

# Fund Management 2021

Contributing editor  
Oliver Rochman



**Publisher**

Tom Barnes  
tom.barnes@lbresearch.com

**Subscriptions**

Claire Bagnall  
claire.bagnall@lbresearch.com

**Senior business development manager**

Adam Sargent  
adam.sargent@gettingthedealthrough.com

**Published by**

Law Business Research Ltd  
Meridian House, 34-35 Farringdon Street  
London, EC4A 4HL, UK

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between May and June 2021. Be advised that this is a developing area.

© Law Business Research Ltd 2021  
No photocopying without a CLA licence.  
First published 2015  
Seventh edition  
ISBN 978-1-83862-664-8

Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



---

# Fund Management 2021

Contributing editor

**Oliver Rochman**

Morgan, Lewis & Bockius LLP

---

Lexology Getting The Deal Through is delighted to publish the seventh edition of *Fund Management*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Oliver Rochman of Morgan, Lewis & Bockius LLP, and to Michelle Moran of K&L Gates LLP for her assistance with previous editions.



London  
June 2021

---

Reproduced with permission from Law Business Research Ltd  
This article was first published in June 2021  
For further information please contact [editorial@gettingthedealthrough.com](mailto:editorial@gettingthedealthrough.com)

# Contents

<b>Global overview</b>	<b>3</b>	<b>Luxembourg</b>	<b>76</b>
Oliver Rochman Morgan, Lewis & Bockius LLP		Marc Meyers and Veronica Aroutiunian Loyens & Loeff	
<b>Cayman Islands</b>	<b>4</b>	<b>Malta</b>	<b>85</b>
Gary Smith Loeb Smith Attorneys		Marina Grech, Bettina Gatt and Luigi Farrugia Ganado Advocates	
<b>France</b>	<b>11</b>	<b>Portugal</b>	<b>93</b>
Arnaud Pince De Pardieu Brocas Maffei		Pedro Simões Coelho, Ricardo Seabra Moura and Carlos Couto VdA	
<b>Germany</b>	<b>20</b>	<b>Sweden</b>	<b>101</b>
Tarek Mardini and Sebastian Käßlinger POELLATH		Fredrik Wilkens, Emma Stuart-Beck, Henrik Schön, Lave Nilsson and Anton Sjökvist Advokatfirman Vinge KB	
<b>Greece</b>	<b>30</b>	<b>Switzerland</b>	<b>109</b>
Michael Tsibris and Giannis Koumettis Souridakis Tsibris Law Partnership		Urs Hofer and Alexander Eichhorn Walder Wyss Ltd	
<b>Hong Kong</b>	<b>38</b>	<b>Taiwan</b>	<b>120</b>
Vivien Teu and Christina Suen Dentons Hong Kong		Victor I Chang and Stephanie Peng LCS & Partners	
<b>Ireland</b>	<b>47</b>	<b>Thailand</b>	<b>126</b>
Sarah Cassidy and Shane Geraghty Dillon Eustace		Rachitporn Manawes, James Lawden and Poomruthai Singhanat Weerawong, Chinnavat & Partners Ltd	
<b>Japan</b>	<b>56</b>	<b>United Kingdom</b>	<b>132</b>
Kiyomi Kikuchi and Takehiro Fujita TMI Associates		Kate Habershon, Oliver Rochman, William Yonge, Steven Lightstone and Monika Rzesniowiecka Morgan, Lewis & Bockius LLP	
<b>Lebanon</b>	<b>64</b>	<b>United States</b>	<b>144</b>
Rita Papadopoulou Abou Jaoude & Associates Law Firm		David Freese, Jarrod Huffman, Christine Lombardo, Beau Yanoshik, Ruohe Liu and Ellen Weinstein Morgan, Lewis & Bockius LLP	

# Malta

Marina Grech, Bettina Gatt and Luigi Farrugia

Ganado Advocates

## FUND MANAGEMENT REGULATION

### Regulatory framework and authorities

- 1 | How is fund management regulated in your jurisdiction?  
Which authorities have primary responsibility for regulating funds, fund managers and those marketing funds?

The Malta Financial Services Authority (MFSA) regulates funds, fund managers and those marketing funds in Malta.

The Maltese regulatory regime for funds, fund managers and entities marketing funds, was enacted on 19 September 1994 with the adoption of the Investment Services Act, CAP 370 of the Laws of Malta (the ISA), which introduced the concept of a collective investment scheme (CIS) into Maltese law as well as a licensing requirement for CISs and their service providers on the basis of the nature of the services provided in respect of specific classes of financial instruments.

The ISA has, over the years, been significantly revised and supplemented in order to transpose relevant EU legislation, including the Alternative Investment Fund Managers Directive (AIFMD), the Undertakings for the Collective Investment in Transferable Securities (UCITS) Directive and Markets in Financial Instruments Directive (MiFID II). The ISA remains, however, the cornerstone of fund regulation in Malta.

Fund managers are all required to hold a Class 2 investment services licence. However, fund managers may be classified as alternative investment fund managers (AIFMs) in terms of AIFMD, de minimis AIFMs, being under-threshold fund managers, and UCITS ManCos established under the UCITS Directive. On the other hand, funds may take the form of UCITS Funds, alternative investment funds (AIFs), notified alternative investment funds (NAIFs) or professional investor funds (PIFs). NAIFs are not regulated by the MFSA. Regulatory responsibility for their operations and oversight is shifted to the AIFMs.

The establishment or appointment of a regulated investment management entity separate from the fund is possible but not obligatory, as funds incorporated in Malta can opt to be self-managed. In such cases, the fund takes responsibility for the investment management structure internally through the establishment of the appropriate internal mechanisms.

