sub-funds each of which is set up as a Professional Investor Fund, the EUR750,000 or USD750,000 requirement is applicable on a per scheme basis rather than on a per sub-fund basis. Thus effectively an "Extraordinary Investor" may hold less than EUR750,000 or USD750,000 in a sub-fund provided that his total holding in the scheme is at least EUR750,000 or USD750,000.

Prior to accepting any investment the PIF should be in receipt of a completed "Extraordinary 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 an "Extraordinary Investor". In the case of an entity holding on a nominee basis, the individual underlying investors must confirm that they are "Extraordinary Investors". Alternative, the entity can satisfy itself that the underlying individual investors are "Extraordinary Investors" and give such a confirmation on their behalf.

In the case where the Extraordinary Investor is a company or partnership, such declaration is required from the Director(s)/ General Partner(s), whilst in the case of a trust, from the Trustee. The Extraordinary Investor Declaration Form is required for the prospective investor to demonstrate eligibility to be treated as an Extraordinary Investor. A proforma of an Extraordinary Investor Declaration Form is provided in Appendix III to Part B of these Rules.

PIFs promoted to Extraordinary Investors are not subject to any investment or borrowing (including leverage) restrictions other than those which may be specified in their Offering Document/ Marketing Document.

## **5. Standard Licence Conditions**

The MFSA aims to provide a regulatory framework which is both robust and simultaneously adaptable to allow managers and promoters to innovate and to develop new products to meet the changing needs of the market. The Standard Licence Conditions<sup>2</sup> for PIFs promoted to Experienced Investors are set out in Part BI of these Rules, in Part BII as regards PIFs promoted to Qualifying Investors and in Part BIII as regards PIFs promoted to Extraordinary Investors.

## **6. Listing on the Malta Stock Exchange**

A PIF that has been granted or has applied for a Collective Investment Scheme licence may apply for admissibility to listing with the Listing Authority. The MFSA is the Listing Authority in terms of the Financial Market Act, 1990.

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.

Furthermore – provided that during the application for a Collective Investment Scheme licence, the MFSA is informed of the PIF'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.

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<sup>2</sup> Hereinafter referred to as 'SLCs'

## 7. Offering Document/ Marketing Document

A PIF targeting Experienced or Qualifying Investors is required to draw up an Offering Document which should at least include the information listed in Appendix II to Part B of these Rules. The Offering Document should be provided to prospective investors free of charge.

A PIF targeting Extraordinary Investors may either:

- draw up an Offering Document including at least the information listed in Appendix II to Part B of these Rules; or
- draw up a Marketing Document.

The Marketing Document should at least include the following information:

- i. a list of Service Providers including the Directors, General Partner(s) or Trustee<sup>3</sup>, and their respective contact details;
- ii. a definition of Extraordinary Investor;
- iii. a risk warnings section describing in brief at least the principal risks associated with investing in the PIF;
- iv. the investment objectives, policies and restrictions of the PIF or where applicable its sub-funds;
- v. details of the fee structure;
- vi. details of the classes/ units on offer whether these constitute a distinct sub-fund or not;
- vii. overview of the safekeeping arrangements in the case where a custodian/ prime broker is not appointed;
- viii. a Statement – where the PIF has issued “Voting Shares” to the promoters and “non-Voting Shares” to prospective Investors – identifying the holders of the “Voting Shares” of the PIF. This section should also provide that the identity of the ultimate beneficial owners of the holders of “Voting Shares” will be disclosed upon request;
- ix. the Extraordinary Investor Declaration Form and the Subscription Form;
- x. the following text:
  - “[name of the Fund] is licensed by the Malta Financial Services Authority (“MFSA”) as a Professional Investor Fund which is available to investors qualifying as ‘Extraordinary Investors’. This entails the minimum level of supervision for a Fund regulated in Malta.
  - Professional Investor Funds are Non-Retail schemes. Therefore, the protection normally arising as a result of the imposition of the MFSA’s investment and borrowing restrictions and other requirements for retail schemes do not apply.
  - Investors in PIFs are not protected by any statutory compensation arrangements in the event of the fund’s failure.

