

INVESTMENT SERVICES RULES FOR QUALIFYING PROFESSIONAL INVESTOR FUNDS

PART A: THE APPLICATION PROCESS

1 REGULATION OF COLLECTIVE INVESTMENT SCHEMES IN TERMS OF THE INVESTMENT SERVICES ACT

1.01 Collective investment schemes, including professional investor funds ('PIFs') are regulated by the Investment Services Act¹ (hereinafter referred to as "the Act") which provides the statutory basis for regulating collective investment schemes constituted in or operating in or from Malta. Qualifying PIFs are a special class of collective investment schemes which fall within the provisions of the Act.

1.02 Article 2 of the Act defines a "collective investment scheme" as any scheme or arrangement which has as its object or as one of its objects the collective investment of capital acquired by means of an offer of units for subscription, sale or exchange and which has the following characteristics:

- a. the scheme or arrangement operates according to the principle of risk spreading; and either
- b. the contributions of the participants and the profits or income out of which payments are to be made to them are pooled; or
- c. at the request of the holders, units are or are to be repurchased or redeemed out of the assets of the scheme or arrangement, continuously or in blocks at short intervals; or
- d. units are, or have been, or will be issued continuously or in blocks at short intervals.

The Act also provides that an alternative investment fund that is not promoted to retail investors and that does not have the characteristic listed in paragraph (a) shall only be deemed to be a collective investment scheme if the scheme, in specific circumstances as established by regulations under this Act, is exempt from such requirement and satisfies any conditions that may be prescribed."

1.03 Article 2 of the Act defines an "alternative investment fund" or "AIF" as meaning 'a collective investment undertaking, including the investment compartments thereof, which raises capital from a number of investors with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and does not require authorisation pursuant to Article 5 of Directive 2009/65/EC².

¹ Cap. 370 – Laws of Malta

² Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

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- 1.04 In terms of the AIFMD³, the following undertakings shall not be considered as AIFs:
- (a) a holding company;
 - (b) an institution for occupational retirement provision which is covered by Directive 2003/41/EC;
 - (c) employee participation schemes or employee savings schemes;
 - (d) securitisation special purpose vehicles.
- 1.05 The exclusions referred to in Rule 1.04 and further exemptions can be granted from the requirement to obtain a collective investment scheme licence in terms of the Investment Services Act (Exemption) Regulations⁴ and the Investment Services Act (Recognition of Private Collective Investment Schemes) Regulations⁵.

³ Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (hereinafter referred to as 'AIFMD').

⁴ S.L. 370.06

⁵ S.L. 370.02

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2 CRITERIA WHICH THE MFSA WILL APPLY IN CONSIDERING AN APPLICATION FOR A LICENCE

- 2.01 The MFSA may only grant a collective investment scheme licence to a Qualifying Investor PIF if it is satisfied that the scheme will comply in all respects with the provisions of the Act, the applicable regulations and the rules included in these Investment Services Rules. Furthermore, the MFSA must also be satisfied that the directors and officers/ trustee(s)/ general partner(s), are “fit and proper” persons to carry out the functions required of them in connection with the PIF.
- 2.02 In accordance with article 6(3) of the Act, when considering whether to grant or refuse a licence, the MFSA will, in particular, have regard to:
- the protection of investors and the general public;
 - the protection to the reputation of Malta taking into account Malta’s international commitments;
 - the promotion of competition and choice; and
 - the reputation and suitability of the applicant and all other parties connected with the scheme.
- 2.03 In assessing an application for a collective investment scheme as a qualifying investor PIF, the MFSA will consider the nature of the scheme and the nature of the investors to whom it will be marketed. It will then look into the experience and track record of all parties who will be involved with the PIF. Such persons should be of good standing and should be competent. The MFSA reserves the right to refuse a licence if it does not approve a party involved with the PIF.
- 2.04 Although the Act provides for the licensing of many different categories of schemes, the MFSA applies the same standards relating to the “fit and proper” status of the applicant and its service providers.
- 2.05 The “fit and proper” test is one which an applicant and a licence holder must satisfy on a continuing basis. The MFSA assesses each case on its own merits and on the basis of the relevant circumstances.
- 2.06 Nonetheless, the onus of proving that it meets the required standards on an on-going basis rests on the applicant and/or licensed PIF as the case may be. It is not the MFSA’s task to prove that an applicant is fit and proper either on licencing or thereafter.
- 2.07 In carrying out the “fit and proper” test, the MFSA adopts a cumulative approach. It may decide that a PIF has failed the test after considering various circumstances, each of which on its own may or would not lead to that conclusion. For this reason, it is essential that the information provided to the MFSA is truthful and as complete as possible.