### Fund administration

- 2 | Is fund administration regulated in your jurisdiction?

Yes. The statutory basis for regulating the provision of fund administration is detailed through the ISA, which states that any person who, in or from Malta, provides to licence holders in Malta, or to equivalent authorised persons and schemes overseas, administrative services that do not themselves constitute licensable activity under the ISA, shall require MFSA recognition.

### Authorisation

- 3 | What is the authorisation or licensing process for funds?  
What are the key requirements that apply to managers and operators of investment funds in your jurisdiction?

### Licensing process

The legal structure chosen to set up an investment fund in Malta will determine the procedures and documentation required. The licensing process for the setting up of investment funds is divided into three phases:

- the preparatory phase;
- the pre-licensing phase; and
- the post licensing or pre-commencement of business phase.

During the preparatory phase, an outline of the proposal and the draft application form together with the supporting documentation and a non-refundable fee are submitted to the MFSA. The MFSA will then initiate its due diligence process and review the documents submitted.

During the pre-licensing phase, provided that the MFSA is satisfied with the draft application, it will issue its in-principle approval for the issue of a CIS licence. The applicant must then submit final signed copies of the application documentation. The MFSA may also impose any other pre-licensing conditions it deems appropriate, which must be satisfied prior to the issue of the licence.

During the post-licensing phase, the applicant may also be required to satisfy a number of post-licensing conditions, prior to commencement of business.

### Key requirements

A Maltese management company or operator of a fund (to the extent that the services provided to the fund qualify as investment services in terms of the ISA) must be licensed by the MFSA. Such licence is subject to a number of requirements, including:

- a place of business in Malta from where the activities are carried out;
- sufficient financial resources and liquidity to be able to conduct its business effectively and meet its liabilities when they fall due; and
- compliance with MFSA requirements applicable to the licence holder, which mainly relate to business organisation, systems, experience and expertise.

Upon licensing, fund managers and operators of funds are required to comply with the ongoing regulatory obligations set out in applicable MFSA Rulebooks and the AML/CFT obligations emanating from the Financial Intelligence Analysis Unit Implementing Procedures.

**Territorial scope of regulation**

**4 | What is the territorial scope of fund regulation? Can an overseas manager perform management activities or provide services to clients in your jurisdiction without authorisation?**

The general principle is that the management of local CIS is subject to licensing in terms of the ISA, unless a specific exemption applies or the overseas fund manager is able to avail itself of EU passporting rights. Indeed, the management company passport under the UCITS IV Directive (Directive 2009/65/EC) ended the requirement that the investment fund management company needs to be established in the same country in which the UCITS is established. Additionally, the adoption of the AIFMD also meant that the investment fund management company need not be established in the same country in which the AIF is established.

**Management company established in another EU/EEA member state**

UCITS ManCo	Prior to providing services in Malta or performing management activities in Malta, the EU fund manager will need to first exercise its passport rights under the relevant EU directive.
AIFM	Prior to providing services in Malta or performing management activities in Malta, the overseas fund manager will need to first exercise its management passport under the relevant EU directive. Authorisation requirements apply in respect of non-EU AIFMs managing an EU AIF.

**Acquisitions**

**5 | Is the acquisition of a controlling or non-controlling stake in a fund manager in your jurisdiction subject to prior authorisation by the regulator?**

Yes. The acquisition of a qualifying shareholding in a fund manager is subject to prior authorisation. The ISA defines qualifying shareholding as:

*a direct or indirect holding in a company which represents 10% or more of the share capital or of the voting rights .... or which makes it possible to exercise a significant influence over the management of the company in which that holding subsists.*

**Restrictions on compensation and profit sharing**

**6 | Are there any regulatory restrictions on the structuring of the fund manager's compensation and profit-sharing arrangements?**

Specifically, with respect to the payment of performance fees to fund managers of UCITS funds or of retail AIFs, the Investment Services Act (Performance Fees) Regulations set out the rules to be followed for the adoption, payment and disclosure of performance fees.

**FUND MARKETING**

**Authorisation**

**7 | Does the marketing of investment funds in your jurisdiction require authorisation?**

The general principle enshrined in the Investment Services Act (ISA) is that the units in a CIS may not be marketed in Malta unless that collective investment scheme (CIS) is authorised by the Malta Financial Services Authority (MFSA). This principle is, however, subject to the applicability of EU passporting rights. In fact, the Alternative Investment Fund Managers Directive (AIFMD), grants EU alternative investment fund managers (AIFMs) managing EU AIFs a marketing passport,

enabling the former to market that EU AIF in another EU member state to professional investors. The AIFM must submit a notification of its intention to market to the competent authority of the other EU member state where the units of the alternative investment fund (AIF) will be marketed. However, any AIFM wishing to market AIFs to retail investors in Malta, must obtain prior authorisation from the MFSA.

Non-EU AIFMs marketing AIFs in Malta would need to comply with the Maltese National Private Placement Regime prior to the marketing of such funds.

Likewise, the UCITS Directive provides for a harmonised passporting regime whereby a UCITS authorised in any EU member state may be marketed to investors in another member state following notification of its intention being submitted to the host member state's competent authority.

**8 | What marketing activities require authorisation?**

Investment funds that do not benefit from EU passporting rights, and whose activities are not otherwise exempt, are required to hold a collective investment scheme licence in Malta prior to marketing their units in Malta, whether directly or indirectly through intermediaries.

