



## Redomiciliation of Investment Funds

### Offshore to Onshore - Re-domiciliation of Funds to Malta

The re-domiciliation of Funds ("**Investor Funds**" or "**Funds**") to Malta was made possible through the enactment of the Continuation of Companies Regulations (the "**Regulations**") in November of 2002. Re-domiciliation results in savings in costs and time, with the management, ownership, structure and assets of the Fund remaining largely unaffected. The change is in the Funds' domicile and, consequently, the applicable legal system, regulator and taxation framework. Two factors stand out in enhancing the attractiveness of Malta as a location for re-domiciliation: firstly, its regulator, which is known for its efficiency, approachability and commitment to the maintenance of high standards; secondly, Malta offers a highly favorable system of taxation for Investor Funds, with the exemption of income tax and capital gains tax at the Fund and non-resident investor level and its framework of double taxation treaties.

ITEMS OF INTEREST DECEMBER 2009

#### Preliminary Issues

##### **Permission to re-domicile**

The Regulations allow any body corporate incorporated or registered under the laws of "an approved country or jurisdiction"<sup>1</sup> (the "**Exit Jurisdiction**") to re-domicile to Malta, provided that re-domiciliation is permitted under the laws of the Exit Jurisdiction and in terms of the companies' constitutive documents. If the Fund's constitutive documents do not permit continuation in another jurisdiction they will have to be amended accordingly. However, it is advisable to have a fresh constitutive document drawn up for the Fund in order to reflect and fully comply with the requirements of Maltese company law.

##### **Substantive Previous Existence in the Exit Jurisdiction**

The Fund seeking re-domiciliation to Malta must have existed in the Exit Jurisdiction for a period of one year.

##### **Similar Constitution**

The Regulations also require that the Fund be constituted as a company which is "similar in nature" to a Maltese company. Investor Funds in Malta are typically constituted as public or private investment companies with variable share capital or public investment companies with fixed share capital. However, they may also be constituted as unit trusts, limited

partnerships or common contractual Funds, but these latter entities do not qualify as companies for re-domiciliation purposes.

##### **Name of the Fund**

If the Fund is to be constituted as an investment company with variable share capital, the name of the Fund must be followed by the words investment company with variable share capital" or by "SICAV" followed by the words "public limited company", or "plc" in the case of public company, or "private limited company", "limited" or "ltd" in the case of a private company. On the other hand, Funds constituted as investment companies with fixed share capital, must be followed by the words "investment company with fixed share capital" or "INVCO" followed by the words "public limited company", or "plc".

##### **Directors**

Investor Funds constituted as public investment companies with variable or fixed share capital must have a minimum of two directors, who may be individuals or bodies corporate, and in the case of self-managed Funds the directors must be fit and proper persons to carry on the business of investments. Furthermore, in order to demonstrate substance in Malta and ensure compliance with local regulatory requirements it is advisable to appoint one director who is resident in Malta.

##### **Company Secretary**

Investor Funds set-up as SICAVs or INVCOs must appoint a company secretary, who may be either an individual or, subject to approval from Malta Financial Services Authority (MFSA), a body corporate. The post of company secretary can be held by a director.

<sup>1</sup> The MFSA allows companies from the EU, EEA and OECD Member States, the Bahamas, Bermuda, the British Virgin Islands, the Cayman Islands, Gibraltar, Guernsey, the Isle of Man, Jersey and Mauritius to re-domicile to Malta, which all have appropriate provisions in their laws.



### **Share Capital**

If the Fund has a fixed share capital, it must take the form of an INVCO, and unlike SICAVs, must have a minimum authorised share capital of EUR 46,590. On the other hand, Fund's with a variable share capital must be constituted as SICAVs and are not subject to any minimum limit of authorised share capital. A SICAV cannot issue partly paid up shares and its share capital must be divided into a specified number of shares without assigning any nominal value thereto. The actual value of the paid up share capital of a SICAV shall be at all times equal to the net asset value of the Fund.

### **Shares held by Foreign Nominees or Trustees**

If any shares in the Fund are held by a foreign nominee or trustee authorised in an approved jurisdiction, then such nominee or trustee must apply to the MFSA for a specific authorisation to continue to act as such when the Fund has been re-domiciled to Malta. Alternatively, any shares held by a foreign nominee or trustee can be transferred to any of the nominee companies licensed and operating in Malta.

### **Service Providers**

Re-domiciliation to Malta does in principle not demand any change in the service providers of an investor Fund. In fact, as long as the Fund has appointed those service providers which are obligatory under Maltese law (namely, the administrator the money laundering and reporting officer, auditors and custodian in the case of Funds promoted to experienced investors) the service providers remain unaffected by continuation into Malta. It should be noted, however, that if all service providers are located outside Malta and the Fund has not appointed a resident director, the Fund must appoint a local representative to act as a point of liaison with the MFSA.

