

Always at your service!

Fund administration in Gibraltar is making its mark

By Rolf Majcen, Managing Director,
FTC Capital GmbH,
Austria

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 from Guernsey, Jersey or the Isle of Man, for which, by virtue of Article 299, Section 6(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 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 accessibility that is much appreciated by foreign promoters.

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. The rationale of the FSC is obvious – make it a quick and painless process to enable funds to launch efficiently in Gibraltar.

Experienced Investor Funds

The competitive Experienced Investor Fund Regime, which was developed in August 2005, enhanced Gibraltar's attraction as a domicile for alternative investment funds and a good number of hedge funds, private equity funds and property 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) Regulations 2006 and the Financial Services (Experienced Investor Funds) Regulations 2005. It is easy to establish an EIF. If the fund set-up is ready (offering memorandum, bank accounts, election of prime broker, depositary, manager, administrator, auditor, contribution of the board of directors of the company, legal advisor) the administrator of the fund shall, within 14 days of the establishment of the fund, file with the FSC a written notification of the establishment of the fund. A copy of the offering documents and an opinion of a lawyer of at least five 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.

Without a doubt, Cayman Islands

has become the world's most important hedge fund domicile but also Gibraltar provide the services, infrastructure and operational flexibility which the international investor demands, within the framework of clear and carefully enforced legal guidelines, that are in tune with the requirements of the modern hedge funds industry. Whilst the "registered investment fund", (Section 4(3) of the Cayman Islands Mutual Funds Law (Cayman MFL)), is the most common structure that is used for setting up an alternative investment fund in the Cayman Islands, the EIF is Gibraltar's premier vehicle for alternative investment strategies. The differences between the fund structures of both jurisdictions are minimal. Let us cast a glance at the similarities:

- There are no regulatory restrictions on investment policies or strategies or commercial terms for EIFs and Cayman registered funds.
- There are no promoter approval requirements, which is helpful to small and start-up managers who do not have a track record. The management of both can be done by the directors of the fund themselves.
- There is no regulatory restriction on the choice of external fund managers.
- A trustworthy and reliable legal regulatory system.
- A stable and business-friendly government.
- Tax-neutral for international fund vehicles.
- No exchange controls in relation to international fund vehicles.
- A well-developed regulatory system that is compliant with international standards.

Both Cayman and Gibraltar offer flexibility in the structure of investment funds, which may be structured as companies, partnerships or unit trusts depending on the client's requirements and can be established quickly and cost-effectively; both jurisdictions also offer the opportunity to create multi-portfolio structures with segregation of assets and liabilities (Segregated Portfolio Company (SPC), Protected Cell Company (PCC)), such that there are no cross-liabilities between separate portfolios and thus providing an alternative to the traditional umbrella fund structure. As with the Cayman Islands, 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, gift, wealth taxes or VAT in Gibraltar. In addition, tax breaks for fund managers make it interesting to conduct the investment management from Gibraltar. Similarities are also to be found with regard to the provisions of redomiciliation. Hedge funds which have been established as companies are able to move to Gibraltar from the country of their incorporation without liquidation and fresh registration, as long as redomiciliation is provided for in the charter, statutes or memorandum and articles, or other instruments constituting or defining the foreign company, and if permitted to do so by the applicable law in the jurisdiction of their incorporation. The principal Gibraltar regulations governing redomiciliation are the Companies (Re-Domiciliation) Regulations 1996 amended as of 2005 combined with Circular No. 20 of Companies House dated as of 2 January 2007 and the Financial Services (Experienced Investor Funds) Regulations 2005. 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 as an EIF afresh, indeed as a new partnership or unit trust. In 2006 the first hedge funds moved their registered office from the Caribbean into Gibraltar –there are no bureaucratic delays in Gibraltar and for successful redomiciliation just a few formalities and the presentation of evidential documents are necessary.

The Cayman regime does not stipulate the jurisdictions in which the custodian of a Cayman registered fund should be located; Gibraltar does not even require an EIF to have a depositary if it is a hedge fund or a closed-end fund and an approved prime broker is appointed. Where an EIF has a depositary, whether or not pursuant to a requirement, the depositary shall be such person as the FSC may authorise to act as depositary. In practice usually a credit institute based in Gibraltar will be appointed, however, a registered office in Gibraltar is not required. Funds that would like to have a foreign custodian only need to ascertain that the FSC has no objections.

There are also similarities with regard to the European Savings Directive as both Cayman registered

funds as well as EIFs are deemed to be "out of scope". Moreover, conditions for subscriptions, offering documents and reporting are quasi equal.

Where are the Differences?

- Gibraltar is a member of the EU.
- The administrator of EIFs must be domiciled in Gibraltar, whereas local administrators for Cayman registered funds are not required.
- EIFs must have at least two Gibraltar resident directors authorised by the FSC to promote better corporate governance and greater investor protection. In contrast, the Cayman law requires a minimum of two directors for Cayman registered funds but without residency requirements and corporate directors are also acceptable.