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<sup>3</sup> As applicable

- *The MFSA has made no assessment or value judgment on the soundness of the fund or for the accuracy or completeness of statements made or opinions expressed with regard to it.”.*

The Marketing Document should also include as an Annex, either the most recent version of the Constitutional Document of the PIF or a summary thereof. In the latter case, the Marketing Document should provide that a copy of the PIF’s Constitutional Document will be provided to prospective investors upon request. The Marketing Document or where applicable the Offering Document, should be provided to prospective investors free of charge.

## **8. Service Providers**

A PIF may appoint any Service Provider as it may deem necessary – although PIFs promoted to Experienced Investors are required to appoint a Custodian responsible for the safe custody of the assets of the PIF and for monitoring the activities of the PIF’s Manager as more fully detailed in the applicable Part BI of these Rules.

Ordinarily, Service Providers of a PIF may include, amongst others, a Manager, an Administrator, an Investment Adviser and/or a Custodian/Prime Broker.

Service Providers should be established and regulated in a Recognised Jurisdiction. Recognised Jurisdictions include EU and EEA Members, and signatories to a Multilateral MoU or Bilateral MoU with the MFSA covering the relevant sector of financial services.

The MFSA may, in the following scenarios, also accept Service Providers which may not be established and regulated in a Recognised Jurisdiction:

- i. where the Service Provider is the subsidiary of a firm that is regulated in a Recognised Jurisdiction, that retains control of its subsidiary and undertakes to provide all the necessary information to the MFSA; or
- ii. where the MFSA considers that the Service Provider is subject to regulation to an equal or comparable level in the jurisdiction concerned.

Where one or more of the proposed Service Providers is not based in a Recognised Jurisdiction or does not fall under (i) above, it is recommended that prior to the submission of an Application for a PIF Licence, the promoters submit an application for preliminary indication of acceptability of a PIF as outlined under Section 9 below.

### **8.1 Manager**

Where a third party Manager is to be appointed and the proposed Manager is established in Malta, the Manager should be in possession of a Category 2 Investment Services Licence issued in terms of Article 6 of the Act and should be duly licensed and authorised by the MFSA to provide management services to collective investment schemes.

Where the proposed Manager has appointed a Sub-Manager with limited or full discretion in respect of the management of the assets of the PIF, the Sub-Manager is not subject to MFSA’s approval and no eligibility criteria apply. In such case, the MFSA expects the Manager to exercise care and diligence in the selection of the Sub-Manager and to assume responsibility for the acts of the Sub-Manager.

For PIFs which do not appoint a third party Manager, including PIFs which qualify as *de minimis* self-managed Schemes, reference should be made to the relevant supplementary conditions applicable to self-managed funds included in SLCs 4.1 to 4.15 of Appendix I to Part B of these Rules.

## **8.2 Fund Administrator**

Administrative services in relation to the PIF may either be carried out by an appointed third party Administrator or undertaken by the appointed Manager.

Where the proposed Fund Administrator is established in Malta, the Administrator should be in possession of a Fund Administration recognition certificate issued in terms of Article 9A of the Act.

## **8.3 Custodian**

A PIF promoted to Experienced Investors shall appoint a third party Custodian responsible for the safe-keeping of the assets of the Scheme and for undertaking monitoring duties over the PIF's Manager as more fully detailed in the relevant SLCs prescribed in Part BI of these Rules and in the Investment Services Act (Custodians of Collective Investment Schemes) Regulations. The appointed Custodian shall be independent from the Manager and need not be established and regulated in Malta.

In the case of a PIF promoted to Qualifying or Extraordinary Investors, although the MFSA recommends and would ordinarily expect the appointment of a Custodian, which may be a Prime Broker, for safekeeping the PIF's assets, there is no obligation to have either. Where no Custodian is appointed, responsibility for the establishment of proper arrangements for the safe keeping of the PIF's assets remains with the Directors/ General Partner(s)/ Trustee and officers of the PIF. The applicant will be required to outline – as part of the application process – the arrangements that will be put in place to ensure adequate safekeeping of the assets of the PIF.

