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Alternative Funds

Ireland
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Law and Practice

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1. General

1.1 General Overview of Jurisdiction

General

International fund promoters are attracted to Ireland due to its open, transparent and well-regulated investment environment, its strong emphasis on investor protection, its efficient tax environment, and its innovative business culture. With over 16,000 professionals employed exclusively in the servicing of investment funds, the Irish funds industry has developed as a centre of excellence with expertise that spans a wide range of services, including fund administration, transfer agency, depositary, legal, tax and audit services, stock exchange listing, compliance and consultancy services. Ireland is a leading domicile for internationally distributed investment funds with over 40% of global alternative investment funds administered in the jurisdiction.

With an unrivalled track record in the European alternatives space, the Irish funds industry remains at the forefront of product innovation, providing opportunities and solutions for this complex sector.

Ireland was the first jurisdiction to provide a regulatory framework specifically for the alternative investment fund industry. From traditional "long only" to complex alternative strategies, Ireland offers world-class, innovative product solutions catering to the widest spectrum of investment strategies.

Alternative Investment Funds

The Irish funds industry offers asset managers extensive fund-structuring expertise, servicing capabilities and the distribution access needed to launch and run an alternative investment fund. Irish alternative investment funds (AIFs) cater to the widest range of investment strategies within a robustly regulated framework and competitive tax environment, offering a tried-and-tested model that is responsive to market developments.

2. Funds

2.1 Types of Alternative Funds

The Alternative Investment Fund Managers Directive (AIFMD), which was implemented in Ireland in July 2013, revolutionised the European regulatory landscape for AIFs. An AIF is defined under the AIFMD as "any collective investment undertaking which raises capital from a number of investors, with a view to investing it in accordance with a defined policy for the benefit of those investors" and which is not required to be authorised under the UCITS directive.

All funds within that definition fall within the remit of the AIFMD which has established organisational, operational, transparency and conduct of business requirements for AIF managers (AIFMs) and the funds they manage. The AIFMD applies to all AIFMs, whether based in the EU or not, who manage or market AIFs within the EU.

The Central Bank of Ireland (Central Bank) acts as the regulatory body to AIFs and "the competent authority" under the AIFMD.

There are two main types of AIFs in Ireland. These are:

- the qualifying investor AIF (QIAIF); and
- the retail investor AIF (RIAIF).

QIAIF

The QIAIF is a regulated investment fund which is suitable for professional investors. The QIAIF is the most adaptable category of Irish regulated fund and is the structure used most frequently for real asset, private equity, real estate, infrastructure, credit funds, loan origination, hedge funds and hybrid strategies. The requirements for investors in a QIAIF are:

- a minimum subscription of at least EUR100,000 or foreign currency equivalent; and
- satisfying the "qualifying investor" criteria prescribed by the Central Bank, subject to exemptions for investments by the AIFM or connected persons.

The key features of a QIAIF are summarised as follows:

- QIAIFs can be structured as open-end, limited liquidity or closed-end funds. Liquidity must be provided at least quarterly if classified as open-end. Unrestricted for QIAIFs structured as limited liquidity or closed-end funds. Gates, deferred redemptions, holdbacks, in-kind redemptions and side pockets can all be facilitated.
- All major AIF strategies used by hedge funds, private equity, real estate funds, credit funds, funds of funds loan origination, managed accounts, master-feeders and hybrid structures are permitted. Direct exposure to commodities is permitted.
- No borrowing restrictions. No leverage limits imposed but maximum level must be set and adhered to.
- Qualifying investors including professional investors under the AIFMD and other categories of sophisticated investor permitted by the Central Bank.
- QIAIFs can issue multiple classes of shares/units with differing features and characteristics (eg, fees, liquidity, distribution policy, etc).
- QIAIFs can avail of the AIFMD marketing passport for distribution to EEA investors and can be sold in all major non-EEA jurisdictions.

- As a general rule, QIAIFs are not subject to tax in Ireland on any income or gains they realise from their investments.

RIAIF
The RIAIF framework provides a regulatory "halfway house" which allows for the creation of an investment fund subject to less investment and eligible asset restrictions than the UCITS framework but subject to greater regulatory scrutiny than the QIAIF regime.

As a result, the RIAIF regime provides an attractive option for managers who need to set up a more highly regulated fund but whose investment strategies do not sit neatly within the UCITS framework.

