

INVESTMENT SERVICES RULES FOR RECOGNISED PERSONS

Part A.II: RECOGNISED PRIVATE COLLECTIVE INVESTMENT SCHEMES

1. Regulation of Private Collective Investment Schemes

The Investment Services Act, 1994 “the Act” provides the statutory basis for regulating collective investment schemes. 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.

The Act defines “Collective Investment Schemes” 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 characteristics listed in paragraph (a) hereof shall only be deemed to be a collective investment scheme, if the scheme, in specific circumstances as established by regulations under the Act, is exempt from such requirement and satisfies the conditions that may be prescribed.

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 collective investment scheme to operate in or from Malta without having a licence.

Subarticle 4(2) makes it illegal for a collective investment scheme to use Malta as a base without having a licence.

Subarticle 4(3) permits the initial steps in establishing a collective investment scheme to be taken before a Licence has been obtained but the collective investment 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, 2007, the Investment Services Act (Recognition of Private Collective Investment Schemes) Regulations, 2002 and the Undertakings for Collective Investment in Transferable Securities and Management Companies Regulations, 2004 as amended.

A Collective Investment Scheme operating in or from Malta, or constituted under Maltese law, may, subject to satisfying certain specific criteria, apply for recognition by MFSA as a Private Scheme in terms of the Investment Services Act (Recognition of Private Collective Investment Schemes) Regulations, 2002. A Collective Investment Scheme so recognised is exempt from the requirement of a Collective Investment Scheme Licence.

A Scheme is deemed to be a Private Collective Investment Scheme if it satisfies the following requirements:

- i. the number of participants in the Scheme is limited to fifteen individuals;
- ii. the participants are close friends or relatives of the promoters;
- iii. the Scheme is essentially private in nature and purpose;
- iv. the Scheme does not qualify as a Professional Investor Fund.

Provided that one of the participants may be a company if the following requirements are satisfied:

- a. taking into account the ultimate individual beneficial owners of such company, the maximum number of fifteen participants is still satisfied;
- b. the company's ultimate individual beneficial owners are close friends or relatives of the promoters;
- c. the company is in no manner involved in the management or administration of the Scheme and its connection with the Scheme is merely that of investor.

2. Criteria which MFSA will apply in considering an application for Recognition as a Private Collective Investment Scheme

The MFSA may only recognise a Private Collective Investment Scheme if it is satisfied to the extent that the Scheme 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 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 Scheme.

When considering whether to recognise or otherwise a Private Collective Investment Scheme, the MFSA will, in particular, have regard to:

- a. the protection to the reputation of Malta taking into account Malta's international commitments;
- b. the reputation and suitability of the Applicant and all other parties connected with the Scheme.

The MFSA will need to be satisfied with the "fit and proper" status of the Applicant and the Recognised Private Scheme. The "fit and proper" test is one which an Applicant and a Recognised Private Collective Investment Scheme 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 Recognised Private Collective Investment Scheme as the case may be. It is not the task of the MFSA to prove that an Applicant is fit and proper either on Recognition or thereafter. The MFSA's approach is cumulative. It may decide that an Applicant 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 is said and of what is not said (for example in respect of a person's criminal record) that ought to have been disclosed. It should be noted that it is an offence to provide inaccurate, false or misleading information to the MFSA.

The MFSA will only grant the Scheme recognition as a Private Collective Investment Scheme if it is satisfied that the Scheme complies with all the criteria and requirements for it to be considered private in nature and purpose and is satisfied of the “fit and proper” status of the Directors/ Officers of the Scheme as well as that of its participants. It is to be noted that the MFSA will limit its due diligence procedures to determining the integrity of the persons concerned and unlike in the case of licensed schemes, the MFSA will not assess the competence of the persons responsible for managing the Scheme, and will not subject the Scheme to any investment or borrowing restrictions or other conditions other than those specified in this Part, or which may be specified in the recognition certificate.

3. The Application Process

The application process to be followed by an Applicant for Recognition as a Private Collective Investment Scheme, is summarised below.

There are two phases as follows:-

Phase One – Preparatory

- a. After any required preliminary discussions with the MFSA, the promoters should submit an application together with supporting documents (in draft form) as specified hereunder.
- b. The application and the supporting documentation will be reviewed and comments provided to the Applicant generally within three weeks from submission of the application documents.
- c. 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 begin at this stage.

Phase Two – Pre-Recognition

- d. Once the review of the application and supporting documents has been completed and sufficient replies to the Authority’s due diligence enquires have been received, the Authority will issue (provided it is satisfied that the Applicant meets the eligibility criteria for Recognition), its ‘in principle’ approval for the Recognition of the Applicant.
- e. At this stage, the Applicant will be required to finalise any outstanding matters. Submission of signed copies of the revised supporting documents in their final format, and any other issues raised during the application process, should be resolved as part of Phase Two.

- f. The Applicant will be Recognised as soon as all pre-Recognition issues are resolved.

The Recognised Private Scheme acknowledges that the MFSA will not be liable in damages for anything done or omitted to be done unless the act or omission is shown to have been done or omitted to be done in bad faith.

The Recognised Private Scheme acknowledges that the MFSA has the right, from time to time, to vary or revoke any condition or to impose new conditions.

4. Application Documents

A request for Recognition as a Private Collective Investment Scheme should be supported by the following documentation/ information:

- i. a letter formally applying for recognition;
- ii. a copy of the Scheme's Memorandum and Articles of Association, or equivalent constitutional document depending on the legal form of the Scheme;
- iii. details of the investment objectives and policies of the Scheme;
- iv. a Personal Questionnaire, in the form set out in Schedule II to Part A.I of these Rules, duly completed by each Director and participant in the Scheme;
- v. registered address in Malta and contact details;
- vi. the names of the participants in the Scheme, together with a confirmation signed by all participants and endorsed by the Directors (as applicable) that they are close friends or relatives of the promoters;
- vii. an undertaking from the Participants/ Directors (as applicable) that the Scheme satisfies the criteria for Private Schemes and will continue to do so on an on-going basis unless advance notice is given to the MFSA;

The MFSA may require Applicants requesting Recognition as a Private Collective Investment Scheme to submit to the MFSA whatever additional information it deems appropriate for the purposes of determining whether it should recognise the Applicant as a Private Collective Investment Scheme.