Where the PIF wishes to appoint a Custodian established in Malta, the Custodian should be in possession of a Category 4a Investment Services Licence in the case of a PIF promoted to Experienced Investors or a Category 4a or Category 4b Investment Services Licence in the case of PIFs promoted to Qualifying or Extraordinary Investors.

## **8.4 Investment Adviser**

The Investment Adviser is a person responsible for the provision of investment advice to the PIF or its Manager on the assets of the PIF. It is understood that the Investment Adviser will not have any discretion with respect to the investment and re-investment of the assets of the PIF.

PIFs are generally not required to appoint a third party Investment Adviser. Moreover, the proposed Investment Adviser need not be established and regulated in Malta.

Where the Investment Adviser is appointed directly by the Manager, rather than by the PIF such Investment Adviser is not subject to MFSA's approval and no eligibility criteria apply.

Where the proposal includes the appointment – directly by the PIF – of a third party Investment Adviser, and the proposed Investment Adviser is established in Malta, the Adviser should be in possession of a Category 1A, 1B, 2 or 3 Investment Services Licence issued in terms of Article 6 of the Act and should be duly licensed and authorised by the MFSA to provide investment advice to collective investment schemes.



## **9. The Application Process**

### **9.1. *Application for Preliminary Indication of Acceptability of a Professional Investor Fund***

An application for preliminary indication of acceptability of a PIF is to be submitted in respect of a prospective PIF having one or more of its Service Providers which does not fall within the parameters outlined in Section 8 above.

If any of the external service-providers to be appointed by the PIF operate from a country that is not a “Recognised Jurisdiction” or are not subsidiaries of a company involved in financial services and regulated in a Recognised Jurisdiction, it is recommended that at an early stage, applicants request a preliminary indication of acceptability of the PIF. Schedule B to this Part contains the application form for preliminary indication of acceptability of a PIF.

The MFSA will review the proposed structure of the PIF and its prospective Service Providers and will inform the applicant whether the proposed structure of the PIF and its Service Providers are acceptable to the MFSA.

The MFSA will ordinarily communicate the acceptability or otherwise of the proposed structure of the PIF within seven business days of receipt of the application for preliminary indication of acceptability of a PIF provided all relevant details pertaining to the regulatory status of the relevant Service Provider(s) and the applicable regulatory framework in the jurisdiction concerned are received.

The application for preliminary indication of acceptability of a PIF does not replace the application for a PIF Licence. Therefore, where the MFSA has issued a positive indication of acceptability of the PIF, the applicant would then need to apply for a Collective Investment Scheme licence<sup>4</sup>. A positive indication of acceptability of a PIF should not be construed as a commitment or guarantee that the MFSA will grant a licence to the PIF once the applicant submit an application for a PIF Licence.

### **9.2. *The Application Process in relation to a PIF***

When submitting an application for a Collective Investment Scheme licence under the Act, the promoter should ensure that the appropriate Application Form<sup>5</sup> is completed.

The application requirements and the ongoing requirements, to which licences are subject, are summarised below.

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<sup>4</sup> Reference should be made to Section 9.2 below.

<sup>5</sup> (Schedule A to this Part refers)

There are three phases - as follows:-

*Phase One - Preparatory*

- a. The MFSA recommends that the promoters arrange to meet representatives of the MFSA to describe their proposal. This preliminary meeting should take place in advance of submitting an Application for a licence. Although guidance will be given on the relevant regulatory requirements and on the completion of the Application documents, responsibility for the formulation of the proposal and the completion of the Application documents will remain with the Applicant. It is essential that the Applicant provides a comprehensive description of the proposed activity during this phase.
- b. Following the preliminary discussions, the promoters submit a draft Application Form<sup>6</sup>, together with supporting documents as specified in the Application Form itself.
- c. The draft Application and the supporting documentation will be reviewed by the Authority and comments will be provided to the Applicant. In the case of third-party managed PIFs promoted to Experienced or Qualifying Investors, the MFSA is committed to review the Application Form and supporting documents and provide its comments to the Applicant within seven business days from receipt of the application documents. In the case of PIFs promoted to Extraordinary Investors, the MFSA is committed to review the Application Form and the supporting documents and to provide its comments to the Applicant within three business days. This time-frame only applies when the PIF appoints a third-party Manager and where all service providers are based and regulated in Recognised Jurisdictions.
- d. The MFSA may ask for more information and may make such further enquiries as it considers necessary. The 'fit and proper' checks – which entail following up the information which has been provided in the Application documents – commence at this stage.
- e. The MFSA will consider the nature of the proposed PIF and a decision will be made regarding which SLCs should apply. Where the circumstances so justify some of these conditions may be disapplied or amended as long as investors are adequately protected. Furthermore the Authority may also impose supplementary conditions where applicable. The SLCs are very important since they represent the ongoing requirements to which the Applicant will be subject, if and when licensed.