**Territorial scope and restrictions**

**9 | What is the territorial scope of your regulation? May an overseas entity perform fund marketing activities in your jurisdiction without authorisation?**

Any entity performing fund marketing activities in respect of funds established in Malta would be subject to licensing, to the extent that such activities constitute investment services in terms of the ISA and unless the relevant entity can rely on an exemption in terms of the law that is applicable to its operations.

**10 | If a local entity must be involved in the fund marketing process, how is this rule satisfied in practice?**

Not applicable.

**Commission payments**

**11 | What restrictions are there on intermediaries earning commission payments in relation to their marketing activities in your jurisdiction?**

In accordance with the Conduct of Business Rule Book, where a manufacturer distributes its products to clients through a distributor and pays a commission to a distributor based on levels of business introduced, the manufacturer must be able to demonstrate that these arrangements: (1) do not impair the distributor's duty to act in the best interest of the client and (2) do not give rise to a conflict of interest between the distributor and the client.

MiFID, AIFMD and the UCITS Directive also contain similar rules on inducements.

**RETAIL FUNDS**

**Available vehicles**

**12 | What are the main legal vehicles used to set up a retail fund? How are they formed?**

The definition of a collective investment scheme under the ISA is vehicle agnostic. Under Maltese law, a fund may be established as a (1) company (ie, an INVC0 or a SICAV (investment company with variable capital)), (2) limited partnership, (3) unit trust, (4) foundation or (5) contractual fund. However, the most common legal vehicle used to establish funds, both retail and professional, is the SICAV.

**SICAV**

The absolute majority of CISs in Malta are established as SICAVs (ie, an investment company with variable share capital). The rules relating to the manner in which a SICAV’s share capital is calculated, the possibility of establishing it as a multi-fund or multi-class structure, in addition to the legal ring-fencing of assets between share classes makes it one of the most flexible legal vehicles available.

A SICAV is constituted through the registration of its memorandum and articles of association with the Malta Business Registry, together with the submission of supporting documentation.

**Laws and regulations**

**13 | What are the key laws and other sets of rules that govern retail funds?**

The key laws and regulations regulating retail funds are the following:

- Companies Act and subsidiary legislation;
- ISA and subsidiary legislation;
- UCITS V Directive as transposed into local laws and regulations;
- AIFM Directive and Regulation, as transposed into local laws and regulations;
- Rules for Retail Collective Investment Schemes issued by the MFSA, including:
  - Part A: Application Process for Retail Collective Investment Schemes;
  - Part BI: Standard Licence Conditions applicable to Malta based Retail Non-UCITS Collective Investment Schemes; and
  - Part BII: Standard Licence Conditions applicable to Malta based Retail UCITS Collective Investment Schemes.
- Rules for Alternative Investment Funds issued by the MFSA. This provides the regulatory framework for retail AIFs, including:
  - Part A: Application Process for Alternative Investment Funds; and
  - Part B: Standard Licence Conditions applicable to Alternative Investment Funds.
- The Listing Rules (Admissibility requirements for Collective Investment Schemes), these are issued by the MFSA and are applicable to collective investment schemes listed on the Malta Stock Exchange.

**Authorisation**

**14 | Must retail funds be authorised or licensed to be established or marketed in your jurisdiction?**

The ISA provides the statutory basis for the licensing and regulation of funds. It establishes that any collective investment scheme that:

- issues or creates units or carries on any activity in or from Malta; or
- is formed in accordance with or exists under the laws of Malta, which issues or creates any units or carries on any activity in or from within a country, territory or other place outside Malta, must first be licensed by the MFSA.

Thus, the licensing requirement applies both to funds established and marketed in Malta, funds established in Malta but marketed outside Malta, as well as funds established outside of Malta but marketed in Malta.

Foreign funds that do not benefit from EU passporting rights are required to hold a collective investment scheme licence in Malta prior to marketing their units in Malta, whether directly or indirectly through intermediaries.

**Marketing**

**15 | Who can market retail funds? To whom can they be marketed?**

The Maltese regulatory regime establishes two main categories of retail collective investment schemes, namely:

- UCITS; and
- non-UCITS retail funds, being any fund that is not a UCITS, and that targets retail investors.

Retail funds marketed to retail investors target investors who do not qualify as professional investors as defined in MIFID. Reference should be made to fund’s offering documents in this regard. Both open-ended retail funds and closed-ended retail funds can market their units to the general public in Malta, subject to any applicable provisions of the Prospectus Regulation in respect of the offer of units issued by closed-ended funds.

Open-ended and closed-ended retail funds can be marketed by the fund itself or by its fund manager.

**Managers and operators**

**16 | Are there any special requirements that apply to managers or operators of retail funds?**

The requirements that apply to managers or operators of retail funds stem from the ISA, the subsidiary legislation issued thereunder and the relevant MFSA Rulebooks. A retail fund can be externally managed or can be authorised as a self-managed fund (provided it adopts a corporate structure). A third-party manager can qualify as a de minimis fund manager, an AIFM or a UCITS ManCo. If the fund manager is established outside Malta, before it is able to manage funds established in Malta, it must determine whether it is exempt from licensing in Malta or whether it can avail itself of European passporting rights.

**Investment and borrowing restrictions**

**17 | What are the investment and borrowing restrictions on retail funds?**

The table below highlights, in general terms, the investment and borrowing restrictions applicable to retail funds.

