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GREAT FUND INSIGHTS

Selecting your Fund Domicile

Channel Islands Part 2 – Jersey

Kamar Jaffer Hello, and welcome back to Great Fund Insights: Selecting your Fund Domicile, our video podcast series featuring an expert law firm in an offshore jurisdiction. I'm Kamar Jaffer, a Middle East funds and asset management partner at A&O, and I will be moderating today's conversation. During this series, our expert panellists will explore some of the benefits and the legal and regulatory considerations for each offshore location. We will cover frequently asked questions on how to choose a domicile for your fund and why offshore jurisdictions have become a key choice for global alternative investment funds.

Today we will be discussing topical fund trends in the Channel Islands. We focused in Part I on Guernsey and now, in Part II, we will be focusing on Jersey. I am joined today by our guest speaker, Sophie Reguengo, a Partner in Ogier in Jersey. Sophie is a highly experienced investment funds and regulatory lawyer with over 15 years of experience in the funds industry. She is a member of the investment funds team in Jersey as well as part of Ogier's multi-disciplinary private equity team. Sophie is focused on private equity and real estate structures and advises private and public funds in relation to fund formation and raising capital, as well as regulation, fund finance, acquisition and sales restructurings and winding up. Sophie, thank you for participating in this series, I'm delighted to have you with us today.

Sophie Reguengo Thank you so much, Kamar. I forgot we had given the full biography but that covers everything. As I say, hello to everybody, and thanks again, Kamar, for having invited us in to speak about Jersey. It was fantastic to meet you earlier this year and to be supporting on these podcasts. As Kamar says, my name is Sophie Reguengo, I am a partner in the Jersey office of Ogier and I sit in the investment funds and regulatory team.

Kamar Jaffer Great, so let us kick off with the first question. So Jersey is an established fund jurisdiction, what are the funds that you are currently seeing come to market, Sophie?

Sophie Reguengo First of all, Kamar, that is correct. Jersey is a well-established jurisdiction, not only for fund domicile but also for fund management and fund administration. We have a wealth of excellent service providers and experienced non-executive directors on island here, and we have a robust regulatory framework. Jersey has developed a forward thinking fund sector that offers regimes for retail options through to more sophisticated and to the institutional end of the market as well.

We are an island for the alternatives in terms of asset classes, predominantly private equity, venture capital and real estate, but we are also seeing a growth in hedge funds. Jersey's core fund offering has remained the same, targeting the rest-of-the-world investors, for example non-EU investors from the UK, the US, the Middle East and Asia, but also EU investors where they have workable NPPRs.

In terms of current trends in Jersey, since its introduction in 2017 the Jersey Private Fund is the number one firm favourite in terms of regulatory product. The number of Jersey Private Funds has climbed now past 550 since its introduction according to latest statistics; in fact the 2021 data shows over 500 registered since the regime was introduced, with a 30% increase last year alone, so the growth trajectory is increasing, and it is easy to see why Jersey Private Funds are in demand. The JPF has become synonymous with flexibility and speed to market. It therefore provides an ideal solution for managers across all alternative asset classes who are looking to launch fund products quickly and efficiently to sophisticated professional and high net worth investors.

JPFs also cater well for the co-investment and for pooled private wealth investments and are capable of being marketed under European and UK private placement regimes.

Kamar Jaffer Sophie, what is the common type of fund vehicle that you see being used and also what are the creative or innovative structures that you have seen come to market?

Sophie Reguengo Sure, so we are still seeing the limited partnership as the vehicle of choice for PE and VC funds and JPUTs for real estate; those are Jersey Property Unit Trusts. The main feature of limited partnership, as the name suggests, is the limited liability afforded to the limited partners; in addition, the law is very flexible such that the partners in a Jersey limited partnership are free to agree the terms attaching to the structure and operation of the partnership as between them. We are increasingly seeing cell companies being used for fund structuring. We recently worked on an ICC- incorporated cell company structure for an FCA-regulated client who was looking for a solution to manage lots of different assets under one umbrella, housing different real estate strategies for different investors, all, in this case, sophisticated high net worth investors. We are also undertaking due diligence on a number of PCC cellular fund structures at the moment as well. These are protected cell companies, which use protected cells much in the same way as, in this case, housing each investment. The only real difference between an incorporated cell and a protected cell is that an IC is a company in its own right with a different personality separate from its incorporated cell company.

Kamar Jaffer And what are the key regulatory considerations on the structuring side?

Sophie Reguengo Often the first question we think of and the first question we ask in Jersey is…well, we looked at the number of offers and investors; the numbers are very important. Our collective investment funds law enshrines this into law: what is a regulated fund or what we also call here a public fund? It has to have as its objective a collective investment of capital by means of an offer through the public for units for a subscription sale or exchange. Then you add to it whether that is either an open-ended fund or whether it operates on the principle of risk spreading, usually acquiring more than one asset, and an offer to the public is one where it is not restricted, one of the tests for that being that it is not communicated to more than 50 people. So if your fund is making a restricted offer, it can stay clear of a regulated funds base and can instead be authorised as a private fund, which we will talk about later. The most common type of public fund is an expert fund but we also have listed funds, recognised funds, and eligible investor and unregulated funds.