The SLCs for PIFs promoted to Experienced Investors are set out in Part BI of these Rules, in Part BII as regards PIFs promoted to Qualifying Investors and in Part BIII as regards PIFs promoted to Extraordinary Investors.

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<sup>6</sup> Rather than a Final Application Form

Phase Two – Pre-Licensing

- f. Once the review of the draft Application and supporting documents has been completed, the Authority will issue its ‘in principle’ approval for the issue of a licence if satisfied that the Application and supporting documents are in order.
- g. At this stage, the Applicant will be required to finalise any outstanding matters. This phase should also include submission of signed copies of the revised Application form together with supporting documents in their final format, and the settling of any other issues raised during the Application process.
- h. A licence will be issued as soon as all pre-licensing issues are resolved.

Phase Three – Post-Licensing/Pre-Commencement of Business

- i. The Applicant may be required to satisfy a number of post-licensing conditions prior to formal commencement of business.

**9.3. The Application Documents**

An applicant for a PIF Licence is ordinarily required to submit the following documents:

**9.3.1. Investment Companies**

- i. Application Form (Schedule A to this Part);
- ii. Draft version of the Offering Document/ Marketing Document;
- iii. Draft version of the Memorandum & Articles of Association of the PIF;
- iv. Draft Board of Directors’ resolution:
  - confirming the Directors’ intention to apply for a licence in favour of the PIF;
  - identifying the person(s) responsible for signing the application documents;
  - identifying the person(s) responsible for acting as a point of liaison with the MFSA;
  - identifying the person(s) responsible on behalf of the Board for the Compliance obligations of the PIF;
  - identifying the person(s) responsible on behalf of the Board for the AML obligations of the PIF;
  - approving and assuming responsibility for the contents of the Offering Document/ Marketing Document.
- v. Application Fee;
- vi. Directors of the PIF:

where Individuals

- Personal Questionnaires of the proposed Director(s);

where Corporate, regulated in a recognised jurisdiction

- details of the regulatory status of the proposed Corporate Director(s);
- name of the individual that will represent the Corporate Director on the Board of Directors of the PIF;

- vii. Founder Shareholder(s) – that hold more than 10% of the voting shares:

where Individuals

- Personal Questionnaire of the proposed Founder Shareholder(s);

where Corporate, regulated in a recognised jurisdiction

- details of the regulatory status of the proposed Corporate Founder Shareholder(s);

where Corporate, not regulated in a recognised jurisdiction

- Personal Questionnaire of the Directors of the proposed Corporate Founder Shareholder(s);
- Personal Questionnaire of the qualifying beneficial owners of the proposed Corporate Founder Shareholder(s); and
- last three years audited financial statements of the proposed Corporate Founder Shareholder(s).

- viii. Compliance Officer, Money Laundering Reporting Officer - Personal Questionnaire and Competency Form of the individuals proposed to carry out these functions.