Fund	Investment restriction
UCITS	<ul style="list-style-type: none"> <li>• Cannot invest more than 10 per cent of their assets in transferable securities (TS) and money market instruments (MMI) other than those admitted to a stock exchange or that are dealt in on a regulated market.</li> <li>• Cannot invest more than 5 per cent of their assets in TS or MMI issued by the same body. The 5 per cent limit can be raised to a maximum of 10 per cent of the fund’s assets if the total value of securities held in bodies in which it invests more than 5 per cent is less than 40 per cent. This limit does not apply to deposits and over-the-counter derivative transactions made with financial institutions subject to prudential supervision.</li> <li>• Cannot invest more than 20 per cent of the fund’s assets with the same institution.</li> <li>• Cannot invest more than 20 per cent of their assets in units of other CISs.</li> <li>• 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 constitutional documents or prospectus, or both.</li> </ul>

Fund	Investment restriction
Non-UCITS Retail funds	<ul style="list-style-type: none"> <li>Cannot invest more than 10 per cent of their assets in securities that are not traded in or dealt on a market that the depositary and manager of the scheme have agreed between themselves as being appropriate for the fund, is listed in the prospectus of the fund, is regulated, operates regularly, is recognised and is open to the public, has adequate liquidity and adequate arrangements in respect of the transmission of income and capital and it is not the subject of an MFSA restriction.</li> <li>Cannot hold more than 10 per cent of any class of security issued by any single issuer.</li> <li>Cannot hold more than 10 per cent of its assets in securities issued by the same body.</li> <li>Can invest in nil paid or partly paid shares and subscribe for placing or underwriting provided the amount to be paid does not exceed 5 per cent of the value of the scheme.</li> <li>The CIS and its manager, considering all of the schemes that the latter manages, cannot acquire sufficient instruments to give it the right to exercise control over 20 per cent or more of the share capital or votes of a company or sufficient instruments to enable it to exercise significant influence over the management of the issuer.</li> <li>Cannot deposit more than 10 per cent of its assets with the same credit institution.</li> <li>Cannot invest more than 20 per cent of its assets with any one CIS.</li> <li>May only invest in FDI for efficient portfolio management purposes. Maximum exposure limits apply.</li> </ul>
Retail AIFS	<ul style="list-style-type: none"> <li>May not invest more than 10 per cent of their assets in securities that are not traded in or dealt on a market.</li> <li>Cannot invest more than 10 per cent of their assets in securities issued by the same body or hold more than 10 per cent of any class of security issue by any single issuer.</li> <li>No more than 10 per cent of the AIFs assets can be kept on deposit with any on body. However, this limit can be increased to 30 per cent 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.</li> <li>No more than 20 per cent of the AIF's assets can be invested in any one CIS.</li> <li>Can invest in nil paid or partly paid shares and subscribe for placing or underwriting provided the amount to be paid does not exceed 5 per cent of the value of the scheme.</li> <li>The CIS and its manager, considering all of the schemes that the latter manages, cannot acquire sufficient instruments to give it the right to exercise control over 20 per cent or more of the share capital or votes of a company, or sufficient instruments to enable it to exercise significant influence over the management of the issuer.</li> <li>May only invest in FDI for efficient portfolio management purposes. Maximum exposure limits apply.</li> </ul>

Fund	Borrowing restrictions
UCITS	<ul style="list-style-type: none"> <li>When structured as an investment company it cannot borrow funds. However, it can acquire foreign currency by means of a 'back-to-back' loan. By way of derogation, the Malta Financial Services Authority provides that a UCITS fund can borrow if the borrowing is either: (1) on a temporary basis and represents, no more than 10 per cent of its assets (for an investment company) or no more than 10 per cent of the value of the fund (for a common fund) or (2) to enable the acquisition of immovable property that is essential for the direct pursuit of its business and represents, in the case of an investment company, no more than 10 per cent of its assets.</li> </ul> <p>In such cases, the fund cannot borrow cannot more than 15 per cent of its total asset value.</p>

Fund	Borrowing restrictions
Non-UCITS retail funds	<ul style="list-style-type: none"> <li>It can only borrow up to a maximum of 10 per cent of: (1) its assets, when set up as an investment company or limited partnership; (2) the value of the fund, when set up as a unit trust or a common contractual fund</li> <li>the borrowing can only be made on a temporary basis and the scheme's overall risk exposure must not exceed 110 per cent of its assets under any circumstances.</li> </ul>

Retail - AIFS Vide Non-UCITS retail funds restrictions.

**Tax treatment**

**18 | What is the tax treatment of retail funds? Are exemptions available?**

Maltese tax legislation does not distinguish between retail and professional investment funds. The key distinction which determines the Maltese tax treatment of a fund is whether the collective investment scheme is classified as a 'prescribed' or 'non-prescribed' fund.

A fund (or a sub-fund if the scheme is divided into sub-funds) is treated as a 'prescribed' fund if:

- It is a fund of a Collective Investment Scheme formed in accordance with the laws of Malta; and
- the value of its assets situated in Malta amounts to at least 85 per cent of the value of the total assets of the fund; and
- it has so declared in writing to the Commissioner for Revenue.

On the other hand, Maltese funds which do not have such an exposure to Maltese assets and have made a declaration to that effect are classified as non-prescribed funds.

A non-prescribed fund is exempt from Maltese income tax on any income and capital gains, other than income derived from immovable property situated in Malta. A prescribed fund is also exempt from tax in Malta except for income derived from immovable property situated in Malta, bank interest (which is subject to a 15 per cent withholding tax), and other types of investment income (which are subject to a withholding tax of 10 per cent).

Any income or capital gains derived by non-resident investors from a Maltese fund are not subject to any withholding tax so long as they are not owned and controlled by, directly or indirectly, nor act on behalf of, an individual who is ordinarily resident and domiciled in Malta.