Key features of the RIAIF are as follows:

- RIAIFs are subject to certain investment concentration limits imposed by the Central Bank in the AIF Rulebook – eg, a RIAIF may not keep more than 10% of its net asset value issuer limit on deposit with any one institution, increased to 30% of the net asset value limit with acceptable credit institutions;
- RIAIFs are retail fund products and as such, cannot avail of the automatic right of EU-wide marketing under the AIFMD marketing passport reserved exclusively for qualifying professional investors – for RIAIFs, access to individual markets across the EU may be authorised on a case-by-case basis;
- RIAIFs may only engage a fully authorised AIFM to manage the fund – accordingly, non-EU AIFMs may not manage a RIAIF; and
- as a general rule, RIAIFs are not subject to tax in Ireland on any income or gains they realise from their investments.

2.2 Fund Structures

Irish AIFs authorised by the Central Bank are typically established in one of the following legal structures.

Irish Collective Asset-Management Vehicle (ICAV)
The ICAV is a corporate vehicle tailored specifically for Irish investment funds, established by way of registration and authorisation by the Central Bank. As a corporate vehicle, the ICAV has a distinct and separate legal personality – ie, it may enter into contracts itself, can own property itself, etc. The ICAV is represented by its board of directors which retains overall responsibility for managing the business of the ICAV.

The ICAV has been specifically created for the Irish funds industry, enabling it to be more flexible than other legal structures. The ICAV legislation essentially drew upon the best and most successful aspects of Irish company law, improving it in several material aspects. The advantage of this is that with its own specific legislative code, the ICAV is not impacted by amendments to European/Irish company law (which are targeted at ordinary companies and not funds), protecting the ICAV from any unintended consequences of such legislative changes. The result is a more straightforward set of legal rules applicable to the ICAV, and lower administration and operating costs.

Some ICAV key characteristics are as follows:

- ability to "check the box" for US tax purposes;
- preparation of separate accounts in respect of each sub-fund where it is structured as an umbrella; and
- flexibility to dispense with the requirement for prior investor approval of any alterations to the ICAV's instrument of incorporation where the depositary of the ICAV certifies the changes do not prejudice investor interests.

ICAVs can also be used for hybrid lending and credit strategies offering investors a blended exposure to:

- credit and loan investments in one ICAV sub-fund; and
- indirect exposure to loan-origination activity in another sub-fund of the same ICAV.

Investment Company
Investment companies are incorporated under the Irish Companies Acts. Similar in some ways to the ICAV, the investment company has a distinct and separate legal personality. The shareholders of the company enjoy limited liability. It is possible to structure the investment company as a single fund or as an umbrella fund with statutorily recognised segregation of liability between the sub-funds of the same investment company. The investment company was traditionally the preferred Irish vehicle for structuring investment funds, but since the introduction of the ICAV, it has fallen from prominence.

Unit Trust
A unit trust is a contractual fund structure constituted by a trust deed between a trustee and a management company (manager) under the Unit Trusts Act, 1990. A unit trust is not a separate legal entity and therefore the trustee acts as legal owner of the fund's assets on behalf of the investors. Since the unit trust does not have legal personality, it cannot enter into contracts.

A separate management company is always required and managerial responsibility rests with the board of directors of the management company. The trust deed is the primary legal document which constitutes the trust and it sets out the various rights and obligations of the trustee, the management company and the unit-holders.

Like the investment company, the popularity of the unit trust has diminished since the introduction of the ICAV. It remains popular for Asian-based asset managers (particularly Japanese-based asset managers).

Common Contractual Funds (CCF)
A CCF is a contractual arrangement established under a deed, which provides that investors participate as co-owners of the assets of the fund. The ownership interests of investors are represented by "units", which are issued and redeemed in a manner similar to a unit trust. The CCF is an unincorporated body, not a separate legal entity and is transparent for Irish legal and tax purposes.

As a result, investors in a CCF are treated as if they directly own a proportionate share of the underlying investments of the CCF rather than having shares or units in an entity which itself owns the underlying investments. Tax transparency is the main feature which differentiates the CCF from other types of Irish funds.

