

The Experienced Investor Fund regime in Gibraltar has proven to be an extremely versatile way of setting up a fund within the European Union.

Experienced Investors

In order to qualify for this regime, marketing must be restricted to investors who are deemed to be experienced under the Financial Services (Experienced Investor Funds) Regulations 2005 (the EIF Regulations). The EIF regulations define Experienced Investors as investors who have a net worth of €1m aside from their residential property, individual investors whose normal business activity includes investment related activity (i.e. investment professionals) or investors who invest a minimum of €100,000 in the fund. It is important to note that these definitions are individual and not cumulative so it is sufficient for an investor to invest €100,000 for it not to have to prove any of the other conditions. There is no minimum or maximum number of investors required for an EIF. Indeed, the Gibraltar Companies Act was amended to allow a fund to trade as a private company even with more than 50 shareholders.

Promoters

Unlike in other jurisdictions there is no requirement for the promoters of the fund to be licensed. It is sufficient for the fund administrator to perform the normal know your client and client acceptance procedures for them to be able to set-up a fund in Gibraltar. The reason for this is that each fund must have two directors who are authorised by the Financial Services Commission ("FSC") to act as EIF directors. The EIF directors' role is to ensure proper governance of the fund. Where the fund is a unit trust with a corporate trustee or where the fund is a limited partnership with a corporate general partner, two directors or the trustee or general partner, as the case may be, must be FSC authorised directors.

Management

Although many funds in Gibraltar do not have investment managers and are managed by their boards of directors, an EIF may choose to appoint an investment manager in Gibraltar or in any other jurisdiction. It is sufficient under Gibraltar law that that investment manager or adviser is licensed or entitled to give investment management/advice in its home jurisdiction. An investment manager or advisor license in Gibraltar is a full European Union license. This means that the license can be passported anywhere within the European Union. As such, the normal capital adequacy requirements that exist in other European jurisdictions also apply to the Gibraltar managers or advisors. A Gibraltar investment manager/advisor must have a physical presence and staff in Gibraltar.

Depositaries

An EIF that is open ended must have a depositary. The fund may also appoint brokers to assist with their trading activity. Neither the depositary nor the brokers need be in Gibraltar although in the case of Protected Cell Companies "PCCs" there may be some advantage to having these in Gibraltar, as there is more certainty that a Gibraltar court will enforce the statutory segregation of cell assets than a non-Gibraltar court that may not be as familiar with Protected Cell Companies legislation.

Prospectus

An EIF must issue a prospectus that is consistent with industry standards and which will allow an investor to make an informed investment. The prospectus/private placement memorandum (PPM) must state the fees that are chargeable out of the property of the fund, the investment objectives, borrowing or investment restrictions, if any, and the risks associated with such investment. The prospectus/PPM is a private document in all cases except if the fund is incorporated as a public limited company. As mentioned above, however, there is no legal requirement to use a public limited company for a fund in Gibraltar even if the fund has more than 50 investors.

Authorisation and Regulatory Requirements

One of the key unique selling points of the Gibraltar fund is the authorisation process. For an EIF it is sufficient for the fund to incorporate, appoint its service providers, produce its prospectus and hold a board meeting to launch itself as a fund. There is no regulatory pre approval necessary for launch. Within 14 days of launch, a fund must notify the FSC of the launch along with a copy of the prospectus, the memorandum and articles, a legal opinion from senior Gibraltar counsel stating that the fund was set-up in accordance with the EIF regulations and other relevant legislation, a form signed by the administrator and the license fee of £2,500. This is very significant as it means that effectively there is no regulatory down time and the fund may be launched as quickly as necessary. The FSC will then review the submitted documents and may come back with questions or comments. Going forward is necessary for an EIF to ensure that it complies with the EIF regulations. Breach of certain regulations requires the directors and/or administrator of the fund to notify the FSC.

The directors authorised (especially the directors) and the administrators are charged with ensuring on-going compliance with Gibraltar legislation and with corporate governance requirements. An EIF must have a fund administrator that is authorised and has a presence in Gibraltar. In addition to the two Gibraltar based EIF directors, the fund must also appoint auditors

that are registered in Gibraltar. Three out of the four "big four" auditors are based in Gibraltar as are several other firms that have ample experience in fund audit.

There are no restrictions on borrowing or owning investments. A fund may invest in any class of investment and at any percentage given that this is a fund that is targeted to experienced investors who are informed and are able to bear the risks of such investments. The fund may, however, impose certain restrictions on itself. These are disclosed in the prospectus and, of course, must always be adhered to.

Taxation

Gibraltar funds may obtain an exemption from the Commissioner of Income Tax on any tax on investment income. There is no capital gains tax, inheritance tax, wealth tax in Gibraltar. There is a stamp duty of £10 on the creation of share capital of a company and on any increase in share capital. Furthermore, there is no tax in Gibraltar on dividends from quoted securities or on income from trading listed securities. Indeed, a fund may find it more beneficial not to apply for the certificate of exemption from the Commissioner of Income Tax in certain cases and to rely on the regular internal tax regime of Gibraltar which will invest in the majority of cases not tax any income or gains earned by the fund. The reason for this is that Gibraltar, being part of the European Union, can benefit from the European Parent Subsidiary Directive. This means that payments to a Gibraltar company from subsidiaries in certain European jurisdictions (such as Luxembourg) will not be subject to withholding tax. This is another one of Gibraltar's unique selling points and it is particularly relevant in private equity and real estate funds.

There is no withholding tax on payments from a Gibraltar fund to its non-Gibraltarian investors.

The valuation methods for EIFs must be disclosed within the prospectus. There are no particular rules on valuations other than their disclosure. Although any internationally accepted accounting standard might be used for the audit, many Gibraltar funds are audited under IFRS or UK GAAP.

Protected Cell Companies (PCCs)

The third unique selling point of Gibraltar is that it is possible to set-up a fund in Gibraltar as a Protected Cell Company (PCCs). PCCs are companies, which can segregate their assets into cells, which are statutorily, protected and are remote from each other in bankruptcy. This means that if one cell incurs a liability, the creditors of that cell will be unable to satisfy their debt from assets attributable to another cell. This is particularly useful to investment managers that wish to set-up several funds with several strategies under one vehicle and save with economies of scale. Investors can invest in one or more cells according to their investment strategies.

Conclusion

The quick and easy regulatory notification process, the possibility of setting up PCC funds and Gibraltar's position within the European Union are all factors that are certain to make Gibraltar a very interesting and competitive jurisdiction for the set-up of funds.