I will expand a little now on expert funds given their popularity in the public funds space. So where a fund is to be regulated as a collective investment fund (CIF), which means that an offer can be made to an unlimited number of investors and you are not limited to that 50 cap I mentioned. Then a light level of regulation is possible, provided that all investors qualify as expert investors and expressly acknowledge an investment warning. This allows a fund to qualify as an expert fund under the Expert Fund Guide issued by the JFSC. Expert investors include, amongst other tests, any person investing at least USD100,000 or another currency equivalent; the approval process for seeking a certificate for expert funds pursuant to CIF law is streamlined and typically takes around five working days from the formal filing of the application. Other necessary features of expert funds will be that the investment manager must be established in an OECD member state or a state that is subject to a memorandum of understanding with the JFSC otherwise approved by the JFSC and they need to be regulated in that state or satisfy certain criteria under the Guide. Also since 2013, Jersey AIFMs marketing Jersey or other non-EU/EEA AIFs to investors in the EEA, have been required to comply with additional disclosure, transparency and reporting requirements pursuant to the AIFMD. And, in order to access national private placement routes, certain additional consents may be required in Jersey.

Kamar Jaffer And what are the key requirements that apply in relation to private funds?

Sophie Reguengo The Jersey Private Fund Guide, or JPF Guide, issued by the Jersey Financial Services Commission, defines a JPF as a private investment fund involving the pooling of capital, raised for the fund, and that operates on the principle of risk spreading, and describes certain vehicles helpfully that are not intended to fall within the scope of the JPF Guide. These broadly include holding companies, joint ventures – an exemption we use quite a lot – securitisation vehicles, family office vehicles and carry or incentivisation vehicles. A JPF may be structured in Jersey as a company, a unit trust or a limited partnership or an equivalent vehicle overseas. It requires a consent issued under the Control of Borrowing (Jersey) Order and may be established using a streamlined authorisation process. And, in this case, for private funds, the promoter of the JPF will not require the prior approval of the JFSC. In terms of offering a JPF, there is no requirement for it to have an offer document but investors must acknowledge in writing a prescribed investment warning and disclosure statement. Neither the number of offers nor the number of investors can exceed the 50 magic number and each investor must either be a professional investor or an eligible investor, each as defined in the Guide, and this includes an investor that invests a minimum of £250,000 or another currency equivalent.

The JPF Guide provides guidance in relation to how offers and investors will be counted. Now a requirement of the JPF Guide is that a JPF must appoint a designated service provider, which should be an existing Jersey-regulated, full-substance entity and as such is a role typically carried out by the JPF's administrator. The DSP must, amongst other duties, make all reasonable enquiries to ensure that the JPF meets the eligibility criteria, both upon establishment and on a continuing basis, and ensure that all necessary due diligence on the JPF and related parties, which includes the promoter and other service providers, is carried out. Now where a JPF is structured as a company, there is no requirement under the JPF Guide for Jersey-resident directors. Similarly, where a JPF is structured as a partnership or unit trust, there is no requirement under the Guide for the GP or trustee to be incorporated in Jersey or for those entities to have Jersey-resident directors. However, whilst there is no explicit requirement under the Guide for mind and management to be in Jersey, the Guide does state that Jersey's expectation is that in the majority of cases there would be one or more Jersey-resident director on the board of a JPF's governing body.

So the key selling points of the JPF regime include: suitability for funds making fewer than 50 offers to investors meeting certain eligibility criteria; carve-outs for holding structures, joint ventures, special purpose vehicles, employee-incentive arrangements and family structures; a speed-to-market, 48-hour approval process following submission of a complete application to the JFSC via a dedicated web portal; and competitive regulatory fees (the fee payable to the JFSC is around £1,500 upon registration and thereafter around £1,000 annually). It is a proportionate, light-touch regulatory supervision but it is also subject to Jersey's full AML and CFT regime. They have an ability to access investors worldwide, including to be authorised as AIFs to access European and UK capital, and there is no requirement for an offer document, although there is a standard for content requirements, where there is one, and investors must receive and sign an investment warning in prescribed terms. So with its flexibility and speed to market, the JPF regime provides a perfect platform for emerging and first-time managers to start small and build track record, which is key to launching funds II and III.

Kamar Jaffer Sophie, what are the economic sets and requirements that apply, and can you also describe the eco system in Jersey?