Investment Limited Partnerships
The investment limited partnership (ILP) is a regulated partnership structured under the Investment Limited Partnerships Act 1994 (ILP Act) which is treated as transparent for Irish tax purposes. The ILP is not subject to Irish tax on income and gains accruing to it. The ILP is created by a limited partnership agreement entered into by one or more general partner(s), who manage the business of the limited partnership, and a number of limited partners. Although the ILP legislation was introduced in Ireland in 1994, only a handful of ILPs have been established. The general consensus among private equity asset managers is that the ILP Act has limitations and is currently out of sync with equivalent limited partnership structures available in other international fund domiciles.

The international interest in a fit-for-purpose Irish partnership vehicle has grown over the past decade, particularly since the introduction of the AIFMD in 2014, with global private equity asset managers looking to establish parallel European structures (to their pre-existing Delaware or Cayman fund ranges) for distribution to European investors via the AIFMD passport. This, among other things, prompted the Irish funds' industry association to open dialogue with the Central Bank and the Irish Department of Finance about addressing the limitations in the ILP Act in order to align it with international standards for private equity funds, thereby enhancing its attractiveness for private equity asset managers. This ongoing dialogue has culminated in the publication of the Investment Limited Partnerships (Amendment) Bill 2020 (Bill).

At the time of writing, the Irish government has now published the Bill to amend the existing ILP Act and the Bill is progressing through the Irish parliament and is expected to be published in 2020. See **2.19 Anticipated Changes** for further information on the proposed reforms to the ILP Act.

European Long-Term Investment Funds (ELTIFs)
Irish AIFs, operating as ELTIFs, are regulated in their operation by European Long-Term Investment Funds Regulation ((EU) No 2015/760). An Irish AIF which is structured as an ELTIF is under obligation to limit its investment strategy to those eligible investments as prescribed in the European Long-Term Investment Funds Regulation.

2.3 Regulatory Regime

Legislation and Regulatory Requirements
All Irish AIFs are impacted at an operational level by domestic legislation in the form of the European Communities (Alternative Investment Fund Managers) Regulations 2013 (S.I. 257/2013) (the AIFM Regulations) which transposed the AIFMD into Irish law.

The Commission Delegated Regulation (EU) No 231/2013 (AIFMD Level 2 Regulation), which supplemented the AIFM Directive, is also directly effective to all Irish AIFs.

In addition to the AIFM Regulations and the AIFMD Level 2 Regulation, all AIFs (and Irish-regulated service providers) are subject to the Central Bank's AIF Rulebook, which contains chapters outlining the detailed regulatory requirements for each.

Investment Restrictions
QIAIFs
QIAIFs are not subject to any investment or borrowing restrictions. Investment companies authorised as QIAIFs have a statutory requirement to observe the principle of risk spreading.

RIAIFs
RIAIFs are subject to a regime more restrictive than QIAIFs, with the Central Bank imposing certain investment restrictions and concentration limits on RIAIFs. Like a UCITS, a RIAIF needs to disclose in its prospectus documentation, the quantitative parameters on the extent of leverage which will be used, and is required to calculate its global exposure by using either the commitment method or the value-at-risk methodology. Three of the key investment restrictions and concentration limits applicable to a RIAIF are:

- the limit for investing in unlisted securities is 20% of NAV;
- the limit for investing in securities issued by the same institution is 20% of NAV; and

- the limit for investing in any class of security issued by any single issuer is 20% of NAV (this restriction does not apply to investments in other open-end investment funds).

2.4 Loan Origination

Generally, Irish AIFs may not originate loans unless they are authorised as a loan origination QIAIF (LQIAIF). The LQIAIF is a special category of QIAIF which can originate loans subject to the Central Bank's specific requirements relating to the same. The specific requirements aim to address investor protection and other regulatory prudential requirements, such as including risk management, leverage, disclosure and reporting requirements.

An LQIAIF may be established as a standalone QIAIF or as a single sub-fund under an umbrella platform where other sub-funds under that umbrella need not be subject to loan origination requirements.

2.5 Cryptocurrencies and Non-traditional Assets

There are no generally applicable restrictions on QIAIFs or RIAIFs owning cryptocurrencies for investment purposes.

However, it should be noted that the Central Bank has not, to date, confirmed its position on the status of cryptocurrencies as a security, token or otherwise. Until such time as the Central Bank's position is clear, the precise treatment of cryptocurrencies, and any rules that might apply to advising on the issuance of or dealing in cryptocurrencies, will ultimately depend on the Central Bank's determination of that analysis.

