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# The Legal 500 Country Comparative Guides

## Gibraltar

# ALTERNATIVE INVESTMENT FUNDS

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This country-specific Q&A provides an overview of alternative investment funds laws and regulations applicable in Gibraltar.

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# GIBRALTAR ALTERNATIVE INVESTMENT FUNDS



## 1. What are the principal legal structures used for Alternative Investment Funds?

Gibraltar Alternative Investment Funds (“AIFs”) may be structured either as an Experienced Investor Fund (“EIF”) or a Private Scheme (also known as a “Private Fund”).

### EIF

An EIF is a regulated collective investment scheme designed for professional, high net worth or experienced investors. An EIF may be open-ended or closed-ended and can be marketed to an unlimited number of investors provided they meet the definition of an “experienced investor”. This definition broadly covers, investment professionals, investors who have a net worth in excess of €1,000,000 or investors that invest a minimum of €100,000 in the EIF.

There are no statutory investment restrictions or limitations on borrowing or leverage. EIFs allow for a wider range of investments from traditional asset classes to more alternative in nature.

EIFs benefit from the facility to launch themselves and notify (rather than apply to) the local regulator, the Gibraltar Financial Services Commission (“GFSC”) within 10 days of its launch therefore allowing EIFs to be marketed very quickly.

EIFs can be set up within a matter of days of finalising the offering document and appointing service providers as no GFSC approval is required (other than for its initial incorporation). The speed and ease of set up along with the degree of flexibility that the EIF allows, makes it an excellent investment vehicle.

Benefits of establishing an EIF include: pre-launch approval or post-launch notification mechanism available, can be marketed very quickly, no investment or borrowing restrictions, ability to be self-managed, competitive start-up and on-going costs and no diversification requirements.

### Private Fund

A Private Fund, is an unregulated collective investment scheme that is not subject to any licensing requirements. Private Funds can only be made available to a restricted and identifiable category of persons, the number of offers is limited to fifty and a Private Fund cannot be listed on any stock exchange. Where a Private Fund is established to invest in crypto assets, the Gibraltar Funds and Investments Association’s (“GFIA”) Corporate Governance Code for Gibraltar Crypto Funds (the “Crypto Fund Code of Conduct”) recommends that investment be restricted to a small group of persons who are all known to each other.

There are no specific licensing requirements for the directors on the board of a Private Fund, nor are there any requirements for a Private Fund to appoint a custodian or an investment manager. A Private Fund may be self-managed by its directors and there are no statutory restrictions governing a Private Fund’s investments or leverage.

Private Funds are well suited for “family and friend” investors or individuals who wish to manage their investments in a formal fund structure. They are often used as a cost-efficient way of pooling and trading a small group of individuals’ funds and are also often established as investment vehicles for family offices. Private Funds are extremely flexible and can be tailored to suit individual requirements.

Private Funds must remain private for one year from the date of offer after which they may be converted into an EIF to attract further investment outside of the identifiable person category.

Benefits of establishing a Private Fund include: speed, cost-effectiveness and efficiency, no custodian/depositary requirement, no authorised Gibraltar resident directors’ requirement and no pre-approval from the GFSC is required to commence investment activities.

Funds can be established using a variety of legal entities, including:

- **Private Limited Companies:** which benefit from separate legal personality meaning that, subject to limited circumstances, members will not be held personally liable for any liabilities or debts incurred by the company. It also means that the company can be a party to legal proceedings and hold property in its own name;
- **Protected Cell Companies (“PCC”):** a PCC is a single body corporate, consisting of a core-company, and any number of subdivisions (cells). Each cell may serve as a sub-fund with separate investment strategies and investors and, therefore, the PCC structure provides the ability to segregate a fund’s assets and liabilities between each cell. Each sub-fund may be used for specific investment objectives or strategies and are statutorily protected and remote from each other in the event of insolvency. The PCC structure provides investors with the opportunity to split their investment between different strategies while still complying with any relevant minimum investment thresholds. A Private Fund may not be established as a PCC.
- **Limited Partnerships:** Limited partnerships consist of one or more persons called ‘general partners’, who shall be liable for all debts and obligations of the firm, and one or more persons (which may consist of body corporates) to be called ‘limited partners’, whose liability for the partnership’s debts is limited to their capital contribution to the partnership. There are no limits to the number of partners that can make up a limited partnership. In legal proceedings, only the limited partner will be protected, all other partners may be held personally liable.
- **Unit Trusts:** Unit trusts do not have a separate legal personality, meaning that members of a unit trust will not be protected in legal actions. It is a trust arrangement under which the trustee holds the scheme’s assets on trust for the benefit of unitholders.