Distributions made to recipients who are resident individuals or persons owned and controlled by, directly or indirectly or acting on behalf of individuals ordinarily resident and domiciled in Malta out of untaxed profits are subject to a 15 per cent withholding tax.

**Asset protection**

**19 | Must the portfolio of assets of a retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?**

The custodian must be separate and independent from the fund manager and must act independently and solely in the interests of the unit holders. The custodian of a UCITS and a retail AIF fund must have an established place of business in Malta and be in possession of an investment services licence issued in its favour by the MFSA. Such local presence and authorisation requirements do not apply in the context of a PIF or a non-EU AIF managed by a Maltese AIFM.

The following regulations apply to the protection/safekeeping of the funds' portfolio assets:

- Investment Services Act (Custodians of Collective Investment Schemes) Regulations (Subsidiary Legislation 370.32, Laws of Malta); and

- The MFSA's standard licence conditions applicable to investment services licence Holders that Qualify as Custodians.

## Governance

### 20 | What are the main governance requirements for a retail fund formed in your jurisdiction?

Retail funds established in Malta are subject to various governance requirements that are conventional in the context of the regulated investment funds industry. The below is a non-exhaustive summary of the general governance requirements common to all retail funds.

#### Registration and authorisation

Retail funds operating from Malta are typically established as SICAVs. Their registration in Malta requires the filing of the memorandum and articles of association with the Malta Business Registry, together with supporting documentation as required in terms of the Companies Act.

Furthermore, all funds would only be able to operate from Malta if these are in possession of a licence issued by the MFSA in terms of the ISA.

#### Corporate governance

A retail fund established in Malta is required to implement a robust corporate governance structure. The governing body is legally bound to promote the best interest of the fund and its investors and is responsible for the good governance of the fund, its proper administration and management, as well as for the general supervision of its affairs.

In practical terms, the MFSA typically requires that the board of directors of funds be composed of at least three individuals having the skills required to be able to direct and monitor the operations of the fund. In particular, at least one of the directors, must be independent of the service providers to the fund, including the management function. The board of directors is expected to appoint service providers to the fund having the knowledge, skill and competence required to be able to provide the services to the fund that they are engaged to perform.

#### Officers and service providers

CISs are also required to appoint a secretary to the governing body (to the extent that the legal structure of the fund necessitates the secretary's appointment), a compliance officer and a money laundering reporting officer. While the Compliance Officer is responsible for assisting the fund in complying with any conditions attached to its CIS licence, and the relevant rules and regulations, the Money Laundering Reporting Officer assists the fund in complying with its anti-money laundering and terrorist financing (AML-CFT) obligations as a 'subject person' under the applicable AML-CFT laws.

As noted above, depending on the nature of the CIS in question, a CIS may, and, in certain cases is required to, appoint a number of service providers, including an investment manager, investment advisor, fund administrator, registrar and transfer agent, and a custodian or prime broker, as applicable.

#### Record-keeping

Retail funds established in Malta are subject to numerous record-keeping obligations that stem from distinct pieces of local legislation and regulation.

## Reporting

### 21 | What are the periodic reporting requirements for retail funds?

The table below sets out the list of external reports that retail funds are expected to prepare.

External reporting	
Reporting requirement	Reportable to
Annual Return	Malta Business Registry (MBR)
Beneficial Ownership Information	MBR
Audited Financial Statements	MBR, MFSA & Tax Authorities
Annual Fund Return	MFSA
Central Bank of Malta Returns	MFSA
Income Tax Return	Tax Authorities
Value Added Tax Return	Tax Authorities
AML/CFT Risk Evaluation Questionnaire	Financial Intelligence Analysis Unit (FIAU)

Provided that UCITS are also required to publish half-yearly reports.

## Issue, transfer and redemption of interests

### 22 | Can the manager or operator place any restrictions on the issue, transfer and redemption of interests in retail funds?

In the case of UCITS, any restrictions on the issue, transfer or redemption of interests must be disclosed in the scheme's prospectus. If set up as an investment company and if provided for in their constitutional documents, UCITS funds can temporarily suspend the repurchase or redemption of units provided the suspension is exceptional, justified and in the interests of the investors.

In the case of retail AIFs, any restrictions on the issue, transfer and redemption of interests must be in line with the provisions of the fund's prospectus. AIF managers of open-ended retail AIFs can also place restrictions on the redemption of interests to manage liquidity risk. AIF managers can employ tools such as gates, partial redemptions, notice periods provided they are disclosed to investors before they invest and periodically if there are any material changes to them.

## NON-RETAIL POOLED FUNDS

### Available vehicles

### 23 | What are the main legal vehicles used to set up a non-retail fund? How are they formed?

Non-retail funds may be established as companies, limited partnerships, unit trusts, foundations or mere contractual arrangements. Nevertheless, the SICAV remains the main vehicle used to establish a non-retail fund.

### Laws and regulations

### 24 | What are the key laws and other sets of rules that govern non-retail funds?

The Investment Services Act (ISA) is the cornerstone of fund regulation in Malta. The legislator in Malta has also published various subsidiary legislation under the ISA relevant to the regulation of non-retail collective investment schemes (CISs) in Malta. Each non-retail fund that may be set up in Malta is also governed by a dedicated set of rules published by the Malta Financial Services Authority (MFSA) (MFSA Rulebooks). The MFSA Rulebooks are, in turn, supplemented by additional guidance, circulars and other material published by the MFSA from time to time.