2.6 Regulatory Approval Process

QIAIFs

With regard to the authorisation of QIAIFs, save for the pre-clearance of key parties, the Central Bank does not require any prior filing of QIAIF documentation for its review. By contrast, the Central Bank facilitates a practice of self-certification (ie, certification, in the appropriate manner, is furnished to the Central Bank, certifying that all the disclosure requirements relating to QIAIF documentation have been met). Once the appropriate documentation is filed, the QIAIF will be authorised and will come into existence within 24 hours of application without prior review. However, it typically takes four to six weeks to negotiate all service provider contracts and settle the offering documents.

RIAIFs

For RIAIFs, the Central Bank requires certain documents, such as the prospectus, supplement, letters of confirmation and detailed application forms to be pre-lodged and cleared of comment by the Central Bank before the final application for authorisation can be submitted. In general, it takes between ten and 12 weeks from the initial submission of draft documents to the Central Bank for a UCITS to obtain authorisation.

2.7 Requirement for Local Investment Managers

There is no requirement to have a local investment manager as a condition for managing an Irish AIF.

Where an AIFM intends to delegate the portfolio management function to an investment manager located outside of Ireland, the Central Bank must be satisfied that the investment manager is appropriately regulated in its home jurisdiction before it is cleared to act as an investment manager to an Irish AIF.

There is a fast-track approval process where the investment manager is authorised under the Markets in Financial Instruments Directive (MiFID) in the EU or is from a "recognised jurisdiction" (ie, a jurisdiction which the Central Bank deems to apply a regulatory regime equivalent to its own). The recognised jurisdictions currently include Abu Dhabi, Australia, the Bahamas, Bermuda, Brazil, Canada, Dubai, Guernsey, Hong Kong, India, Japan, Jersey, Malaysia, Qatar, Singapore, South Africa, Switzerland and the USA.

The European Securities and Markets Authority (ESMA), EU national securities regulators, and the UK Financial Conduct Authority (FCA) have confirmed that the memoranda of understanding (MoUs) agreed between them in 2019, will come into effect once the Brexit transition period expires. Such MoUs, which cover co-operation and exchange of information, will allow arrangements for fund manager delegation of portfolio/investment management to continue when the UK exits the EU.

2.8 Other Local Requirements

AIFs are required to maintain a registered address in Ireland. However, AIFs are not required to maintain business premises or hire local employees. A minimum of two directors of the AIF must be Irish-resident. For an ILP, the general partner must be an Irish-registered company and such general partner must have two Irish-resident directors.

2.9 Rules Concerning Other Service Providers

There are a number of Central Bank rules in relation to the choice and location of other service providers, such as the fund administrator, depositary, money-laundering reporting officer and auditor.

Fund Administrator

Each AIF must appoint an administrator incorporated in Ireland and authorised by the Central Bank for such purposes. The fund administrator provides administrative and accounting services such as the calculation of the NAV of an AIF, fund accounting and the preparation of financial statements. Such

entities are subject to strict outsourcing rules. For example, the verification and release of the NAV cannot be outsourced and must be carried out in Ireland.

Depositary
AIFMs must ensure that a single depositary is appointed for each AIF it manages, in accordance with the AIFM Regulations. Depositaries, inter alia, are responsible for the holding and safekeeping of fund assets, oversight, record-keeping and monitoring of cash levels and the appointment of sub-custodians. The depositary must be authorised by the Central Bank and must be located in Ireland.

Money-Laundering Reporting Officer
The Criminal Justice (Money-Laundering and Terrorist Financing) Act 2010 – 2018, as amended – imposes requirements on certain regulated entities to implement controls and procedures designed to prevent money laundering and to guard against the financing of terrorism. Irish investment funds are subject to these requirements and as a condition of authorisation with the Central Bank, QIAIFs must appoint a sufficiently experienced and appropriately senior person as the money-laundering reporting officer, who will be responsible for ensuring the fund meets its reporting requirements.

Irish Legal Advisers
Each AIF must appoint Irish legal counsel.

Auditor
Each AIF must appoint an auditor. In Ireland, an auditor must be one or more persons qualified to audit accounts under the Companies Act.

2.10 Requirements for Non-local Service Providers

See **2.9 Rules Concerning Other Service Providers**.

2.11 Tax Regime

The primary legislative basis for the Irish tax regime is the Taxes Consolidation Act 1997 (as amended) (TCA). The tax regime applicable to a particular fund will depend on the legal form and regulatory treatment of the respective Irish fund.