True, Gibraltar has been a latecomer to the global hedge fund industry. But it has been making up for lost time and developing into an exciting place to do business for all aspects of the fund industry – with ongoing attractiveness! The advantages of Gibraltar as a fund domicile also 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 airlines fly to Malaga several times a day from where it is an hour to get to Gibraltar. Moreover, the airlines Iberia and British Airways connect Gibraltar airport daily with Madrid or London and further destinations for departure are projected. There is a good infrastructure of lawyers and accountants in Gibraltar. 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. It is also important to mention that Gibraltar's proposed stock exchange, GibEX, is expected to be up and running probably sometime in 2008/2009 which will give a further boost to the fund industry, and that the Gibraltar Association of Investment Managers and Stockbrokers (GASIM) recently formed a subcommittee to represent the booming fund industry in Gibraltar in order to create an organisation for fund practitioners to share their experiences.

It is interesting to note how German Federal Financial Supervisory Authority (BaFin), in co-ordination

with Deutsche Bundesbank, construed provisions of the solvability regulations (Solvabilitätsverordnung (SolV)) 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 the purpose of the solvability regulations, not a “third country” but associated to the European Economic Area.

European VAT developments are also affecting the fund industry. According to Article 135(1)(g) of the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, Member States shall exempt the management of special investment funds from VAT. Although Gibraltar is not a Member State by definition and the Directive 2006/112/EC does not apply to Gibraltar, it is part of the European Union. An interpretation compliant with European Community Law and within the meaning of the European Court of Justice case - ECJ 28 June 2007, Rs C-363/05, JP Morgan - is that the management of Gibraltar domiciled funds by fund managing companies located in a Member State shall not be taxable.

Because Gibraltar is part of the European Union, it can benefit from the Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (Parent Subsidiary Directive). This Directive was designed to eliminate tax obstacles in the area of profit distributions between groups of companies in the EU by abolishing withholding taxes on payments of dividends between associated companies of different Member States and preventing double taxation of parent companies on the profits of their subsidiaries. Private equity funds and property funds incorporated in Gibraltar, which, for example, incorporate a wholly-owned subsidiary in Luxembourg, can effectively have the benefits of the Parent Subsidiary Directive. There are interesting possibilities, if, for example, the fund invests in a subsidiary of the Luxembourg company which has its registered office in Germany – the German company, after paying any German taxes on its income, can pay its dividends to its Luxembourg parent without paying any German withholding tax (double tax treaty). Once the dividends reach the

Luxembourg parent, those profits can be sent as dividends to the Luxembourg company’s Gibraltar parent without suffering any Luxembourg withholding tax (Parent Subsidiary Directive).

Fund Administration is making its Mark

Gibraltar is not simply a fund domicile. Its forward-thinking legislation and straightforward regulation enables the local fund administrators not only to specialise in administration capabilities and corporate services for structures domiciled in Gibraltar but also for funds established in other jurisdictions.

Traditionally the hedge fund route has been to domicile hedge funds in offshore jurisdictions such as the Cayman Islands, and to a lesser extent, the British Virgin Islands and Bermuda but have them administered in Dublin and listed on the Irish Stock Exchange. However, competition for alternative fund administration business has become intense as it has grown from a small and relatively specialised activity into a mainstream field. Gibraltar has started to get in on that act by servicing sophisticated funds domiciled in other countries. 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. To exemplify, Cayman exempted companies registered as mutual funds under Section 4(3) of the Cayman MFL, the most common fund vehicle in Cayman, or BVI international business companies (private and professional mutual funds) are allowed to be administered from another jurisdiction, therefore even from Gibraltar, which is part of the European Union.

Service providers in Gibraltar are keen to grow the industry, and with its moderate cost base, the domicile is proving to be a very attractive alternative to other more seasoned jurisdictions. Gibraltar hosts a range of fund administrators, from the global names to boutique providers. Its ambitious international fund administration sector serves a large number of small and medium-sized asset and alternative investment managers. However, because they are licensed as Collective Investment Scheme Administrators under the Financial Services (Collective Investment Schemes) Act 2005, they have already demonstrated the capability to service large fund’s specific strategies and attracted funds sponsored or advised by the likes of Goldman Sachs, Bear Sterns and Credit

Suisse. Also the fact that, a major player in the property business, recently launched a USD1 billion property fund in Gibraltar by using the structure of an Experienced Investor Fund and Capita Financial Administrators (Gibraltar) Ltd for their administrator speaks volumes for the excellent reputation Gibraltar has built-up as a jurisdiction in which to conduct fund business. It is also worth mentioning that 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 co-operation and information sharing. The assessment found a high standard of compliance with the “Basel Core Principles for Effective Banking Supervision”. In addition, the combating of anti-money laundering and financing of terrorism was also acknowledged to be well developed.

Developing fund administration services is crucial for any jurisdiction wanting to compete in the fund business sector and the selection of a fund administrator is often considered an important decision made by the promoter or the hedge fund manager. The global growth of hedge and other funds has put increasing pressure on the resources of the large and well-established European centres such as Dublin, Luxembourg or the Channel Islands. Sharing the same time zone as London and being conveniently placed between the US and Far East time zones, Gibraltar’s geographic location means it is ideally placed to provide administration services to funds from a wide range of jurisdictions. Gibraltar has a clear chance to attract more of the business that is currently carried out in the aforementioned domiciles, as business in these centres outgrows their size and the quality of service diminishes. The trends are encouraging and Gibraltar is poised to become firmly established as a specialist base for hedge funds business and an even stronger competitor in the alternative investment funds marketplace within the European Union and the European time zone for being both a fund domicile and a centre for fund administration. While technology is a vital component of any servicing arrangement, fund management remains a relationship driven business and even a niche position in the market can be a very effective one to take!