## 2. Does a structure provide limited liability to the sponsor and/or manager vis-a-vis investors?

The limited company/partnership structures set out above provide separate legal personality and

accordingly, any liability would be of the entity itself, rather than of its investors/service providers. Liability of investors is generally limited to the amount committed/paid in the fund. In the case of a limited partnership, a general partner’s liability is unlimited but manageable if set up as a corporate entity with limited liability.

## 3. Is there a market preference and/or most preferred structure? Does it depend on asset class?

Typically, the most common legal vehicles for AIFs in Gibraltar are: (a) private companies limited by shares; and (b) PCCs.

It must be noted, however, that the most appropriate structure for a fund will depend on a number of factors, such as the particular fund’s investment strategy. For example, funds that adopt a single strategy will often find that a private limited company is best suited to their needs. Conversely, a fund adopting multiple strategies may find that the PCC is a more suitable option. Similarly, the tax transparency offered by limited partnerships means that this may be the most appropriate structure in cases where investors want to take advantage of fiscal arrangements between the jurisdiction(s) of the fund’s investments and their home jurisdiction.

## 4. Does the regulatory regime distinguish between open-ended and closed-ended Alternative Investment Funds (or otherwise differentiate between different types of funds or strategies (e.g. private equity vs. hedge)) and, if so, how?

The law does describe an open-ended investment company, in general terms, as a body corporate, most or all of the shares in, or securities of which can be realised within a reasonable period. Realisation will typically involve the redemption or repurchase of shares in, or securities of, the body corporate. This realisation must be on the basis of the value of the property that the body corporate holds (that is, the net asset value). Generally speaking however, the AIF regime does not distinguish between open-ended and closed ended AIF’s, nor does it differentiate between different types of funds or strategies.

Information on whether an AIF is open or closed-ended must be disclosed in an AIF’s offering document.

However, in the context of AIFMs, it must be noted that

small AIFMs that manage portfolios of AIFs that are unleveraged and have no redemption rights exercisable during a period of five years following the date of initial investment of each AIF are able to avail themselves of the sub-threshold AIFM exemption under the Alternative Investment Fund Managers Directive (“AIFMD”) provided their assets under management do not exceed €500 million, whereas this exemption only applies for assets under management of up to €100 million (including any assets acquired through the use of leverage) for all other AIFMs.

### **5. Are there any limits on the manager’s ability to restrict redemptions? What factors determine the degree of liquidity that a manager offers investor of an Alternative Investment Fund?**

Generally, there are no statutory or regulatory limitations on the ability of managers to restrict redemptions in either open-ended or closed-ended funds, although contractual restrictions (under an AIF’s rules (including its offering document) or incorporation documents) may be imposed.

It is, however, market practice to provide for rules for occasional suspension of an AIF’s net asset value calculation and accordingly, this will have the effect of limiting subscription and redemption rights.

In respect of AIFMs to which the full scope of the AIFM Regulations apply, for each AIF that they manage which is not an unleveraged closed-ended AIF, they must employ an appropriate liquidity management system and adopt procedures which enable them to monitor the liquidity risk of the AIF and to ensure that the liquidity profile of the investments of the AIF complies with its underlying obligations. AIFMs must also regularly conduct stress tests, under normal and exceptional liquidity conditions, which enable them to assess the liquidity risk of the AIFs and monitor the liquidity risk of the AIFs accordingly and ensure that, for each AIF that they manage, the investment strategy, the liquidity profile and the redemption policy are consistent.

### **6. What are potential tools that a manager may use to manage illiquidity risks regarding the portfolio of its Alternative Investment Fund?**

A number of contractual tools may be utilised by managers in order to manage illiquidity risks when faced with redemption pressures. The most commonly used tools are: redemption fees, redemption gates,

redemptions in kind, side pockets as well as suspension of redemptions.

### **7. Are there any restrictions on transfers of investors’ interests?**

Unless any specific contractual limitations are imposed, interests can generally be transferred freely provided that the general rules on eligible investors and transfers are complied with. For example, in the case of EIFs the investors must meet the eligibility criteria for “experienced investors”.

### **8. Are there any other limitations on a manager’s ability to manage its funds (e.g., diversification requirements)?**

Generally speaking, managers are free to manage funds as they view fit. It should also be borne in mind that management of the fund should be done in accordance with the fund’s offering document and, thus, the manager must comply and adhere to the offering document in its entirety. Gibraltar AIFs are not subject to any diversification requirements in relation to their investments.

Gibraltar legislation has transposed the AIFMD provisions relating to asset stripping. The provisions cover situations where an AIF managed by an in-scope AIFM holds a significant proportion of the shares in, or acquires control of, a non-listed company or an issuer of traded securities, imposing requirements relating to the provisions of information to the company or issuer, shareholders, employers and employees. In addition, the provisions also contain restrictions on distributions, capital reductions, share redemptions and acquisitions by companies or issuers of their own shares for two years after the AIF acquires control.