Investment Undertakings (Including Public and Private Companies, ICAVs and Unit Trusts)
As a general rule, investment funds (which fall within the definition of an "investment undertaking" for the purposes of Section 739B, TCA) are not subject to tax in Ireland on any income or gains they realise from their investments and there are no Irish withholding taxes in respect of distributions, redemptions or transfers of units by or to non-Irish investors, provided certain conditions are met. In particular, non-Irish resident investors and certain exempt Irish investors must provide the appropriate Irish Revenue-approved declaration to the fund.

Alternatively, instead of requiring declarations from every investor, the fund can apply to Irish Revenue for an exception from this requirement, known as the "equivalent measures exception". This reduces the administrative burden on the fund.

Notwithstanding that the fund will be exempt from Irish tax as an investment undertaking, a charge to tax may arise on the occurrence of a "chargeable event" (see below) in respect of the fund. This is a tax which is collected on behalf of investors in the fund (effectively a form of exit tax) and paid to Irish Revenue (Investment Undertaking Tax). Irish funds should only be required to apply Investment Undertaking Tax on payments in respect of certain Irish investors.

Ireland does not impose transfer, subscription, net asset or capital taxes on the issue, transfer or redemption of units owned by non-Irish resident investors.

Irish investment undertakings that invest in Irish real estate assets and assets related to Irish real estate have, since 1 January 2017, been subject to a new tax regime in Ireland which applies to Irish Real Estate Funds (IREF Regime). The key consequence of IREF status is that the IREF is potentially required to apply a 20% withholding tax on the occurrence of certain events, known as "IREF taxable events". This 20% withholding tax is a departure from the standard treatment of an investment undertaking as described above. In addition, following the enactment of the Irish Finance Act 2019, an IREF itself can be subject to tax on specified amounts, where certain leverage ratios are breached. The tax charge is an amount of income tax and is charged at 20%. The computation of this tax charge is complex and depends upon a number of factors.

CCFs
A CCF is a contractual arrangement enabling investors to pool assets in a regulated fund vehicle which is effectively treated as transparent for Irish tax purposes.

The key differentiating factor of a CCF over other forms of Irish fund is the fiscal transparency of the CCF which, if recognised in the relevant investment jurisdiction, can enable investors to access the benefits of the double-taxation agreement in place between their home jurisdiction and the investment jurisdiction.

In order for the CCF to be treated as tax transparent, certain conditions must be met, including that the units in the CCF must be held either:

- by a pension fund or beneficially owned by a person other than an individual; or
- by a custodian or trustee for the benefit of a person other than an individual.

For Irish tax purposes, the income arising or accruing to a CCF is treated as arising or accruing to its investors in proportion to the value of the units beneficially owned by them, as if such income and gains flow directly through the CCF.

The tax transparency of the CCF has been recognised in over 20 markets including Australia, Canada, Germany, Italy, Switzerland, the UK and the USA. In other jurisdictions, it may be possible to seek a specific ruling in advance of any proposed investments.

ILPs
An ILP is treated as transparent for Irish tax purposes and the ILP is not subject to Irish tax on income and gains accruing to it. Instead, the income and gains accruing to the ILP are treated as accruing to the investors in proportion to the value of the units beneficially owned by them. If the ILP invests in Irish-situated assets, certain Irish tax consequences may arise for the ILP or its investors.

Distributions, interest or gains derived from investments held by the ILP may be subject to taxes, including withholding taxes imposed by the country of source.

2.12 Double-Tax Treaties

Irish funds which fall within the investment undertaking tax regime may, depending on the wording of the particular treaty and their legal form, be able to access a particular double-tax treaty directly. The Irish Revenue Commissioners will generally provide confirmation of Irish tax residence for Irish investment funds structured as investment undertakings, noting in that confirmation that the fund is only liable to tax in Ireland to the extent that it has Irish-resident investors.

On the basis that the CCF and ILP are viewed as effectively tax transparent in Ireland, these funds are not generally able to benefit from a reduction in any rate of tax or withholding tax under Ireland's double-taxation agreements. The availability of double-tax treaty relief for investors in such funds will depend upon:

- whether the tax authorities in the investor's jurisdiction and the tax authorities in the jurisdiction where the assets are located (source country tax authorities) accept the fiscal transparency of the entity; and
- the terms of the relevant treaty.

