

FUND MANAGEMENT

Malta



Fund Management

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Quick reference guide enabling side-by-side comparison of local insights into fund management issues, including regulatory framework and authorities; regulation of fund administration; fund authorisation and licensing; territorial scope of regulations; acquiring a stake in a fund manager; restrictions on compensation and profit sharing; fund marketing, including rules on commission payments; legal vehicles available for retail funds and non-retail pooled funds; investment, borrowing ownership, management and operating restrictions; tax, asset protection, governance, reporting, issue, transfer and redemption issues; separately managed accounts; re-domiciliation of funds; listing funds; foreign investor participation rules; funds investing in derivatives; hot topics, such as treatment of strategic industries, high-frequency trading, commodity position limits, capital adequacy for investment firms and 'shadow banking'; and other recent trends.

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FUND MANAGEMENT REGULATION

Regulatory framework and authorities

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.

Law stated - 06 May 2022

Fund administration

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.

Law stated - 06 May 2022

Authorisation

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 four phases:

- the intention stage;
- the pre-authorisation stage;
- the authorisation stage; and
- the post authorisation stage.

During the intention stage a prospective applicant intending to apply for authorisation in terms of the Investment Services Act shall initially submit a submission of intent in the form of a high-level presentation to the MFSA. Upon receipt, the MFSA may request additional information and documentation from the applicant or a preliminary meeting. Upon conclusion of its review, the MFSA shall determine whether the applicant can proceed with the submission of the full application for licensing.

During the pre-authorisation stage the applicant should submit the application pack through the LH portal. The MFSA will review the completeness of the application and provide their initial feedback. The applicant must then revert to the MFSA's communication and once satisfied the MFSA will conduct an in-depth review of the application and revert with clarifications.

During the authorisation stage the MFSA will inform the applicant whether it will grant or refuse the application. The MFSA may request further clarifications from the applicant if requested by the regulatory committee. If the MFSA grants authorisation to the applicant, it will issue an in-principle approval. Once the pre-authorisation requirements are satisfied, a licence is granted by the MFSA. At this stage post authorisation requirements will be specified.

An authorisation made by the MFSA may be subject to certain post authorisation requirements.

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.

Law stated - 06 May 2022

Territorial scope of regulation

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.

Law stated - 06 May 2022

Acquisitions

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.'

Law stated - 06 May 2022

Restrictions on compensation and profit sharing

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.

Law stated - 06 May 2022

FUND MARKETING

Authorisation

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.

Law stated - 06 May 2022

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.

Law stated - 06 May 2022

Territorial scope and restrictions

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.

Law stated - 06 May 2022

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

Not applicable.

Law stated - 06 May 2022

Commission payments

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.

Law stated - 06 May 2022

RETAIL FUNDS

Available vehicles

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 INVCO or a SICAV (investment company with variable share 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. 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.

Law stated - 06 May 2022

Laws and regulations

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 B: 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.

Law stated - 06 May 2022

Authorisation

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 does the following 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.

Law stated - 06 May 2022

Marketing

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:

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.

Law stated - 06 May 2022

Managers and operators

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.

Law stated - 06 May 2022

Investment and borrowing restrictions

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"> • 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. • 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. • Cannot invest more than 20 per cent of the fund's assets with the same institution. • Cannot invest more than 20 per cent of their assets in units of other CISs. • 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.
Non-UCITS Retail funds	<ul style="list-style-type: none"> • 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. • Cannot hold more than 10 per cent of any class of security issued by any single issuer. • Cannot hold more than 10 per cent of its assets in securities issued by the same body. • 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. • 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. • Cannot deposit more than 10 per cent of its assets with the same credit institution. • Cannot invest more than 20 per cent of its assets with any one CIS. • May only invest in FDI for efficient portfolio management purposes. Maximum exposure limits apply.

