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GIBRALTAR:
AN ALTERNATIVE FUND JURISDICTION
IN THE EUROPEAN UNION

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1. Introduction

The significant global expansion in funds has put considerable pressure on established fund centres such as Dublin, Luxembourg and the Caribbean. These pressures have given rise to delays in fund establishment and greater selectivity by fund administrators creating a healthy overspill to other jurisdictions which had previously been unexploited.

Funds are a creative form of investment. Independent asset managers may wish to pool assets and streamline administration and are increasingly using collective investment vehicles. Funds are also becoming the preferred structure for family estates and trusts. They offer professionally managed investment structures, tailor-made to the family's profile and objectives.

There are a number of funds currently domiciled in Gibraltar and others that are administered from Gibraltar. A significant number of these are hedge funds registered in the Caribbean where the promoters require the administration to be carried out in the European time zone. Gibraltar has the major names in accounting services to provide audit and other support services as well as banks to provide custody services.

High regulatory standards combined with the flexibility of a small jurisdiction and the availability of a quality infrastructure at low cost is increasingly making Gibraltar an attractive fund location.

Gibraltar is part of the European Union by virtue of its relationship with the United Kingdom. Gibraltar has transposed all relevant EU Banking and Financial Services Directives so that its financial services sector is firmly within the integrated structured financial services system contemplated by the EU. 'Passporting' of banking and insurance services has been in place in Gibraltar for some years and financial services passporting was brought in to effect in July 2003. This allows financial services firms and certain funds to offer their services and products throughout Europe on the basis of their Gibraltar licence.

2. The Gibraltar Regulatory Regime

The Financial Services Ordinance 1989 and the Financial Services (Collective Investment Schemes) Regulations 1991, effectively divide the types of licensing requirements on funds that may be incorporated in Gibraltar into 3: Experienced Investor Funds, Public Funds that do not trade in transferable securities and Public Funds that trade exclusively in transferable securities ("UCITS Funds")

a. Private Funds

Experienced Investor Funds (“EIFs”) under the Experienced Investor Funds Regulations, 2005 are funds designed for professional, high net worth or otherwise experienced investors. Investors in these funds must have a net worth in excess of €1,000,000 or invest a minimum of €100,000. An EIF may be set up in a matter of days. For authorisation to trade, it has merely to notify Financial Services Commission (“FSC”) within 14 days of establishment. The notification is made by the administrator and is accompanied by the fund’s offering documents and an opinion from counsel that the fund complies with the EIF Regulations. An EIF must have two Gibraltar-resident directors who are approved by the FSC and a Gibraltar-based administrator.

This is a niche area for funds currently in Gibraltar. EIFs do not have to go through the regular procedure for regulation and licensing but are structured both to ensure adequate investor protection and comfort and to allow for expansion. Set-up time and costs are quite competitive.

b. Public Funds (Non-UCITS)

The alternative is to set up a public fund (that may be listed), and to apply for a licence to the FSC under Gibraltar law. The licensing procedure is quite involved as one would expect and licensing should take around 2 months. The fund is normally set up as a public open-ended investment company and if necessary with an umbrella structure (segregated sub-funds for each class of shareholder in respect of different classes of investments). Public funds may also be structured as unit trusts although this has become less common in recent years

The requirements for licensing under the Financial Services Ordinances are basically that the company must have a paid up share capital of at least £50,000 and it must have at least two Gibraltar resident Directors. Usually they require a ‘bricks and mortar’ presence in Gibraltar but this can often be achieved in a variety of ways. The Directors obviously must have some experience in investment in order for the FSC to feel comfortable with granting them a licence. We recommend that a face-to-face meeting be organised between the directors or promoters and the Investment Services Supervisor of the FSC.

There are also various restrictions on the types of investments, ; however, it is possible (in the case of non-UCITS funds) to obtain derogations from these regulations by making a case before the Investment Services Supervisor of the FSC. The end result is that these funds may, with consent from the FSC, invest in almost any type of investment including hedge funds, real property and even private equity.

c. Public Funds (UCITS)

Where the intention of a public fund is to invest solely in “transferable securities” namely stocks and bonds listed on a recognised European Community or other stock exchange. These funds, once specifically so licensed, may passport their services within the European Union on the basis of their Gibraltar license. Unlike with the non-UCITS public funds, they must comply with all of the regulations with regard to investment restrictions and structure. For example, no more than 10% of the fund’s assets may be invested in one entity and the fund can invest only up to a total of 10% of the share capital of any one entity. Such funds must also engage licensed custodians and administrators.