2.13 Use of Subsidiaries for Investment Purposes

It is common for AIFs to use subsidiaries for investment purposes. Subsidiaries can be used for a number of other purposes, including to allow for the containment of liability risks attached to a single investment (such as a property or real estate investment) or to facilitate lending to the fund by an institution which may only lend to a certain category of entity.

A subsidiary may also be used to reduce liability to withholding tax on interest payments under double-tax payments under double-tax treaties between Ireland and other countries.

A wholly owned subsidiary of an AIF is also subject to certain conditions laid down by the Central Bank. The principal conditions are that:

- the directors of the fund must form a majority of the board of directors of the subsidiary and they must maintain full control over the activities of the subsidiary;
- the shares of the subsidiary must be held by the fund's depositary on behalf of the fund; and
- the AIF's administrator must confirm that it will value the underlying assets of the subsidiary in accordance with the AIF's valuation principles.

The subsidiary's constitutional documents must also include certain provisions.

2.14 Origin of Promoters/Sponsors of Alternative Funds

There is a broad fluctuation year-on-year on the location of promoters/sponsors of Irish AIFs. In 2018, approximately 65% of promoters/sponsors of Irish AIFs were based in Europe, 26% in North America, 5% in Africa, 3% in the Middle East and 1% in Asia.

2.15 Origin of Investors in Alternative Funds

While investors in Irish AIFs are truly global, the leading distribution channels are the UK, Germany, the Netherlands, Norway, Sweden and France.

2.16 Destination of Investments Made by Alternative Funds

Irish AIFs invest globally as there is no restriction on the jurisdictions in which they may invest.

2.17 Key Trends

There has been a recent surge in asset managers launching loan origination, hybrid lending and credit strategies.

In addition, the rise of the ICAV can, to an extent, be attributed to its flexibility to accommodate private equity-type strategies

and features (such as capital commitment/drawdown mechanisms, distribution waterfalls, carried interest). Some significant global players in the real asset space have established ICAVs in their private equity, real estate and infrastructure strategies. However, given the historic preference for the limited partnership as the preferred legal form of a private equity fund, the reform of the ILP regime is likely to see an increase in the use of the ILP for these funds.

There has also been a marked increase in interest from asset managers in environmental, social and governance (ESG) products. The increased interest is due to demand from investors and the EU seeking to introduce mandatory rules for AIFs and managers to certify that they are investing in ESG assets. This has resulted in the publication of Regulation (EU) 2019/2088 (Disclosure Regulation) and the proposal for a regulation of the European Parliament and of the Council on the establishment of a framework to facilitate sustainable investment and amending Regulation 2019/2088 on sustainability-related disclosures in the financial services sector (Taxonomy Regulation). This is due to be adopted by the European Parliament at its second reading. It will then be published in the Official Journal of the EU.

See **2.19 Anticipated Changes** for further information on the Disclosure Regulation and Taxonomy Regulation.

2.18 Disclosure/Reporting Requirements

Annual and Half-Yearly Reports – RIAIFS and QIAIFS

RIAIFs and QIAIFs are obliged to publish an annual report within six months of the end of the financial year. In addition, a QIAIF (established as a unit trust or CCF) and a RIAIF must publish a half-yearly report covering the first six months of the financial year within two months of the reporting period.

Other Reporting Requirements – RIAIFs and QIAIFs

All RIAIFs and QIAIFs must file the following reports with the Central Bank:

- a fund profile return describing the particulars of the AIF;
- a monthly return setting out prescriptive information relating to the AIF;
- a quarterly Survey of Collective Investment Undertakings return within ten working days of the relevant quarter; and
- the fund's Annual Survey of Liabilities return.

The depositary of a RIAIF or QIAIF must make certain enquiries into the conduct of the AIFM and management company, investment company, ICAV or general partner in each annual accounting period and report its findings to the unit-holders by way of a depositary report which is included in the annual report of the AIF.

Other Reporting Requirements – AIFMs

Irish AIFMs must also comply with the AIFMD Annex IV reporting obligation. Annex IV reporting covers three key aspects of information which AIFMs need to report to the Central Bank on a regular basis, including: information about the AIFM, as manager, and the AIFs they are managing and, where relevant, marketing.

