

# Gibraltar

## An attractive domicile for hedge funds

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The hedge fund industry in Gibraltar has grown in leaps and bounds over the last couple of years. Gibraltar, which is part of the EU, has staked its claim as an efficient hedge fund centre that is open for business. It operates within a regulated fund regime that is in tune with the requirements of the modern hedge fund industry and is not only attractive as a domicile and servicing centre for alternative funds but could also lead to hedge fund managers choosing Gibraltar as a base for their operations.

### EU membership

Gibraltar joined the European Union in 1973 by virtue of the UK's accession to the EU under the provisions of Article 299 Section 4 (ex-Section 227) of the Treaty establishing the European Community; the cited rule extends the provisions of the Treaty to those "European territories for whose external relations a Member State is responsible." As Gibraltar is part of the EU via the UK's membership, EU-Directives on financial services and other matters such as money laundering must be implemented. Due to the EU-status Gibraltar politically distinguishes itself from Guernsey, Jersey or the Isle of Man, for which, by virtue of Article 299 Section 6 lit c) of the Treaty, that status of EU-membership does not apply.

Gibraltar shares basic legal structures and common law process with the UK. However, it can enact laws independent from the UK. The attractive and flexible framework of the Gibraltarian legislation enables the fund industry to establish a) Experienced Investor Funds (EIF) specially designed for hedge funds, private equity funds and property funds, b) UCITS-funds (investment funds established and authorised in conformity with the requirements of EU-Directive 85/611/EEC), c) non-UCITS retail funds and d) private schemes.

### Regulation of hedge funds

Gibraltar provides a welcoming environment for hedge funds. It developed its own flexible EIF-regime in August 2005, which enhanced its attraction as a jurisdiction for alternative investment funds and a good number of funds have already gone down that route.

The principal regulations governing hedge funds are the Financial Services (Collective Investment Schemes) Act 2005, the Financial Services (Collective Investment Schemes) Regulation 2006, the Financial Services (Experienced Investor Funds) Regulations 2005 and, for matters of redomiciliation of hedge funds into Gibraltar, the Companies (Re-Domiciliation) Regulations 1996 which all can be obtained from the homepage of the Regulator, the Financial Services Commission (FSC, [www.fsc.gi](http://www.fsc.gi)).

### Experienced Investor Funds

EIFs are Gibraltar's premier vehicle for alternative investments. They are open to investors who are considered to be 'experienced'; for instance, a person meets the requirement if that person is a professional asset manager or a person with net assets in excess of €1 million. The term 'experienced investor' is also fulfilled if a participant invests a minimum of €100,000, which makes it easier to subscribe for shares in an EIF.

EIFs are primarily established as open-ended or closed-ended investment companies; unit trusts, partnerships or funds in contractual form as well as protected cell companies (PCC) are also possible. The private company has an interesting special feature, even when compared to other international centres – through amendments of the Companies Act dated April 2006, because it does not limit the number of its members (50 according to Gibraltarian law) for a company that is an EIF and also allows the public distribution of shares to a certain degree.

The strength of the EIF-regime is that it is internationally competitive while maintaining the level of regulation. It offers a fast-track procedure that enables funds to be swiftly and easily set up which brings Gibraltar into line with jurisdictions such as the Cayman Islands or the BVI.

The regulatory regime has placed the burden of compliance, due diligence and ongoing monitoring on the administrator and two FSC licensed directors. Once the EIF is established the administrator has 14 days to notify the FSC of the establishment. A copy of the offering documents and an opinion of a lawyer of at least 5 years professional standing and who is also a Barrister or Solicitor of the Supreme Court of Gibraltar, that the fund complies with the relevant provisions, has to be attached. The Regulator does not only rely on the work of the administrator, but allows this kind of regime because the drafting of the offering documents is being done by lawyers and a senior lawyer is issuing a legal opinion on the fund's compliance with the regulations and has to take the responsibility for the correctness of his opinion.

EIFs are not subject to any mandatory restrictions on their investment or borrowing powers. There is no obligation for an EIF to publish the NAV and it does not have to meet any requirements in respect of minimum net assets. EIFs can be established for one single investor. There is no need to have an authorised 'fund-promoter'.