A CIS that is available for distribution to professional clients in terms of MiFID ('professional clients') may be authorised as (1) a professional *investor fund (PIF)*, being a non-EU harmonised CIS that may be established in Malta, or (2) an AIF (as defined under AIFMD). Each of these non-retail funds may be externally managed or self-managed. Additionally, EU AIFMs have a third option, the notified alternative investment fund (NAIF), which is an AIF that is not authorised by the MFSA, but whose existence must merely be notified by the AIFM to the MFSA. It therefore follows that a NAIF must be externally managed by an AIFM.

**Authorisation**

**25 | Must non-retail funds be authorised or licensed to be established or marketed in your jurisdiction?**

Under the ISA, a CIS is prohibited from:

- issuing or creating any units, or carrying on any activity in or from Malta; or
- issuing or creating any units or carrying on any activity in or from within a country, territory or other place outside Malta, while being formed in accordance with, or existing under the laws of Malta, without a valid CIS licence.

Accordingly, any CIS, wherever established, which intends to market (including through intermediaries) its units or shares in Malta shall, unless specifically exempted, be entitled to exercise EU passporting rights, or without prejudice to the provisions of the ensuing paragraph, requires authorisation.

While the above prohibition applies without limitation in respect of PIFs and AIFs, it is not relevant in the context of NAIFs. As noted above, and, in terms of the ISA (List of NAIFs) Regulations (Subsidiary Legislation 370.34, Laws of Malta) (NAIF Regulations), NAIFs are subject to a notification, as opposed to a fully fledged authorisation, process with the MFSA. Indeed, the NAIF Regulations specify that the inclusion of a NAIF in the List of NAIFs maintained by the MFSA pursuant to the NAIF Regulations does not imply that the NAIF is in possession of a licence granted in terms of the ISA.

**Marketing**

**26 | Who can market non-retail funds? To whom can they be marketed?**

The Maltese regime that regulates the marketing of units or shares in a CIS (including the MFSA's guidance on what constitutes marketing) differs according to whether the CIS qualifies as an AIF or UCITS.

The following table summarises the non-retail fund marketing options presently available in Malta, including by, and to, whom each of such funds may be marketed or subscribed by.

CIS type	Eligible to market	Eligible investors
AIF	<ul style="list-style-type: none"> <li>• AIF (if self-managed)</li> <li>• AIFM (if appointed)</li> <li>• Intermediary(ies) (if appointed)</li> </ul>	<ul style="list-style-type: none"> <li>• Professional clients</li> <li>• Qualifying investors*</li> </ul>
NAIF	<ul style="list-style-type: none"> <li>• AIFM</li> <li>• Intermediary(ies) (if appointed)</li> </ul>	<ul style="list-style-type: none"> <li>• Professional clients</li> <li>• Qualifying investors</li> </ul>
PIF	<ul style="list-style-type: none"> <li>• PIF (if self-managed)</li> <li>• Investment manager (if appointed)</li> <li>• Intermediary(ies) (if appointed)</li> </ul>	<ul style="list-style-type: none"> <li>• Qualifying investors</li> </ul>

The CISs referred to above may be marketed subject to, and in accordance with, applicable laws and regulation. Even though intermediaries may be appointed to undertake marketing, responsibility for same is vested in the manager, which then delegates this to intermediaries.

\* Non-retail funds may only be subscribed to by professional clients (as defined under MiFID) or qualifying investors (as such term is defined under the relevant MFSA Rulebooks).

**Ownership restrictions**

**27 | Do investor-protection rules restrict ownership in non-retail funds to certain classes of investor?**

Non-retail funds may only be subscribed to by professional clients (as defined under MiFID) or qualifying investors (as such term is defined under the relevant MFSA Rulebooks).

**Managers and operators**

**28 | Are there any special requirements that apply to managers or operators of non-retail funds?**

The requirements that apply to managers or operators of non-retail funds stem from the ISA, the subsidiary legislation issued thereunder and the relevant MFSA Rulebooks. While the local regime regulating the management and operation of AIFs largely mirrors the AIFMD framework, the NAIF regime imposes 'special' requirements on the AIFM of the NAIF. Such requirements feature in the NAIF Regulations and section 11 of Part BIII of the MFSA's Investment Services Rules for Investment Services Providers. No special or additional requirements apply to managers or operators of PIFs; rather, considering that the PIF is a local, non-EU harmonised product, the legal and regulatory framework applicable to managers or operators of PIFs is generally more flexible.

**Tax treatment**

**29 | What is the tax treatment of non-retail funds? Are any exemptions available?**

Maltese tax legislation does not distinguish between retail and professional investment funds. The key distinction which determines the Maltese tax treatment of a fund is whether the collective investment scheme is classified as a 'prescribed' or 'non-prescribed' fund.

A fund (or a sub-fund if the scheme is divided into sub-funds) is treated as a prescribed fund if:

- it is a fund of a Collective Investment Scheme formed in accordance with the laws of Malta;
- the value of its assets situated in Malta amounts to at least 85 per cent of the value of the total assets of the fund; and
- it has so declared in writing to the Commissioner for Revenue.

On the other hand, Maltese funds which do not have such an exposure to Maltese assets and have made a declaration to that effect are classified as non-prescribed funds.

A non-prescribed fund is exempt from Maltese income tax on any income and capital gains, other than income derived from immovable property situated in Malta. A prescribed fund is also exempt from tax in Malta except for income derived from immovable property situated in Malta, bank interest (which is subject to a 15 per cent withholding tax), and other types of investment income (which are subject to a withholding tax of 10 per cent).

Any income or capital gains derived by non-resident investors from a Maltese fund are not subject to any withholding tax so long as they are not owned and controlled by, directly or indirectly, nor act on behalf of, an individual who is ordinarily resident and domiciled in Malta.