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- 2.08 When arriving at its decision as to whether an applicant has met the required standards, the MFSA will take account both of what is disclosed and of what ought to have been disclosed. It should be noted that it is an offence to provide inaccurate, false or misleading information to the MFSA.
- 2.09 In general terms, the applicant must meet three criteria to satisfy the "fit and proper" test namely: (a) **integrity**; (b) **competence**; and (c) **solvency**.
- 2.10 Integrity requires that the PIF, its officers and its service providers act honestly and in a trustworthy fashion.
- 2.11 Competence means that the persons responsible for running the PIF must be able to demonstrate an acceptable amount of knowledge, professional expertise and experience. The degree of competence required will depend upon the job being performed. The MFSA will take into account the qualifications, experience and skills of those involved.
- 2.12 Solvency involves ensuring that proper financial controls and management of liquidity and capital is applied.

3 PROFESSIONAL INVESTOR FUNDS

European venture capital funds and European social entrepreneurship funds

3.01 The fund manager may establish the scheme as a European venture capital fund in terms of Regulation (EU) No 345/2013 and in this regard opt to use the designation 'EuVECA' in relation to the marketing of the qualifying venture capital funds in the Union.

3.02 Similarly, the fund manager may establish the scheme as a European social entrepreneurship fund in terms of Regulation (EU) No 346/2013 and in this regard opt to use the designation 'EuSEF' in relation to the marketing of the qualifying social entrepreneurship funds in the Union.

3.03 In the cases referred to in Rules 3.01 and 3.02, the fund manager shall be guided by the provisions of Regulations (EU) No 345/2013 and 346/2013 prescribing rules for the marketing of qualifying venture capital funds/ social entrepreneurship funds to eligible investors across the Union, for the portfolio composition of the qualifying venture capital funds/ social entrepreneurship funds, for the eligible investment instruments and techniques to be used by qualifying venture capital funds/ social entrepreneurship funds as well as for the organisation, conduct and transparency of managers that market qualifying venture capital funds/ social entrepreneurship funds across the Union.

Investor base

3.04 In terms of the MFSA's regulatory regime applicable to collective investment schemes, PIFs can be promoted only to qualifying investors as defined and outlined in these Rules. Thus unless otherwise indicated, all references to PIFs throughout these Rules shall be understood as referring to PIFs promoted to qualifying investors;

Provided that where the fund manager intends establishing the scheme as a European venture capital fund or a European social entrepreneurship fund, it shall be guided by the provisions of the applicable EU Regulations referred to above prescribing the investor base of these funds.

3.05 A PIF promoted to qualifying investors may be established as an investment company with variable share capital (SICAV)⁶; an investment company with fixed share capital⁷; an incorporated cell company⁸ or an incorporated cell of a recognised

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<#>PIFs promoted to Experienced Investors (or Experienced Investor Funds); ¶
<#>PIFs promoted to Qualifying Investors (or Qualifying Investor Funds); and¶
<#>PIFs promoted to Extraordinary Investors (or Extraordinary Investor Funds). ¶

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⁶ Companies Act (Investment Companies with Variable Share Capital) Regulations
⁷ Companies Act (Investment Companies with Fixed Share Capital) Regulations
⁸ Companies Act (SICAV Incorporated Cell Company) Regulations

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incorporated cell company⁹; a limited partnership¹⁰, a unit trust¹¹ or a contractual fund¹².

