Maltese funds as family office structures

Dr Andre Zerafa, of GANADO Advocates, analyses the potential for using Maltese funds as family office structures

The Maltese regulatory framework provides a number of different fund structures starting from the Ucits fund, typically used for retail investors, the notified alternative investment fund (Naif), which is flexible enough to accommodate nearly all types of investment strategies, and the professional investor fund (Pif), which is a home-grown fund structure, not harmonised at EU level, hence not subject to the alternative investment fund managers directive. Nevertheless, a Pif is still subject to licensing by the Malta Financial Services Authority (MFSA) which would approve the Pif's offering documentation as well as its promoters and service providers, unless these are already regulated in their respective jurisdictions.

Dr Andre Zerafa
GANADO Advocates

Dr Andre Zerafa heads GANADO Advocates' investment services and funds team and is also responsible for the firm's capital markets initiatives. Zerafa regularly advises promoters on various corporate, regulatory and other legal issues involved in the setting up of asset management firms, administrators, custodians, prime brokers and securitisation vehicles.

The MFSA's prudential supervision of the Pif is seen as a marked advantage when compared to certain other fund structures as this ensures an additional layer of scrutiny in a context where the Pif is not subject to detailed rules arising from EU directives or regulations, but is rather subject to a set of rules which has been introduced by the Maltese authorities at their own initiative which is, by definition, flexible yet robust. In any case, the Pif would also need to have its in-house compliance officer and money laundering reporting officer, albeit these two roles can be fulfilled by the same person so long as such person resides in Malta and is a director of the Pif.

Of all these fund structures, the Maltese Pif has proven to be the preferred solution particularly when one considers the cost of setting up a regulated fund in an EU member state and the ongoing expenses involved in maintaining such a fund and pay its service providers, as well as the (more flexible) extent of regulatory requirements. Pifs can be used for any kind of investment strategy, be it long only, hedge, private equity, real estate, crypto assets or a mix of all these.

Pif benefits

Principally, the Pif is not required to appoint a depositary. In fact, most Pifs domiciled in Malta would appoint an executing broker for that portion of their patrimony which is invested in financial instruments. The broker would retain custody of such investments; however it would not have any monitoring function nor any of the other functions which are normally imposed on a depositary of a Ucits fund or of a Naif. More importantly, the executing broker or any other entity retaining the custody of the fund's assets would not be required to be domiciled in Malta so long as such an entity is regulated in its domicile. The limited role of the custodian necessarily reduces the custody expense as the function of the custodian is limited to safekeeping of the assets with no further liability.

On the other hand, the Pif can have alternative custody arrangements in place for that portion of its patrimony which is invested in assets which do not lend themselves to a custody arrangement such as private equity, venture capital or real estate investments. In the latter cases, the documents evidencing the Pif's title and ownership of the respective assets would be retained at the Pif's registered office in Malta or at the offices of its administrator. In theory, a Pif can also be self-administered; however, this is rarely the case and Pif structures would typically appoint an external independent fund administrator to provide anti-money laundering support and compliance, payment services, transfer agency and accounting.

Secondly, the Pif can also be self-managed in that it would not require a third-party manager to manage its assets. Furthermore, a Pif can be self-managed in that it would appoint an investment committee to set its strategy and asset allocation but the investment committee would be permitted to delegate the portfolio management function to a firm authorised to provide the Mifid (markets in financial instruments directive) service of discretionary portfolio management on a client-by-client basis, what is sometimes loosely referred to as a 'managed account' arrangement. In such cases, the Pif would be required to fit below the de minimis thresholds arising from the AIFMD, otherwise it would be treated as a self-managed Aif; this would defeat the whole purpose of structuring the fund as a Pif. Where an investment committee is appointed, then the local rules of the MFSA would require that this investment committee meets and decides on the asset allocation in Malta so the Pif's mind and management would remain in the same domicile where it is licensed. If the Pif opts to delegate the management function to a third-party manager, then such third-party manager cannot be an AIFM authorised as such in an EU or EEA country, although it can be a non-EU or non-EEA fund manager.

> ***A family office can easily achieve the eligibility criteria to invest in a Pif which are fixed at a minimum investment of €100,000 and a net worth test which should exceed €750,000***

The family office

A family office can easily achieve the eligibility criteria to invest in a Pif which are fixed at a minimum investment of €100,000 and a net worth test which should exceed €750,000. An important consideration for a family office is also the tax status of the particular fund structure and, in this sense, the Pif also ticks all the right boxes as it is exempt from tax in Malta like any other Maltese domiciled fund vehicle on the basis that it is an investment vehicle whose main purpose is the aggregation of assets and structures in order to achieve economies of scale rather than as a tax structuring entity. The Pif would also be able to set up special purpose vehicles (SPVs) in order to hold certain types of assets. The domicile of the SPVs would depend on their tax treatment – we have seen several cases where it was found that domiciling the SPV in Malta would be more beneficial in view of Malta's extensive double tax treaty network.

Maltese corporate law can be adapted to any type of fund structure including a Pif so a Pif can either be incorporated as an open-ended variable share capital company (Sicav), as a limited partnership, or even as a contractual (non-corporate) fund. Each one of these structures has its particularities; however, generally speaking, a Sicav has all the characteristics of a limited liability company (whether public or private) while a Maltese partnership has separate legal personality and a general partner responsible for its general management and control with limited partners being the investors having their liability limited to the amount invested. On the other hand, a contractual fund does not have any legal personality and is constituted by contract initially entered into between a manager and a custodian with investors then joining as contractual parties.

One of the main advantages of the Pif structure is its long history as it has been present within the Maltese regulatory framework since the turn of the century. The Pif is by far the most common structure for club deals or small groups of investors or family offices where passporting under the AIFMD or the Ucits directive is not required, while still ensuring that the fund and its service providers are subject to regulatory scrutiny both at set up stage and also on an ongoing basis. Of course, family offices benefit from certain exemptions in terms of the AIFMD; however, such exemptions are viewed as either overly restrictive or else as negating any need for licensing or regulation which could both be extreme views. The Pif provides a comfortable compromise. HFM