3. Protected Cell Companies

Gibraltar has implemented protected cell company (“PCC”) legislation, which allows for the statutory segregation of assets and liabilities in different cells in these types of structures. Long used in the case of insurance companies, the PCC legislation allows a fund to be set up so that there is segregation of assets and liabilities in an umbrella structure (i.e. where there are different sub-funds) where it is essential to ensure that there is no contamination between sub-funds. Instead of the client relying on a purely contractual arrangement between shareholders, the legislative regime gives statutory basis for the segregation of assets that binds 3rd parties as well. Sub-funds or cells can be used by separate clients or by one client wishing to promote several investment strategies. Any public fund in which there is a need to segregate assets (such as with different clients or different investment strategies) may be structured as a PCC. The licensing requirements are the same as those for other public funds.

4. Legal Structure

Funds in Gibraltar are usually structured as “open-ended investment companies” to allow investors to exit the investment and redeem their shares at any time (presumably on certain conditions of liquidity being satisfied). Investors are issued redeemable preference shares which they can redeem subject to certain conditions (determined in advance by the fund) being satisfied.

The fund’s Memorandum and Articles must be drafted to allow redemptions of shares at the prevailing Net Asset Value (“NAV”) if the fund is to be open-ended. Typically, the fund will have ordinary shares that carry all voting rights and participation shares that carry economic rights. Participation shares are the units purchased by investors at the NAV; they usually do not have any voting rights, but they may have if desired. The ordinary shares are normally issued to the investment manager or to the directors, depending on who manages the fund.

The fund can be managed by its directors or by investment managers. Investment managers that manage funds in Gibraltar may require a licence from the FSC in Gibraltar to do so. Directors who manage a fund do not require any licensing. Most funds have personal rather than corporate directors who hold regular board meetings in order to ensure that management and control is fully exercised in Gibraltar.

5. Taxation & Confidentiality

Licensed funds in Gibraltar (including EIFs) are exempt from income and company tax in Gibraltar upon receipt of a certificate from the Commissioner of Income tax. There are no capital gains, gift or wealth taxes in Gibraltar. Stamp duty is payable in certain instances but the normally low nominal share capital minimises its effect.

As with any regulated entity, the fund must know the identity of each investor by obtaining a passport copy and utility bills showing his/her residential address along with a supporting reference from a lawyer, accountant or banker. This information is protected by common law confidentiality. As regards third parties, it is possible for the shareholder to remain anonymous on the corporate register by registering the shares in the name of a nominee. The nominee will then hold the shares in trust for and under the direction of any particular investor and his/her name will not be disclosed in any public register.

6. Custodians, Fund Administrators and NAVs

The investments in a private fund may be made directly by the fund or by the fund's Bank as is needed. The Bank can serve as custodian for the fund as well. A public fund must have a custodian to hold and deal with its assets. Several banks in Gibraltar have ample experience and capabilities in providing this service.

The fund can be administered by a professional fund administrator. Subscriptions and redemptions are typically made directly through the administrator with the consent of the directors. Where there are several shareholders to the fund and periodic redemptions are expected, it is recommended that a professional fund administrator be used.

Where the assets of the fund are publicly traded securities, the administrator can usually produce the NAV of the fund and distribute it to shareholders. The NAV will be the figure at which shares are purchased and redeemed by shareholders.

Where the fund holds private equity such as shares in private companies, real estate or chattels, an NAV must be compiled by competent valuers such as accountants or valuation firms. Redemptions of shares in such funds are often restricted in time and scope so that the directors or managers may have ample opportunity to properly dispose of any such assets in order to redeem shares.



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7. Auditors

If a fund administrator is used, they can usually provide management accounts as part of their package of services. There is no statutory requirement for an audit in a private fund. When external shareholders are involved, however, it is usually considered as good practice. A public fund must be audited by an auditor registered in Gibraltar.

8. About Hassans

Hassans International Law Firm was established in the late 1930s by Sir Joshua Hassan QC, LVO who later served for almost 40 years as the Chief Minister of Gibraltar and was regarded as the father of modern Gibraltar. With over 45 lawyers and over 130 employees, Hassans is by far the largest firm in Gibraltar. As such, it tends to deal with large multi-national corporate clients as well as high net-worth individuals. The firm is currently led by James Levy QC who was listed by *Chambers* as one of the 100 'Global Lawyers' of the world. Line Trust Corporation Limited and Line Management Services Limited are both licensed by Gibraltar's Financial Services Commission and provide professional trustee and company management services. With over £8.2 billion in trust assets, Hassans has established itself as a major global offshore law firm.

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