3.06 A “qualifying investor”, is an investor that fulfils the following criteria:

- (a) invests a minimum of EUR 100,000 or its currency equivalent in the PIF which investment may not be reduced below this minimum amount at any time by way of a partial redemption;
- (b) declares in writing to the fund manager and the PIF that it is aware of and accepts the risks associated with the proposed investment; and
- (c) satisfies at least one of the following:
 - (i) is a body corporate which has net assets in excess of EUR 750,000 or which is part of a group which has net assets in excess of EUR 750,000 or, in each case, the currency equivalent thereof;
 - (ii) is an unincorporated body of persons or association which has net assets in excess of EUR 750,000 or the currency equivalent;
 - (iii) is a trust where the net value of the trust's assets is in excess of EUR 750,000 or the currency equivalent;
 - (iv) is an individual whose net worth or joint net worth with that of the person's spouse, exceeds EUR 750,000 or the currency equivalent; or
 - (v) is a senior employee or director of a service provider to the PIF.

3.07 In the case of ‘joint holders’, all holders should individually satisfy the definition of “Qualifying Investor”.

3.08 In relation to investments made by an entity holding on a nominee basis, the underlying investors considered to be the beneficial owners must individually satisfy the definition of “Qualifying Investors”.

3.09 The minimum investment requirement is EUR 100,000, or the currency equivalent. The total amount invested may not fall below this threshold unless this is the result of a fall in the net asset value. Provided that the minimum threshold is satisfied, additional investments – of any size – may be made. The minimum investment requirement applies to each individual “Qualifying Investor”. In the case of joint holders, the minimum investment requirement is EUR 100,000 or the currency equivalent.

3.10 In the case of an umbrella fund comprising of sub-funds each of which is set up as a PIF, the EUR 100,000 requirement or the currency equivalent is applicable on a per scheme basis rather than on a per sub-fund basis.

⁹ Companies Act (Recognised Incorporated Cell Companies) Regulations

¹⁰ Companies Act

¹¹ Trusts and Trustees Act

¹² Investment Services Act (Contractual Fund) Regulations

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4.1 PIFs promoted to Experienced Investors¶

¶ An “Experienced Investor”, is a person having the expertise, experience and knowledge to be in a position to make his own investment decisions and understand the risks involved. An investor must state the basis on which he satisfies this definition, either ¶

¶ by confirming that he/ she is:¶

¶ a person who has relevant work experience having at least worked in the financial sector for one year in a professional position or a person who has been active in these type of investments; or¶

¶ a person who has reasonable experience in the acquisition and/or disposal of funds of a similar nature or risk profile, or property of the same kind as the property, or a substantial part of the property, to which the PIF in question relates; or¶

¶ a person who has made investments amounting to EUR100,000 or USD100,000 within the past 2 years at an average frequency of 3 per quarter;¶

OR¶

¶ by providing any other appropriate justification.¶

¶ Persons who qualify as ‘Professional Clients’ in terms of the MIFID, automatically qualify as ‘Experienced Investors’. The term ‘Professional Client’ is defined in the Glossary to these Rules.¶

¶ In the case of ‘joint holders’, all holders should individually satisfy the definition of ‘Experienced Investor’ outlined above or jointly make investments amounting to EUR200,000 or USD200,000. ¶

¶ In relation to investments made by an entity holding on a nominee basis, the underlying investors considered to be the beneficial owners must individually satisfy the definition of “Experienced Investors”.¶

¶ The minimum investment requirement is EUR10,000 or USD10,000. In the case of PIFs licenced prior to 1st January 2010, the minimum investment requirement remains EUR 15,000 or USD15,000. ¶

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<#> Prior to accepting any investment, the PIF should be in receipt of a completed “Qualifying Investor Declaration” ¶

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- 3.11 PIFs promoted to qualifying investors are not subject to any investment or borrowing (including leverage) restrictions other than those which may be specified in their offering document.

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4 SERVICE PROVIDERS

4.01 A PIF may appoint any service provider as it may deem necessary. Ordinarily, these service providers may include, amongst others, a manager, an administrator, an investment adviser and/or a depositary/prime broker.

4.02 The service providers of a PIF shall be established and regulated in a recognised jurisdiction. Recognised jurisdictions include EU and EEA Members, and signatories to a Multilateral MoU or Bilateral MoU with the MFSA covering the relevant sector of financial services.

4.03 Where one or more of the proposed Service Providers is not based in a Recognised Jurisdiction or does not fall under Rule 4.02 above, it is recommended that prior to the submission of an Application for a PIF Licence, the promoters submit an application for preliminary indication of acceptability of a PIF as outlined in the following sections.