### 9.3.2. Limited Partnership

- i. Application Form (Schedule A to this Part);
- ii. Draft version of the Offering Document/ Marketing Document;
- iii. Draft version of the Deed of Partnership;
- iv. Resolution of the General Partner(s):
  - confirming the its/ their intention to apply for a licence in favour of the PIF;
  - identifying the person(s) responsible for signing the application documents;
  - identifying the person(s) responsible for acting as a point of liaison with the MFSA;
  - identifying the person(s) responsible on behalf of the General Partners(s) for the Compliance obligations of the PIF;
  - identifying the person(s) responsible on behalf of the General Partners(s) for the AML obligations of the PIF; and

- approving and assuming responsibility for the contents of the Offering Document/ Marketing Document.
- v. Application Fee;
- vi. General Partner(s) of the PIF:
- where Individuals
- Personal Questionnaire of the proposed General Partner(s);
- where Corporate, regulated in a recognised jurisdiction
- details of the regulatory status of the proposed Corporate General Partner(s);
  - the name of the individual who will represent the Corporate General Partner(s);
- where Corporate, not regulated in a recognised jurisdiction
- Personal Questionnaire of the Directors of the proposed Corporate General Partner(s);
  - Personal Questionnaire of the qualifying beneficial owners of the proposed Corporate General Partner(s);
  - the name of the individual who will represent the Corporate General Partner(s); and
  - Last three years audited financial statements of the proposed Corporate General Partner(s).
- vii. Compliance Officer, Money Laundering Reporting Officer - Personal Questionnaire and Competency Form of the individuals proposed to carry out these functions.

### 9.3.3. Unit Trust/ Common Contractual Fund

- i. Application Form (Schedule A to this Part);
- ii. Draft version of the Offering Document/ Marketing Document;
- iii. Draft version of the Trust Deed/ Fund Rules;
- iv. A resolution of the proposed Manager:
  - confirming the Manager's intention to apply for a licence in favour of the PIF;
  - identifying the person(s) responsible for signing the application documents;
  - identifying the person(s) responsible for acting as a point of liaison with the MFSA;
  - identifying the person(s) responsible on behalf of the Manager for the Compliance obligations of the PIF;
  - identifying the person(s) responsible on behalf of the Manager for the AML obligations of the PIF; and
  - approving and assuming responsibility for the contents of the Offering Document;

- v. Application Fee;
- vi. Details of the regulatory status of the proposed Trustee.
- vii. Compliance Officer, Money Laundering Reporting Officer - Personal Questionnaire and Competency Form of the individuals proposed to carry out these functions.

9.3.4. Incorporated Cell Companies (ICCs) (Investment companies set up in terms of Legal Notice 559 of 2010)

- i. Application Form (Schedule A to this Part);
- ii. Draft version of the Offering Document/ Marketing Document;
- iii. Draft version of the Memorandum & Articles of Association of the PIF;
- iv. Draft Board of Directors' resolution:
  - confirming the Directors' intention to apply for a licence in favour of the PIF as an Incorporated Cell Company, being an umbrella fund which will include sub-funds to be established as Incorporated Cells (ICs);
  - identifying the person(s) responsible for signing the application documents;
  - identifying the person(s) responsible for acting as a point of liaison with the MFSA;
  - identifying the person(s) responsible on behalf of the Board for the Compliance obligations of the PIF;
  - identifying the person(s) responsible on behalf of the Board for the AML obligations of the PIF;
  - approving and assuming responsibility for the contents of the Offering Document/ Marketing Document;
- v. Application Fee;
- vi. Directors of the PIF:
  - where Individuals
    - Personal Questionnaires of the proposed Director(s);
  - where Corporate, regulated in a recognised jurisdiction
    - details of the regulatory status of the proposed Corporate Director(s);
    - name of the individual that will represent the Corporate Director on the Board of Directors of the PIF;
- vii. Founder Shareholder(s) – that hold more than 10% of the voting shares:
  - where Individuals
    - Personal Questionnaire of the proposed Founder Shareholder(s);

where Corporate, regulated in a recognised jurisdiction

- details of the regulatory status of the proposed Corporate Founder Shareholder(s);

where Corporate, not regulated in a recognised jurisdiction

- Personal Questionnaire of the Directors of the proposed Corporate Founder Shareholder(s);
- Personal Questionnaire of the qualifying beneficial owners of the proposed Corporate Founder Shareholder(s); and
- last three years audited financial statements of the proposed Corporate Founder Shareholder(s).