Once these preliminary issues have been addressed, the company can move on to the second stage of the re-domiciliation process.

### **Request and Supporting Documentation**

A request to re-domicile to Malta must be made to the Registrar of Companies in Malta (the "**Registrar**"), with which there must be submitted the following documentation:

1. an extraordinary shareholders resolution or equivalent document (translated into English) authorising the re-domiciliation of the Fund to Malta.
2. a copy of the revised constitutive document of the Fund, drawn up in accordance with requirements of Maltese company law;
3. certified copies of the passports or, if bodies corporate, a certified copy of the certificate of incorporation and a good standing certificate of the directors, founder shareholders and company secretary of the Fund;
4. a certificate of good standing of the investor Fund or equivalent document (translated into English) issued by the competent authority in the Exiting Jurisdiction or any other satisfactory evidence;
5. a declaration signed by at least two directors, confirming:
  - the name of the Fund;
  - the jurisdiction under which it is currently incorporated and the date of such incorporation;
  - the decision to re-domicile the Fund to Malta;
  - that the Fund has given formal notice to the relevant authority in the Exit Jurisdiction of its decision to be registered as continuing in Malta in accordance with the procedure laid down by law. Evidence of such notification must be annexed to the declaration;
  - that no proceedings for breach of the laws of the Exit Jurisdiction have been commenced against the Fund; and
  - that the Fund is solvent and that they are not aware of any circumstances which could have a negative and material effect on its solvency for the next twelve months;
6. a list of the directors of the Fund and the company secretary or if there are no directors or company secretary, the persons vested with the administration and representation of the Fund;
7. such material as the Registrar may require to satisfy itself that the request to re-domicile the Fund to Malta is permitted by the laws of the Exit Jurisdiction, and the consent of such number or proportion of shareholders, debenture-holders and creditors of the Fund as may be required by the laws of the Exit Jurisdiction has been obtained; and



- the applicable registration fee, which varies depending on the amount of authorised capital of the Fund.<sup>2</sup>

### Licensable Activity

Since the Fund shall be carrying on a licensable activity<sup>3</sup> in Malta, the Fund must apply for and obtain a collective investment scheme license in terms of the Investment Services Act. Furthermore, in those cases where the Fund was engaged in a licensable activity in the Exit Jurisdiction, evidence that the competent authority of the Exit Jurisdiction has given its consent to the re-domiciliation of the Fund to Malta must also be provided (in addition to obtaining a license or authorization in Malta).

### Public and Listed Funds

If the Fund is constituted as a public company in the Exit Jurisdiction and has offered its shares or debentures to the public, it must also submit with its request to re-domicile to Malta, its most recent prospectus and authenticated evidence of the current share registry of Fund (i.e. the list of shareholders) or the method and form of recording such membership. Furthermore, if the Fund is listed on a recognized stock exchange, the consent of that exchange to the re-domiciliation of the Fund to Malta is also required. Re-domiciliation to Malta poses no obstacle to the Fund retaining its listing on a recognized stock exchange.

### Provisional Certificate of Continuation

Once the request for re-domiciliation and all required documentation have been submitted to the Registrar and is found to be compliant with Maltese Company law, the Registrar will proceed to issue a Provisional Certificate of Continuation, after which the Fund is deemed to be provisionally registered in Malta. At this stage the Fund is subject to all obligations and is capable of exercising all the powers of an Investor Fund registered in Malta.

### Final Certificate of Continuation

Within six months (extendable by an additional three months upon reasonable cause being shown) from the issue by the Registrar of the Provisional Certificate of Continuation the Fund must submit to the Registrar documentary evidence of de-registration in the Exit Jurisdiction. It is only after this has been done that the Registrar will issue a final Certificate of Continuation confirming that the Fund has been re-domiciled to Malta.

### lecocqassociate's Experience

lecocqassociate provides legal advice on the structuring of Funds, having experience in Swiss, Maltese, Luxembourg and Offshore Funds.

The information contained herein is for informational purposes only. It does not constitute legal advice or an opinion. Please contact Dominique Lecocq for any questions:

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<sup>2</sup> See Regulation 4(a) of Companies Act (Fees) Regulations, 2008.

<sup>3</sup> An activity which requires licensing or authorization under the Banking Act, Financial Institutions Act, Financial Markets Act, Insurance Business Act, Insurance Brokers and other Intermediaries Act, Investment Services Act, or the Malta Financial Services Authority Act.