➤ *Manager*

4.04 A PIF may be a self-managed PIF or appoint a third party manager.

4.05 The fund manager of a PIF may be one of the following:

- (a) a *de minimis* AIFM in possession of a Category 2 Investment Services Licence issued in terms of Article 6 of the Act and should be duly licensed and authorised by the MFSA to provide management services to collective investment schemes;
- (b) a *de minimis* AIFM which is registered/authorised in an EU or EEA Member State and which is subject to regulation in an equal or comparable level in the EU or EEA Member State concerned;
- (c) a third country AIFM which is authorised/licenced in a third country with whom the MFSA has signed a co-operation agreement in terms of the AIFMD.

4.06 Where the proposed manager has appointed a sub-manager with limited or full discretion in respect of the management of the assets of the PIF, the sub-manager is not subject to MFSA's approval and no eligibility criteria apply. In such case, the MFSA expects the manager to exercise care and diligence in the selection of the sub-manager and to assume responsibility for the acts of the sub-manager.

➤ *Fund administrator*

4.07 The scheme shall have an appointed fund administrator at all times.

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4.08 Where the scheme is externally managed, the administration function may be carried out by the fund manager of the scheme, unless the scheme outsources such function to an independent fund administrator.

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4.09 Where the scheme appoints the fund manager and the fund manager opts to undertake the administration function, it shall ensure that the fund manager is also authorised to carry out such function. The scheme shall seek approval for this appointment from the MFSA and the Authority shall review the competence of the manager to undertake the administration function. The Authority shall also assess the operational set-up in relation to the functional and hierarchical separation of the investment management and fund administration function.

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4.10 The fund administrator can either be in possession of a Recognised Fund Administration Certificate issued in terms of Article 9A of the Act, or established in an EU/EEA Member State or Recognised Jurisdiction and in possession of the necessary authorisation to carry out the administration function.

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4.11 A self-managed scheme shall have an appointed independent fund Administrator in place at all times.

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➤ *Depository*

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Where the proposed fund administrator is established in Malta, it shall be in possession of a Fund Administration recognition certificate issued in terms of Article 9A of the Act.

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4.12 A PIF is not required to appoint a depository in terms of the Investment Services Act (Custodians of Collective Investment Schemes) Regulations¹⁴. Nonetheless a PIF is required to make the necessary arrangements for the appointment of an entity entrusted with safekeeping the PIF's assets.

4.13 Where the PIF does not appoint a depository, responsibility for the establishment of proper arrangements for the safe keeping of the PIF's assets remains with the governing body and the officers of the PIF. The applicant will be required to outline as part of the application process the arrangements that will be put in place to ensure adequate safekeeping of the assets of the PIF.

4.14 Where the PIF wishes to appoint a depository established in Malta, the depository can be in possession of a Category 4a or Category 4b Investment Services Licence. In this case, the depository shall ensure compliance with the applicable provisions of the Investment Services Act (Custodians of Collective Investment Schemes) Regulations.

➤ *Investment adviser*

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4.15 The investment adviser is a person responsible for the provision of investment advice to the PIF or its manager on the assets of the PIF. It is understood that the

¹⁴ L.N. 114 of 2016

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investment adviser will not have any discretion with respect to the investment and re-investment of the assets of the PIF.

- 4.16 PIFs are generally not required to appoint a third party investment adviser. Moreover, the proposed investment adviser need not be established and regulated in Malta.
- 4.17 Where the investment adviser is appointed directly by the manager, rather than by the PIF, it will not be subject to MFSA's approval and no eligibility criteria apply.
- 4.18 Where the proposal includes the appointment – directly by the PIF – of a third party investment adviser, and the proposed investment adviser is established in Malta, it should be in possession of a Category 1A, 1B, 2 or 3 Investment Services Licence issued in terms of Article 6 of the Act and should be duly licensed and authorised by the MFSA to provide investment advice to collective investment schemes.

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5.08 There are three phases to the application process namely (i) Phase One being the preparatory phase; (ii) Phase two being the pre-licencing phase; and (iii) Phase three being the post-licencing phase.