- viii. Compliance Officer, Money Laundering Reporting Officer - Personal Questionnaire and Competency Form of the individuals proposed to carry out these functions.

9.3.5. Incorporated Cells (ICs)(Investment companies set up in terms of Legal Notice 559 of 2010 and Legal Notice 119 of 2012)

- i. Application Form (Schedule A to this Part);
- ii. Draft version of the Offering Document/ Marketing Document;
- iii. Draft version of the Memorandum & Articles of Association of the PIF;
- iv. Draft Board of Directors' resolution:
  - confirming the Directors' intention to apply for a licence in favour of the PIF to operate as, an incorporated cell of the SICAV Incorporated Cell Company (SICAV ICC) or incorporated cell of the Recognised Incorporated Cell Company (IC);
  - identifying the person(s) responsible for signing the application documents;
  - identifying the person(s) responsible for acting as a point of liaison with the MFSA;
  - identifying the person(s) responsible on behalf of the Board for the Compliance obligations of the PIF;
  - identifying the person(s) responsible on behalf of the Board for the AML obligations of the PIF;
  - approving and assuming responsibility for the contents of the Offering Document/ Marketing Document;
- v. A copy of the Resolution passed by the Board of Directors of the SICAV ICC (umbrella fund) or the RICC which
  - Approves the name of the incorporated cell being established;
  - Approves the terms of the memorandum and articles of association of the incorporated cell and resolves that the said memorandum and articles of

- association of the incorporated cell are to be entered into by the incorporated cell company; and
- Authorises, if applicable, the subscription by the incorporated cell company of a share or shares in the incorporated cell.
- vi. Application Fee;
- vii. Directors of the PIF:
- where Individuals
- Personal Questionnaires of the proposed Director(s);
- where Corporate, regulated in a recognised jurisdiction
- details of the regulatory status of the proposed Corporate Director(s);
  - name of the individual that will represent the Corporate Director on the Board of Directors of the PIF;
- viii. Founder Shareholder(s) – that hold more than 10% of the voting shares:
- where Individuals
- Personal Questionnaire of the proposed Founder Shareholder(s);
- where Corporate, regulated in a recognised jurisdiction
- details of the regulatory status of the proposed Corporate Founder Shareholder(s);
- where Corporate, not regulated in a recognised jurisdiction
- Personal Questionnaire of the Directors of the proposed Corporate Founder Shareholder(s);
  - Personal Questionnaire of the qualifying beneficial owners of the proposed Corporate Founder Shareholder(s); and
  - last three years audited financial statements of the proposed Corporate Founder Shareholder(s).
- ix. Compliance Officer, Money Laundering Reporting Officer - Personal Questionnaire and Competency Form of the individuals proposed to carry out these functions.

#### 9.3.6. Supplementary Application Documents – Self Managed PIF

- i. Investment Committee Member, Portfolio Manager, (Risk Manager – where appointed):-
- Personal Questionnaire and Competency Form of the individuals proposed to carry out these functions.
- ii. Terms of reference regulating the procedures of the Investment Committee;



- iii. Confirmation from the Portfolio Manager(s) (as applicable) that he/she/they will:
  - operate in accordance with the investment objective and policy described in the PIF's Offering Document in general and the investment guidelines issued by the investment committee in particular;
  - report to the Investment Committee on a regular basis any transactions effected on behalf of the PIF; and
  - provide to the Investment Committee, any information as the Investment Committee may require from time to time;
- iv. Confirmation from the Portfolio Manager(s)/ Investment Committee that they have appropriate resources available to them to ensure on-going access to the market information which they would need to take account of in making investment management decisions.

9.3.7. Supplementary Application Documents – PIFs targeting Extraordinary Investors

- i. Directors/ General Partner(s)/ Founder Shareholders of the PIF:
  - where Individuals
    - a banker's reference from the individual's main banker with whom the individual has been banking for the last five years or over, confirming whether the individual concerned is a customer of the bank, for how long, and whether he/ she has maintained his/her bank account satisfactorily over such period;
    - a reference from a lawyer, accountant, other professional or regulated person;
  - where Corporate, regulated in a recognised jurisdiction
    - the references referred to above in respect of the person who will be representing the Corporate Director/ General Partner(s)/ Founder Shareholders;
    - a recent certificate of good-standing in respect of such Corporate Director/ General Partner(s)/ Founder Shareholders;
- ii. A confirmation from the Directors/ General Partner(s)/ Manager as the case may be that the proposed Service Providers to the PIF are authorised to provide these services by their home state regulator together with evidence of their respective authorisation.