Regulations require that EIFs shall have an authorised administrator with a physical presence and staff in Gibraltar and an independent

depository. However, administrators are not prohibited from delegating their duties to foreign administrators. EIFs are not required to have a depository where the fund is a closed-ended fund or the fund is a hedge fund and an approved prime broker is appointed. Where an EIF has a depository, whether or not pursuant to a requirement, the depository shall be a person whom the FSC may authorise to act as depository; in practice usually a credit institution based in Gibraltar will be appointed (many first class international banks have established subsidiaries in Gibraltar), however a registered office in Gibraltar is not required.

EIFs have to have at least two Gibraltarian resident directors authorised by the FSC. There is a wider pool of directors in Gibraltar authorised by the FSC that can be appointed to fund boards, which paves the way for better corporate governance and greater investor protection. EIFs can be managed by the directors themselves and the Regulator does not undergo an examination of any external fund managers.

An EIF shall have an annual audit of its financial statements performed by an auditor registered under the Gibraltar Audit Registration Board. Semi-annual reports are not required. The audited financial statements shall be made available to the FSC within 6 months of the financial statement period end.

### Administration of non-Gibraltar domiciled funds

Gibraltar has an ambitious international fund administration sector, headed by Capita Financial Administrators, a subsidiary of Capita Group Plc, a FTSE 100 company. Besides the local domiciled funds there are currently a number of non-Gibraltar domiciled funds that are administered by Gibraltar licensed administrators and each of the different product segments requires distinct administrative service competencies and skill sets. Traditionally the hedge fund route has been to domicile hedge funds in offshore jurisdictions such as the Cayman Islands, Bermuda, Bahamas or the BVI, but have them administered in Dublin and listed on the Irish Stock Exchange. However, Gibraltar has started to get in on that act by the servicing of sophisticated funds domiciled in other countries. Gibraltar's flexible approach means that where a manager has decided to domicile a fund elsewhere, administrators work closely with that jurisdiction to ensure all aspects of corporate governance are monitored.

### Redomiciliation

Gibraltarian legislation also enables hedge funds originally domiciled elsewhere to redomicile into Gibraltar without triggering the need to re-execute all existing contracts and arrangements of the

involving units. Thus, offshore funds created in Caribbean jurisdictions can be transferred into the EU. They maintain their legal form and will be registered by way of continuation as companies under Gibraltar law. If a significant number of European investors are involved a European offshore entity may be more appropriate than a Caribbean one. Needless to say, foreign funds constituted as investment partnerships or unit trusts do not qualify for redomiciliation of their registered office as companies and it would be necessary to reconstitute such funds in Gibraltar afresh, indeed as a new partnership or unit trust.

There are no bureaucratic delays in Gibraltar. In 2006 the first hedge funds moved their registered office from the Caribbean into Gibraltar. For successful redomiciliation just a few formalities and the presentation of a few evidences are necessary. Administrators and the law firms appointed by the fund do the work and take care of filing the application of redomiciliation with the Registrar at the Companies House. They coordinate the whole process with the Regulator and the foreign authorities. In addition it is possible, with good timing (eg. if amendments of offering documents are intended to be done anyhow), to reduce the effective fees of redomiciliation.

As an EIF has to have an administrator with its registered office in Gibraltar, hedge funds that want to redomicile are not completely free to determine the date upon which they can act under Gibraltar law; in a first step the existing administration agreement has to be checked with regard to the terms of termination and the earliest termination date. Occasionally long cancellation periods may be agreed with the foreign administrator. For determining the target date of redomiciliation some kind of 'fine tuning' may also be necessary as one has to consider that the financial period for the first financial statement of an EIF cannot be longer than 18 months.