5.09 Phase one consists of the following steps:

- (a) The MFSA recommends that the applicant/promoters complete the application form and submit it with the supporting documents as specified in the application form itself. The application form must be signed by the applicant who shall be responsible for the submission of all the relevant information, and shall be complete with all the information and documents required. The application form and the supporting documentation will be reviewed and comments are provided to the applicant generally within three weeks from submission of the application documents. The supporting documentation is listed in Schedule A. Nonetheless, the MFSA reserves the right to request such additional information as it may require when processing an application for a licence.
- (b) The MFSA may ask for more information and may make such further enquiries as it considers necessary. Applicants are to note that the MFSA will send all correspondence regarding the application directly to the Applicant.
- (c) The MFSA carries out the necessary due diligence checks at this stage.
- (d) The MFSA will consider the nature of the proposed scheme and will apply the rules included in Part B of this Rulebook which represent the ongoing requirements to which the scheme will be subject, if and when licensed.

5.10 Phase two consists of the following steps:

- (a) Once the MFSA concludes the review of the application and supporting documents, it will issue its 'in principle' approval for the issue of a licence. The 'in principle' approval is valid for a period of three months during which, the applicant will be required to finalise any outstanding matters. Should the three months elapse without the satisfactory resolution of all pre-licencing outstanding issues; the 'in principle approval' issued will cease to have effect.
- (b) Once any outstanding matters have been finalised, the application form and the supporting documentation are endorsed by the members of the governing body of the scheme and are resubmitted to MFSA.
- (c) The MFSA will proceed with the issue of a licence as soon as all pre-licencing issues are resolved.

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<#>Following the preliminary discussions, the promoters submit a draft Application Form¹⁶, together with supporting documents as specified in the Application Form itself. ¶

<#>The draft Application and the supporting documentation will be reviewed by the Authority and comments will be provided to the Applicant. In the case of third-party managed PIFs promoted to Experienced or Qualifying Investors, the MFSA is committed to review the Application Form and supporting documents and provide its comments to the Applicant within seven business days from receipt of the application documents. In the case of PIFs promoted to Extraordinary Investors, the MFSA is committed to review the Application Form and the supporting documents and to provide its comments to the Applicant within three business days. This time-frame only applies when the PIF appoints a third-party Manager and where all service providers are based and regulated in Recognised Jurisdictions. ¶

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Deleted: <#>Phase Two – Pre-Licensing¶

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5.11 During **phase three**, the applicant may be required to satisfy a number of post-licensing matters prior to formal commencement of business.

➤ ***Applications for the licensing of additional sub-funds of an existing PIF***

5.12 A licensed PIF constituted in the form of an umbrella fund wishing to establish additional sub-funds, is ordinarily required to submit the following documents:

- i. formal notification to the MFSA of its intention to apply for a licence in favour of the sub-fund;
- ii. a confirmation from the governing body of the scheme signifying its intention to apply for a licence in favour of the sub-fund;
- iii. a final draft of the revised offering document/ offering supplement;¹⁷
- iv. the appropriate application fee as outlined in section 7 to this Part of the Rules; and
- v. a draft copy of the approval by the governing body of the scheme of the revised offering document/ offering supplement (as applicable).

➤ ***Applications for the approval of additional classes of shares/units of an existing PIF***

5.13 A licensed PIF constituted in the form of an umbrella (i.e. with sub-funds) or multi-class (i.e. without sub-funds) fund wishing to issue an additional class of shares/ units is ordinarily required to the documents listed hereunder. The additional class of shares/ units shall not constitute a distinct sub-fund of the PIF.

5.14 The documents required are the following:

- i. formal notification to the MFSA of its intention to issue additional classes of shares/ units;
- ii. a final draft of the revised offering document;
- iii. a draft copy of the approval of the governing body of the PIF of the offering document; and
- iv. a confirmation from the governing body of the PIF signifying its intention to issue additional classes of shares/ units.

5.15 The issue of additional classes of shares/ units within an existing PIF – so long as the additional classes of shares/ units do not constitute a distinct sub-fund of the PIF – is not subject to any application/ supervisory fees.