9.3.8. Supplementary Application Documents – Proposed appointment of Service Providers which do not operate from a Recognised Jurisdiction

- i. PQs of the Directors and Qualifying Shareholders (>10% control) of the relevant Service Provider;
- ii. Latest three years audited financial statements; and
- iii. Evidence of their respective authorisation.

The MFSA reserves the right to request such additional information as it may require when processing an application for a licence.

#### **9.4. Applications for the licensing of additional sub-funds of an existing PIF**

A licensed PIF 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 Directors, General Partner or the Manager as applicable signifying their intention to apply for a licence in favour of the sub-fund;
- iii. a final draft of the revised Offering Document/ Marketing Document/ Offering Supplement;<sup>7</sup>
- iv. the appropriate application fee<sup>8</sup> and
- v. a draft copy of the approval by the PIF's proposed Directors, General Partner(s) or the Manager<sup>9</sup> of the revised Offering Document/ Marketing Document/ Offering Supplement<sup>10</sup>.

#### **9.5. Applications for the approval of additional classes of shares of an existing PIF**

A licensed PIF constituted in the form of an umbrella (i.e. with sub-funds) or multi-class (i.e. without sub-funds) 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 PIF.

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/ Marketing Document;
- iii. a draft copy of the approval of the PIF's proposed Directors, General Partner(s) or the Manager<sup>11</sup> of the Offering Document/ Marketing Document; and
- iv. a confirmation from the Directors, General Partner(s) or the Manager<sup>12</sup> signifying their intention to issue additional classes of shares/ units.

The issue of additional classes of shares/ units within an existing PIF – so long as the additional classes of shares/ units do not constitute a distinct sub-fund of the PIF – is not subject to any application/ supervisory fees.

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<sup>7</sup> as applicable;

<sup>8</sup> Reference to Section 10 dealing with Fees.

<sup>9</sup> as applicable;

<sup>10</sup> as applicable;

<sup>11</sup> as applicable;

<sup>12</sup> as applicable;

**10. Fees**

The Application Fee is payable on submission of the Application for a PIF Licence and is not refundable. The First Annual Supervisory Fee is payable on the date the Licence is granted and thereafter annually upon the anniversary of the granting of the Licence.

The applicable fees in terms of the Investment Services Act (Fees) Regulations 2014 are as follows:

<b>PIFs licenced pursuant to Article 4 of the Investment Services Act</b>		
	<b>Application Fee</b>	<b>Annual Supervisory Fee</b>
Scheme	€2,000	€2,000
Per Sub - fund	€1,000	€600

<b>Incorporated Cells (“ICs”) of RICCs pursuant to Article 9A of the Investment Services Act</b>		
	<b>Application Fee</b>	<b>Annual Supervisory Fee</b>
Per IC	€2,000	€2,000
Per Sub-Fund of IC	€1,000	€600

The Fees are subject to alteration by Regulations.

**11. Surrender of a Collective Investment Scheme Licence**

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 Collective Investment Scheme Licence, or to wind-up such business in accordance with conditions imposed by the MFSA, in order to protect the interests of unit holders.

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.

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 Directors'/ Manager's/ General Partner's (as applicable) resolution:
  - 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, custodian 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;

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 custodian (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.

An internal process will be initiated for the approval of the surrender of the Collective Investment Scheme Licence as soon as all the 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).

The MFSA will convey its final decision to the Scheme and will issue a public notice regarding the surrender of the Scheme's Licence.

Where the Scheme consists of different Sub-Funds, and only the Licence granted in relation to a Sub-Fund is to be surrendered, reference made in this Section to the Scheme shall refer to the Sub-Fund.