### **9. What is the local tax treatment of (a) resident, (b) non-resident, and (c) pension fund investors (or any other common investor type) in Alternative Investment Funds? Does the tax treatment of the target investment dictate the structure of the Alternative Investment Fund?**

Investment income of a pension fund, provident fund or other fund established in Gibraltar and approved by the Commissioner of Income Tax is specifically exempt from tax in Gibraltar. Although ‘investment income’ is not defined under Gibraltar law, income such as bank interest, dividends from listed securities, income from

funds marketed to the general public and capital gains are specifically exempt under Gibraltar law which is collectively, commonly referred to an 'investment income'.

There is no withholding tax on dividends paid.

There is no liability to tax on dividends paid by a Gibraltar company to a person who is not resident in Gibraltar.

Where a dividend, or part of a dividend, is the distribution of profits that were not assessable to tax in Gibraltar in the hands of the company that originally generated the income (such as investment income), then the dividend, or relevant part of the dividend is not taxable in the hands of a Gibraltar ordinarily resident individual receiving the dividend.

### **10. What rights do investors typically have with respect to the management or operations of the Alternative Investment Fund?**

Investors would not have day-to-day control over the management or operation of the AIF, or over its assets.

### **11. Are managers or advisers to Alternative Investment Funds required to be licensed, authorised or regulated by a regulatory body?**

Most AIFs in Gibraltar will meet the definition of an AIF for the purposes of the AIFMD. AIFs may either be self-managed or be managed by an external manager or advisor that is appointed independently from the fund.

As self-managed AIFs do not have an external manager or advisor, there is no external manager to be authorised under the AIFMD. Instead, the fund itself becomes the AIFM. Self-managed AIFs are typically structured as EIFs and are usually required to have on their board at least two Gibraltar authorised directors who are fit and proper to take up this role.

Many self-managed AIFs will fall within the "Small AIFM" category, and accordingly almost none of the obligations contained in AIFMD will be applicable to it. Small AIFMs are, however, required to register with and report to the GFSC on an annual basis.

If an AIF does appoint an external manager or advisor, the third-party manager will be required to be authorised

or regulated as either an in-scope AIFM or a Small AIFM under the Financial Services (Alternative Investment Fund Managers) Regulations ("AIFM Regulations") or, where foreign managers are appointed, they must be lawfully able to provide their services from their home jurisdiction. EU managers would ordinarily need to be licensed or authorised as an AIFM in their home member state.

### **12. Are Alternative Investment Funds themselves required to be licensed, authorised or regulated by a regulatory body?**

Under the current Gibraltar framework, an AIF itself is not required to be authorised or licensed by the GFSC. Under AIFMD it is the manager (or AIFM), rather than the AIF, which is subject to regulation.

AIFs established as an EIF are regulated under the Financial Services (Experienced Investor Funds) Regulations and are subject to authorisation and ongoing supervision by the GFSC.

### **13. Are there local residence or other local qualification or substance requirements?**

EIFs require at least two Gibraltar resident directors that are authorised by the GFSC (where established as a company). Closed-ended EIFs are also required to have a banker and/or broker (unless the GFSC makes a determination to that effect). EIFs must also have a licensed administrator in Gibraltar or a non-Gibraltar administrator approved by the GFSC.

### **14. What service providers are required?**

A Private Fund requires the following service providers:

1. Company secretary - a Private Fund will be required to appoint a company secretary who will incorporate the vehicle and deal with on-going filings.
2. Administrator - it is not a legal requirement for a Private Fund to appoint an administrator although without a fund administrator there is a significant potential liability for the operator or manager of the Private Fund if there are multiple investors involved with regular reporting/subscriptions/redemptions. Where a Private Fund has been set up to invest in crypto assets, the Crypto Fund Code of Conduct recommends that an authorised administrator be appointed.

3. Auditor – A Private Fund would be exempt from appointing an auditor and the audit of accounts if it qualifies as a “small company”.
4. Directors – minimum of one.

A Gibraltar EIF requires the following service providers:

1. Administrator – Administrators must be domiciled and regulated in Gibraltar, or if not so authorised, be established in a jurisdiction which is regulated in accordance with a legislative and regulatory regime that provides at least equivalent protection to Gibraltar’s regime. The appointment of fund administrators outside Gibraltar requires GFSC’s consent.
2. Bank and/or broker – EIF’s are required to appoint a bank and/or broker unless the fund is a closed-ended fund or the GFSC determines that it would not be appropriate in the circumstances. The principal duty of the bank and/or broker is to keep the EIF’s assets that are under its control safe and accounted for.
3. Auditors- a Gibraltar-based auditor must be appointed.
4. Company Secretary- a Gibraltar-based company secretary must be appointed.
5. Directors – see 2.3 above.