Retail AIFS	<ul style="list-style-type: none"> • May not invest more than 10 per cent of their assets in securities that are not traded in or dealt on a market. • 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. • 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. • No more than 20 per cent of the AIF's assets can be invested in any one CIS. • 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. • 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. • May only invest in FDI for efficient portfolio management purposes. Maximum exposure limits apply.
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Fund	Borrowing restrictions
UCITS	<ul style="list-style-type: none"> • 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. <p>In such cases, the fund cannot borrow cannot more than 15 per cent of its total asset value.</p>
Non-UCITS retail funds	<ul style="list-style-type: none"> • 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 • 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.
Retail - AIFS	Vide Non-UCITS retail funds restrictions.

Law stated - 06 May 2022

Tax treatment

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 that 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.

Law stated - 06 May 2022

Asset protection

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.

Law stated - 06 May 2022

Governance

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.

Law stated - 06 May 2022

Reporting

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.

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

Law stated - 06 May 2022

Issue, transfer and redemption of interests

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.

Law stated - 06 May 2022

NON-RETAIL POOLED FUNDS

Available vehicles

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 investment company with variable share capital (SICAV) remains the main vehicle used to establish a non-retail fund.

Law stated - 06 May 2022

Laws and regulations

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.

Law stated - 06 May 2022

Authorisation

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

Under the ISA, a CIS is prohibited from the following without a valid CIS licence:

- 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.

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

Law stated - 06 May 2022

Marketing

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

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.

Law stated - 06 May 2022

Ownership restrictions

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).

Law stated - 06 May 2022

Managers and operators

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 Part B of the MFSA's Investment Services Rules for NAIFs. 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**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 that 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.

Law stated - 06 May 2022

Asset protection**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 safekeeping 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

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 (MBR), together with supporting documentation as required in terms of the Companies Act. The information provided to the MBR upon incorporation is to be kept updated, in the event of any changes to the corporate structure or the constitutional documents. For a fund to operate in Malta it must have 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.

Law stated - 06 May 2022

Reporting

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.

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.

Law stated - 06 May 2022

SEPARATELY MANAGED ACCOUNTS

Structure

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 discretion to acquire and dispose of assets in the account subject to, and in accordance with, applicable laws and regulation.

Law stated - 06 May 2022

Key legal issues

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

The functions, powers and duties of the portfolio manager and the client, establishment and operation 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.

Law stated - 06 May 2022

Regulation

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 ISA, the subsidiary legislation issued thereunder and the relevant 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, 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.

Law stated - 06 May 2022

GENERAL

Proposed reforms

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.

Building on its commitment of April 2021 to treat the asset management sector as a key strategic priority, in October 2021 the Malta Financial Services Authority (MFSA) published a discussion paper on the local asset management industry, entitled 'Strengthening Malta's Position as an Asset Management Jurisdiction' (Discussion Paper). Through the Discussion Paper, the MFSA provided the industry with visibility of the MFSA's current initiatives and proposals linked to the asset management industry, and also invited stakeholders to submit feedback on the Discussion Paper. Now that the consultation period has closed, the MFSA is expected to release a feedback statement, which will bring together the main considerations put forward by the industry on the Discussion Paper, the MFSA's comments on the same, and detailed proposals on the implementation of key initiatives and themes aimed at further strengthening the local asset management industry.

Also, 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.

Law stated - 06 May 2022

Public listing

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) .

Law stated - 06 May 2022

Overseas vehicles

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.

Law stated - 06 May 2022

Foreign investment

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.

Law stated - 06 May 2022

Funds investing in derivatives

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

None other than those in respect of retail investment funds.

Law stated - 06 May 2022

UPDATE AND TRENDS

Recent developments

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.

Law stated - 06 May 2022

Jurisdictions

	Cayman Islands	Loeb Smith Attorneys
	Germany	POELLATH
	Greece	Souriadakis Tsibris
	Ireland	Dillon Eustace LLP
	Italy	Legance - Avvocati Associati
	Japan	TMI Associates
	Luxembourg	Loyens & Loeff
	Malta	Ganado Advocates
	Monaco	Gordon S. Blair Law Offices
	Portugal	VdA
	Spain	Alter Legal
	Sweden	Vinge
	Switzerland	Walder Wyss Ltd
	Taiwan	LCS & Partners
	United Kingdom	Morgan, Lewis & Bockius LLP
	USA	Morgan, Lewis & Bockius LLP