Distributions made to recipients who are resident individuals or persons owned and controlled by, directly or indirectly or acting on behalf of individuals ordinarily resident and domiciled in Malta out of untaxed profits are subject to a 15 per cent withholding tax.

## Asset protection

30 | Must the portfolio of assets of a non-retail fund be held by a separate local custodian? What regulations are in place to protect the fund's assets?

AIFs and NAIFs established in Malta are required to entrust the safe-keeping of their assets to a custodian, which must, inter alia, have an established place of business in Malta and be in possession of an investment services licence issued in its favour by the MFSA. Such local presence and authorisation requirements do not apply in the context of a non-EU AIF managed by a Maltese AIFM, in which case the custodian may be established in Malta or in the third country where the non-EU AIF is established. While PIFs are also subject to asset protection rules, the nature and extent of such rules differ from those applicable to AIFs and NAIFs.

The primary sources of local legislation and regulation in this regard are the ISA (Custodians of CISs) Regulations (Subsidiary Legislation 370.32, Laws of Malta) and Part BIV of the MFSA's Investment Services Rules for Investment Services Providers.

## Governance

31 | What are the main governance requirements for a non-retail fund formed in your jurisdiction?

The general governance requirements common to non-retail funds, inter alia, include the following.

### Registration and authorisation

This includes the filing of the memorandum and articles of association with the Malta Business Registry, together with supporting documentation as required in terms of the Companies Act. For a fund to operate in Malta it must be in possession of a licence issued by the MFSA in terms of the ISA.

### Corporate governance

A non-retail fund established in Malta is required to implement a robust corporate governance structure. The governing body is legally bound to promote the best interest of the fund and its investors and is responsible for the good governance of the fund, its proper administration and management, as well as for the general supervision of its affairs.

### Officers and service providers

Officers and service providers include the appointment of a company secretary, a compliance officer and a money laundering reporting officer. Depending on the nature of the fund in question, a CIS may, and, in certain cases is required to, appoint a number of service providers, including an investment manager, investment adviser, fund administrator, registrar and transfer agent, and a custodian or prime broker, as applicable.

### Record-keeping

Non-retail funds established in Malta are subject to numerous record-keeping obligations that stem from distinct pieces of local legislation and regulation.

### Reporting

32 | What are the periodic reporting requirements for non-retail funds?

Non-retails funds established in Malta are subject to various external reporting requirements. The below is a non-exhaustive summary of the main reporting requirements applicable to non-retail funds in Malta.

External reporting	
Reporting requirement	Reportable to
Annual Return	Malta Business Registry (MBR)
Beneficial Ownership Information	MBR
Audited Financial Statements	MBR, MFSA and Tax Authorities
Annual Fund Return	MFSA
Central Bank of Malta Returns	MFSA
Income Tax Return	Tax Authorities
Value Added Tax Return	Tax Authorities
AML/CFT Risk Evaluation Questionnaire	FIAU

The service providers of non-retail funds established in Malta are also subject to separate periodic reporting requirements, including, without limitation, in terms of the AIFMD.

## SEPARATELY MANAGED ACCOUNTS

### Structure

33 | How are separately managed accounts typically structured in your jurisdiction?

In a managed account relationship, the client appoints a licensed portfolio management company for the purpose of holding the client's assets in a designated segregated management account, which is subject to discretionary portfolio management. Thus, the portfolio management company is granted discretionary to acquire and dispose of assets in the account subject to, and in accordance with, applicable laws and regulation.

### Key legal issues

34 | What are the key legal issues to be determined when structuring a separately managed account?

of the managed account, client classification, assets' valuation policy, transparency and record-keeping requirements, fee structure (including the regulation of inducements), confidentiality, data protection, liability, investor compensation scheme coverage and complaints handling policies and procedures, are among the key legal and regulatory considerations to be analysed when structuring a separately managed account. Such matters are generally formalised and documented in the form of a written agreement that is entered into by and between the portfolio manager and the client for such purpose.

### Regulation

35 | Is the management or marketing of separately managed accounts regulated in your jurisdiction?

The provision of portfolio management services is regulated in terms of the Investment Services Act (ISA), the subsidiary legislation issued thereunder and the relevant Malta Financial Services Authority (MFSA) Rulebooks. Indeed, subject to certain exemptions provided for under the ISA (Exemption) Regulations (Subsidiary Legislation 370.02, Laws of Malta), no natural or legal person may provide, or hold himself or itself out as providing, the investment service of management of investments in respect of the financial instruments listed in the Second Schedule to the ISA, in or from within Malta, unless in possession of a valid investment services licence.

While local discretionary portfolio managers and investment managers of AIFs, NAIFs and PIFs are required, subject to the applicability of any exemption, to obtain the same category of investment services licence from the MFSA to provide the desired management

services (namely, a category 2 investment services licence), the legal and regulatory framework applicable to each would be dependent on the nature and extent of investment services in respect of which authorisation is sought.

## GENERAL

### Proposed reforms

36 | Are there proposals for further regulation of funds, fund managers or marketers of funds in your jurisdiction?

Malta is currently in the process of implementing legislative and regulatory enhancements impacting the local financial services sector; while a number of such changes are directly targeted at the asset management industry, others affect the industry indirectly. In its 'Strategic Update' issued in April 2021, the Malta Financial Services Authority (MFSA) informed the industry that the asset management sector is a key strategic priority for the MFSA, and that the MFSA shall be engaging with the industry in the near future to elicit feedback on identified proposals for both asset managers and fund structures, in order to enable further sustainable growth in the sector. Similarly, anti-money laundering and counter-terrorist financing are, and shall remain, overarching, cross-sectoral supervisory priorities for the MFSA and the Financial Intelligence Analysis Unit in the months and years ahead.