Sophie Reguengo Sure. Jersey has introduced economic substance laws applicable to both companies and partnerships and both laws are relevant to Jersey investment funds. A company or a partnership will be caught within the scope of Jersey's economic substance regime if it is a resident company or a resident partnership which carries on one or more relevant activities and it receives gross income from that relevant activity. The substance laws do not apply to investment funds, so in the case of self-managed corporate funds, that is a corporate fund that has not appointed itself an external manager. However, any Jersey fund manager appointed in respect of the fund will be conducting a relevant activity, that of fund management business. Accordingly, consideration should be given to the application of the substance laws to GPs, GPLPs managers, investment managers and trustees in Jersey and, if within scope, the relevant company or partnership must satisfy the economic substance tests, which means they must be directed and managed in Jersey. In particular, meetings of the board of directors, who must have the necessary knowledge and experience to discharge their duties as a board, must be held in Jersey at adequate frequencies, having regard to the level of decision making required. A quorum of the board of directors must physically be in Jersey at those meetings, and where a meeting is called to consider a strategic, or what we call CIGA, a majority of directors must be physically present in Jersey. The meetings must record those strategic decisions and all company records and minutes of all board meetings must be retained in Jersey, including the supporting documentation and the like. Luckily, Jersey is a substance jurisdiction and, as mentioned, has a wealth of service providers and experienced non-executive directors on island, so meeting the tests is not usually problematic in itself, but documenting and recording everything is essential.

Kamar Jaffer Sophie, what are the legal and regulatory developments that you can see on the horizon in Jersey?

Sophie Reguengo Improvements to our Jersey limited partnerships law have been on the horizon for quite some years now, and happily those amendments, having been agreed with industry and the government here, came into force in August of this year. The amendments provide welcome enhancement, modernisation and clarification to the law, including an expanded list of safe harbours. Existing limited partnership agreements do not need to be revised to take account of the changes, although some GPs may wish to consider whether amendments may be beneficial to take advantage of the additional flexibility in the regime. Also, as well as enhancements to our AML CFT regime, which is aimed to bring more entities within scope, revisions to our outsourcing policy, we are also expecting limited liability companies to be available for you soon.

In terms of eco system, I should also add a note about digital virtual assets. We are seeing hedge and VC funds investing directly or indirectly into digital and virtual assets. The JFSC, in common with other regulators, is concerned to avoid missselling of digital asset products to retail investors, for example, and they want to ensure that the service providers to these products are appropriately licensed and experienced. The JFSC has also recently issued draft guidance for funds and SPVs involved in digital assets, and consultation is ongoing. There is enhanced scrutiny of regulatory applications when there is a digital asset in connection; related to this we have seen a trend in family offices and high net worth individuals wishing to invest in funds with exposure to digital and virtual assets. It is a big growth area for both Jersey structures and for funds being marketed to Jersey investors, so it is an evolving area and one to watch.

Kamar Jaffer Sophie, what are you seeing on the frontline outside?

Sophie Reguengo So there are two themes to explore here: firstly, the expanding market and new providers and, secondly, ESG and sustainability-linked fund finance. So fund finance continues to grow and attract new lenders and borrowers. The market is expanding beyond the established banks and fund and debt fund providers, leading to a wider range of GPs accessing facilities for their funds, their fund cycles, all across jurisdictions. There is a continued move to more complex products and, as fund finance continues to embed itself in the lifecycles of funds and these funds reaching the more mature phases of their lifecycles, there is a greater move to NAV or hybrid financing. ESG-linked fund finance has been on the up over the past year. This has been particularly prevalent in Luxembourg and in Ireland, which are established fund finance markets and are actively embracing ESG concepts. Lenders have been noting that funds are more likely to have an ESG policy in place by increasingly looking to incorporate key performance indicators tying into these policies into their financing. It is still a challenge, particularly for smaller funds, to provide robust data for key performance indicators to be used in their financing, but this continues to improve as the ESG policies are tending more towards measurable outcomes, genuinely impacting decision making within a fund rather than generalised quantitative statements.

Kamar Jaffer So you mentioned ESG and sustainable finance in the context of fund financing, what are you seeing more broadly in this space?

Sophie Reguengo We are seeing an interesting range of VC fund enquiries at the moment from new managers with ESG-related strategies; in addition, ESG investment is a key trend in private wealth, often using JPF structures. Obviously one of the things managers will need to grapple with is complex disclosure requirements, which may vary across jurisdictions. Jersey has made quite a deliberate decision in introducing its own anti-green washing disclosure requirements for funds, not to establish its own criteria or taxonomy, or to add to the web of complexity which managers must navigate, but at the same time Jersey is taking positive steps as a jurisdiction. Now industry- representative body, Jersey Finance, has launched a long-term strategic plan to support the island's transition to a more sustainable future, which sets out a vision and a number of objectives where Jersey intends to be by 2030.

Kamar Jaffer Thank you very much, Sophie, for sharing your insights and for participating in this final podcast on the Channel Islands, and thanks to all our listeners for tuning in. Look out for the next podcast in the series, Great Fund Insights: Selecting Your Fund Domicile. Have a good day. Thank you.

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