### **15. Are local resident directors / trustees required?**

See 2.3 above.

### **16. What rules apply to foreign managers or advisers wishing to manage, advise, or otherwise operate funds domiciled in your jurisdiction?**

Foreign managers must be authorised or otherwise legally entitled to carry out the function in the state or territory in question and the intention to delegate must be disclosed in the AIF’s offering document.

### **17. What is the typical level of management fee paid? Does it vary by asset type?**

These differ for each fund but typically range between 0.5%-2% of the fund’s net asset value. This is paid irrespective of how the fund performs.

### **18. Is a performance fee typical? If so, does it commonly include a “high water mark”, “hurdle”, “water-fall” or other condition? If so, please explain.**

A performance fee is typical. Given that performance fees are based on gains, limiting measures are typically employed by funds, such as high-water marks and hurdle rates.

### **19. Are founder shares (which offer a reduce fee structure for initial investors) typical in raising assets for new fund launches?**

No.

### **20. Are management fee “break-points” offered based on investment size?**

Yes, the fund structures provide the flexibility for management fee “break-points” to be offered.

### **21. Are first loss programs used as a source of capital (i.e., a managed account into which the manager contributes approximately 10-20% of the account balance and the remainder is furnished by the investor)?**

These are not common in Gibraltar but would not be prohibited.

### **22. What is the typical terms of a seeding / acceleration program?**

Investors are free to be able to agree with a manager what economic interest they will receive in exchange for making early stage investments.

### **23. What restrictions are there on marketing Alternative Investment Funds?**

#### **Private funds**

Private funds cannot be promoted but their shares can be offered to an identifiable category of persons such as “family and friends”. Offers cannot exceed fifty. As set out in 1.1 above, where a Private Fund is established to invest in crypto assets, the Crypto Fund Code of Conduct recommends that investment be restricted to a small



group of persons who are all known to each other.

## EIFs

EIF's are only reserved for well informed investors (i.e. experienced investors' as defined under the EIF Regulations. These are:

- a person or partnership whose ordinary business or professional activity includes (or it is reasonable to expect that it includes) acquiring, underwriting, managing, holding or disposing of investments, whether as principal or agent, or the giving of advice concerning investments;
- a body corporate which has net assets of more than €1 million or which is part of a group which has net assets of more than €1 million;
- an unincorporated association which has net assets of more than €1 million;
- the trustee of a trust where the aggregate value of the cash and investments which form part of the trust's assets is more than €1 million;
- an individual whose net worth, or joint net worth with the individual's spouse, is more than €1 million, excluding the individual's principal place of residence;
- a participant who has an aggregate of at least €100,000 invested in one or more experienced investor funds;
- a participant who invests at least €100,000 in one or more experienced investor funds;
- a participant who invests at least €500,000 in an experienced investor fund where
  - the participant was advised by a professional adviser to invest in an experienced investor fund; and
  - the experienced investor fund in which the investment is made receives confirmation of such advice;
- a participant who is a professional client, as defined in the Financial Services (Investment Services) Regulations; or
- a participant in a fund that has re-domiciled to Gibraltar where the GFSC has permitted the inclusion of such participant either in respect of a specific experienced investor fund or generally in respect of experienced investor funds or a category of such funds from a certain jurisdiction.

## 24. Is the concept of "pre-marketing" (or

## equivalent) recognised in your jurisdiction? If so, how has it been defined (by law and/or practice)?

Gibraltar does not have any specific provisions on pre-marketing.

## 25. Can Alternative Investment Funds be marketed to retail investors?

AIFMs may market units or shares of AIFs that they manage to retail investors (irrespective of whether the AIFs are marketed on a domestic or cross-border basis or whether they are EU or non-EEA AIFs) in accordance with the AIFM Regulations provided they obtain the approval from the GFSC.

## 26. What are the minimum investor qualification requirements?

The investors must comply with the requirements set out in 4.1 above.

## 27. Are there additional restrictions on marketing to government entities or pensions?

No such restrictions exist under Gibraltar law.

## 28. Are there any restrictions on the use of intermediaries to assist in the fundraising process?

There are no restrictions on the use of intermediaries to assist in the fundraising process. However, where an intermediary carries out a regulated activity for the purpose of the Financial Services Act it will need to ensure that it is approximately authorised by the GFSC.

The use of nominees who act as intermediaries between investors and the AIF is possible.

## 29. Is the use of "side letters" restricted?

The use of side letters is not restricted.

## 30. Are there any disclosure requirements with respect to side letters?

Disclosure must be made to investors via an AIF's rules

(including its offering document) or incorporation document to ensure fair treatment.

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