➤ ***Listing on a regulated market***

¹⁷ as applicable;

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- 5.16 A PIF that has been granted or has applied for a collective investment scheme licence in terms of the Act may apply for admissibility to listing with the Listing Authority. The MFSA is the Listing Authority in terms of the Financial Market Act,
- 5.17 Where an application for admissibility to listing has been submitted concurrently with an application for a collective investment scheme licence, the documents submitted as part of the application for a collective investment scheme licence need not be resubmitted as part of the application for admissibility to listing.
- 5.18 In addition, provided the MFSA is informed of the PIF's intention to apply for admissibility to listing – once these documents have been approved by the MFSA, they will be deemed to be approved in relation to both the application for a collective investment scheme licence as well as in relation to the application for admissibility to listing.

6 CESSATION OF A COLLECTIVE INVESTMENT SCHEME LICENCE

- 6.01 The scheme shall inform the MFSA at an early stage of its intention to surrender its collective investment scheme licence. The MFSA may require the scheme to delay the surrender of its licence, or to wind-up such business in accordance with conditions imposed by the MFSA, in order to protect the interests of unit-holders.
- 6.02 The general procedure for surrendering a collective investment scheme licence is outlined below, although the MFSA reserves the right to impose additional requirements or vary them according to the particular circumstances of the case.
- 6.03 Following a notification to the MFSA of its intention to surrender its collective investment scheme licence, the scheme shall submit the following documentation to the MFSA:
- a) a formal request to the MFSA asking for its approval to surrender the collective investment scheme licence;
 - b) a resolution from the governing body of the scheme:
 - i. confirming the scheme's intention to surrender its licence, subject to the MFSA's approval and once the necessary formalities are finalised;
 - ii. confirming that the scheme has informed its auditor, depositary and relevant service providers of its intention to surrender its licence;
 - c) a shareholders' resolution confirming their approval of the proposed closure of the scheme (where applicable);
 - d) the scheme must give due notice to its unit-holders of its intention to surrender its licence (once the necessary formalities are finalised). A confirmation to this effect should be submitted to the MFSA.
- 6.04 Subsequently the scheme shall also submit:
- a) a confirmation from the scheme's administrator that there are no investors in the scheme;
 - b) a confirmation from the scheme's administrator that no complaints/ litigation are/is pending arising from any event which arose whilst there were investors in the scheme;
 - c) a confirmation from the scheme's administrator that the accruals and liabilities of the scheme have been cleared;
 - d) a confirmation from the depositary (where applicable) or administrator that the disbursement of the assets of the scheme has been completed in order; and
 - e) the original licence/s granted to it by the MFSA.
- 6.05 Once all the requirements listed above have been satisfied, the respective supervisory fees are settled, the scheme is delisted from any regulated market and

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passporting notifications have been withdrawn (as applicable), an internal process will be set in motion for approval of the surrender of the collective investment scheme licence.

- 6.06 The MFSA will convey its final decision to the scheme and will issue a public notice regarding the surrender of the scheme's licence.
- 6.07 Where the scheme consists of different sub-funds, and the licence which had been granted in relation to the sub-fund is to be surrendered, this section will nonetheless apply and any references to 'the scheme' shall be deemed to refer to 'the sub-fund'.

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7 FEES

- 7.01 The application fee is payable on submission of the application for a PIF licence and is not refundable.
- 7.02 Licenced collective investment schemes are required to pay the first annual supervisory fee on the date the licence is granted and thereafter annually upon the anniversary of the granting of the licence.
- 7.03 The applicable fees payable in terms of the Investment Services Act (Fees) Regulations¹⁸ are indicated hereunder. The fees are subject to alternation by regulations.

<i>PIFs licenced pursuant to Article 4 of the Investment Services Act</i>		
	Application Fee	Annual Supervisory Fee
Scheme	€2,000	€2,000
Per sub-fund (Fee is applicable per sub-fund up to 15 sub-funds). No annual supervisory fee will be payable from the 16 th scheme sub-fund upwards.	€1,000	€600
<i>Incorporated Cells ("ICs") constituted in accordance with the Companies Act (Recognised Incorporated Cell Companies) Regulations</i>		
Per Incorporated Cell	€2,000	€2,000
Per sub-fund (Fee is applicable per sub-fund up to 15 sub-funds). No annual supervisory fee will be payable from the 16 th scheme sub-fund upwards	€1,000	€600

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¹⁸ S.L. 370.03