### Public listing

37 | Outline any specific requirements for stock-exchange listing of retail and non-retail funds.

In addition to abiding by the legal and regulatory framework applicable to the particular collective investment scheme (CIS) as referenced above, retail and non-retail funds that intend to admit their securities to trading or listing on a regulated market would be required to comply with any additional requirements imposed by the relevant regulated market. By way of example, a CIS that intends to list its securities on the Malta Stock Exchange (would also be required to comply with the dedicated chapter of the Listing Rules applicable to CISs issued by the MFSA as listing authority under the Financial Markets Act (Chapter 345, Laws of Malta).

### Overseas vehicles

38 | Is it possible to redomicile an overseas vehicle in your jurisdiction?

Yes; the Investment Services Act and the Continuation of Companies Regulations (Subsidiary Legislation 386.05, Laws of Malta) permit the migration or re-domiciliation of funds in the form of a body corporate into and out of Malta.

### Foreign investment

39 | Are there any special rules relating to the ability of foreign investors to invest in funds established or managed in your jurisdiction or domestic investors to invest in funds established or managed abroad?

Other than the applicable marketing restrictions, there are no special statutory restrictions in this regard. That said, the ability of foreign investors to invest in domestic funds may be limited by the applicable fund regulations.

## Funds investing in derivatives

40 | Are there any special requirements in your jurisdiction relating to funds investing in derivatives?

Answer pending.

## UPDATE AND TRENDS

### Recent developments

41 | Are there any other current developments or emerging trends in your jurisdiction that should be noted? Please include reference to world-wide regulatory concerns, such as restrictions on foreign ownership in strategic industries, high-frequency trading, commodity position limits, capital adequacy for investment firms and 'shadow banking'.

No updates at this time.

### Coronavirus

42 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

States and regulators across the globe were and remain sensitive to the difficulties faced by the industry and continue to play a crucial role in safeguarding investor protection, financial stability and market integrity. The Malta Financial Services Authority (MFSA) is continuously engaging with the industry and is closely monitoring the impact of the outbreak of covid-19 on the local regulated market. The below is a list of the MFSA's main communications (including best practices) addressed to consumers and firms operating in the asset management industry, for such purpose:

- Press Release on the MFSA's expectations of licensed firms to have in place covid-19 contingency and business continuity plans;
- Circular on timing of regulatory reporting due to the outbreak of the pandemic;
- Circular regarding interim measures for the processing of physical documentation;
- Circular addressed to consumers with important information relating to covid-19; and
- Circular addressed to consumers on the heightened importance of cybersecurity and information technology risk management.

The MFSA continues to monitor developments in the local regulated market as a result of the covid-19 situation and is committed to using its powers to ensure the orderly functioning of markets, financial stability and investor protection.

## Other titles available in this series

Acquisition Finance	Distribution & Agency	Investment Treaty Arbitration	Public M&A
Advertising & Marketing	Domains & Domain Names	Islamic Finance & Markets	Public Procurement
Agribusiness	Dominance	Joint Ventures	Public-Private Partnerships
Air Transport	Drone Regulation	Labour & Employment	Rail Transport
Anti-Corruption Regulation	e-Commerce	Legal Privilege & Professional Secrecy	Real Estate
Anti-Money Laundering	Electricity Regulation	Licensing	Real Estate M&A
Appeals	Energy Disputes	Life Sciences	Renewable Energy
Arbitration	Enforcement of Foreign Judgments	Litigation Funding	Restructuring & Insolvency
Art Law	Environment & Climate Regulation	Loans & Secured Financing	Right of Publicity
Asset Recovery	Equity Derivatives	Luxury & Fashion	Risk & Compliance Management
Automotive	Executive Compensation & Employee Benefits	M&A Litigation	Securities Finance
Aviation Finance & Leasing	Financial Services Compliance	Mediation	Securities Litigation
Aviation Liability	Financial Services Litigation	Merger Control	Shareholder Activism & Engagement
Banking Regulation	Fintech	Mining	Ship Finance
Business & Human Rights	Foreign Investment Review	Oil Regulation	Shipbuilding
Cartel Regulation	Franchise	Partnerships	Shipping
Class Actions	Fund Management	Patents	Sovereign Immunity
Cloud Computing	Gaming	Pensions & Retirement Plans	Sports Law
Commercial Contracts	Gas Regulation	Pharma & Medical Device Regulation	State Aid
Competition Compliance	Government Investigations	Pharmaceutical Antitrust	Structured Finance & Securitisation
Complex Commercial Litigation	Government Relations	Ports & Terminals	Tax Controversy
Construction	Healthcare Enforcement & Litigation	Private Antitrust Litigation	Tax on Inbound Investment
Copyright	Healthcare M&A	Private Banking & Wealth Management	Technology M&A
Corporate Governance	High-Yield Debt	Private Client	Telecoms & Media
Corporate Immigration	Initial Public Offerings	Private Equity	Trade & Customs
Corporate Reorganisations	Insurance & Reinsurance	Private M&A	Trademarks
Cybersecurity	Insurance Litigation	Product Liability	Transfer Pricing
Data Protection & Privacy	Intellectual Property & Antitrust	Product Recall	Vertical Agreements
Debt Capital Markets		Project Finance	
Defence & Security			
Procurement			
Dispute Resolution			

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)