### Investment manager

Gibraltar offers a very convenient location, at least for European managers, a few of which have already moved their business to, or established all or part of their operations in, Gibraltar. The advantages include the European time zone, the proximity to investors and operational partners and the geographical location which makes it easy to hold meetings. A range of low-budget-flight airlines fly to Malaga several times a day from where it is an hour to drive to Gibraltar. Moreover airlines Iberia and British Airways connect Gibraltar Airport daily with Madrid or London and further destinations for departure are projected. Due to the fact that structuring offshore funds has come under the scrutiny of the tax authorities it

may be important, especially when investment advice to the fund is being provided by a fund manager in London, to ensure that the offshore funds do not fall into the UK tax net. At a time of demanding corporate governance requirements, it is becoming increasingly important for directors to attend some board meetings in person. Domiciling an offshore fund in Gibraltar, which is more accessible than a Caribbean jurisdiction, allows European investment managers to attend meetings more frequently, visit the administrator in that jurisdiction at the same time, and thus demonstrate to the tax authorities that the fund is domiciled in a particular place.

### Protected Cell Company

Since 2001 PCC legislation enables companies to be incorporated as a PCC or existing companies to convert into a PCC. It allows a single corporate structure (eg. an EIF) to contain multiple units or cells that are not legally affected by each other's insolvency or liquidation because assets and liabilities between different cells are segregated. A PCC, combined with contractual limitations of rights of recourse, provides an excellent platform from which to launch a portfolio of fund products and offers a structure well suited to the umbrella fund concept (as well as for private equity funds and property funds). The challenge for PCC has always been whether the ring-fencing provisions would be upheld in a court of law, but given that many countries have this type of corporate vehicle, it is now more accepted than it might have been a dozen years ago.

### Destination well-known

Gibraltar provides an attractive fiscal environment. Investment income derived outside Gibraltar is exempted from income tax in Gibraltar. Alternatively a fund can apply for an exemption certificate from the Commissioner of Income Tax which acknowledges that income derived by the fund is exempt from taxes. There are no capital gains taxes or VAT in Gibraltar. In addition, tax breaks for fund managers make it interesting to conduct the investment management from Gibraltar. There is also a highly developed infrastructure, including comprehensive specialist legal and accounting services, to support the industry. Services are cost competitive and these include fund administration, custody services, audit and legal services. The licensing and registration fees which a fund promoter would be expected to pay to the FSC for the incorporation of a fund and its licensing in Gibraltar compare well with other jurisdictions and there are currently no annual fees payable by funds.

In March 2006 the International Monetary Fund (IMF) carried out an assessment of Gibraltar's

compliance with respect to international standards in banking, insurance, and anti-money laundering and combating the financing of terrorism. In its subsequent report dated May 2007 it attested that Gibraltar was a well-regulated financial centre and had a Regulator with a good reputation for cooperation and information sharing. The assessment found a high standard of compliance with the 'Basel Core Principles for Banking Supervision'. In addition, the combat of anti-money laundering and financing of terrorism was also acknowledged to be well developed.

It is interesting to note how German Federal Financial Supervisory Authority (BaFin), in coordination with Deutsche Bundesbank, construed the provisions of solvability regulations in respect of the requirements of equity capital on 13 December 2007: they noted, inter alia, that Gibraltar is an associated territory like the Channel Islands and the Isle of Man, but has a special status, as EU-law applies in whole and therefore Gibraltar is for reasons of solvability regulations - equivalence of securities commissions - not a 'third country' but associated to EWR.

EU-status means that there is no interest payment for Gibraltar-domiciled hedge funds according to the European Savings Directive (Directive 2003/48/EC) and that they are therefore classified as "out of scope".

An EIF can be listed on international stock exchanges (eg. Irish Stock Exchange) and clearing is possible via Clearstream Banking SA.

The FSC, the statutory body responsible for the regulation of the financial services industry in Gibraltar, is required by statute to match UK standards where EU legislation applies. The UK conducts regular reviews of the FSC to ensure that these high standards continue to be met. The FSC, which is a member of the International Organisation of Securities Commissions (IOSCO) since early 2005, has a proactive attitude and an accessibility that is much appreciated by foreign promoters.

In order to create an organisation for fund practitioners to share their experiences the Gibraltar Association of Investment Managers and Stockbrokers ("GASIM") in early 2008 formed a sub-committee to represent the booming fund industry in Gibraltar.

Last but not least it is important to mention that the Gibraltar's proposed stock exchange, GibEX, is expected to be up and running probably sometime in 2008 which will give a further boost to the fund sector. **THF**