2.19 Anticipated Changes

Taxonomy Regulation and Disclosure Regulation Overview

The Taxonomy Regulation

The Taxonomy Regulation provides for a framework to classify environmentally sustainable economic activities. It sets out the criteria and factors to be considered for a product or activity to be deemed "environmentally sustainable". It seeks to increase transparency and establish clarity on what activities are deemed "green" or "sustainable".

The Taxonomy Regulation also sets out a list of economic activities with performance criteria for their contribution to six environmental objectives, namely:

- climate change mitigation;
- climate change adaptation;
- sustainable use and protection of water and marine resources;
- transition to a circular economy;
- pollution prevention and control and protection; and
- restoration of biodiversity and ecosystems,

(the "Environmental Objectives").

In order for an activity to qualify as being "environmentally sustainable", it must substantially contribute to one of the Environmental Objectives, while also complying with each of the following criteria:

- no significant harm – the activity does not significantly harm any of the Environmental Objectives;
- technical screening criteria – the activity must comply with technical screening activity in respect of each of the Environmental Objectives; and
- minimum social and governance safeguards – the activity must comply with the minimum social and governance safeguards prescribed in the Taxonomy Regulation.

The Disclosure Regulation

The Disclosure Regulation is aligned with the Taxonomy Regulation and imposes additional disclosure requirements to investors on sustainability-related disclosures by financial market participants and financial advisers in relation to financial products.

The Disclosure Regulation will apply from 10 March 2021 and introduces additional requirements and common criteria for investors to determine what activities are environmentally sustainable, and additional requirements for ESG products with certain characteristics.

Timing
The timeline for the implementation of, and compliance with, the Disclosure Regulation and the Taxonomy Regulation is uncertain. Currently, financial market participants must comply with the Disclosure Regulations from 10 March 2021. However, both require the European Supervisory Authorities (ESAs) to develop the regulatory technical standards (RTS), which will ultimately specify the details of the presentation and the content of this disclosure. The draft RTS will not be submitted to the European Council until December 2020.

Under the Taxonomy Regulation, financial market participants must comply with the obligations in respect of climate change mitigation and climate change adaptation from 31 December 2021, however the draft RTS that will assist financial market participants to comply with these obligations will not be submitted to the European Council until 1 June 2021.

Proposed Enhancements to the ILP Act
It is proposed that the Investment Limited Partnership Act, 1994 will be updated to further enhance the attractiveness of ILPs for international investors. A summary of the main proposals (which may be subject to change) are set out below.

Naming convention
Inclusion of the ability to register a dual foreign name in order to enable an ILP operating in a non-English-speaking jurisdiction (eg, China) to have official recognition of a translated name in that jurisdiction.

Partner register
Limitation of the inspection rights of partners, the depositary and third parties (with the consent of the general partner) to details on the name and address of each partner and the date on which such person became, or ceased to be, a partner.

Removal of the right to inspect details on the amounts and date of contributions, except with the consent of the general partner.

Limited partners
Revision of the definition of "limited partners" to align with modern private equity categories of limited partners, to make it possible to divide limited partners into sub-categories for regulatory reasons, fee treatment, rights and voting, etc.

Addition of a definition of "majority of limited partners" to align with partnership structures in competing fund domiciles by providing flexibility so that an ILP can specify, for example, a majority by number, a majority by value, a majority by class or a majority that is higher than a simple majority.

General partners
Provisions for the creation of a statutory novation of assets and liabilities on substitution of a general partner without further formality, to simplify the administration of changes in general partners.

Express confirmation of the ability to transfer a general partner interest and provision for the liability of incoming and outgoing general partners.

Withdrawal of capital
Relaxation of requirements on withdrawal of capital, including removal of the requirement for:

- the general partner to certify that the ILP is able to pay its debts in full as they fall due after the proposed return of capital is made; and
- a limited partner to be liable for repayment of capital with interest for a period of four months from the date of return of capital where the general partner certification is not secured.

Amendment of partnership agreement
Removal of requirement for all partners to consent in writing to amendment of the LPA.

Provision for amendment of the LPA where provided in the LPA, upon certification by the depositary that the proposed amendment does not:

- prejudice the interests of limited partners; and
- relate to any matter specified by the Central Bank requiring approval by limited partners.

Umbrella partnerships
Ability to establish ILPs as an umbrella fund, with segregated liability between sub-funds.

Migration of partnerships
Ability to migrate a partnership into and out of Ireland on a statutory basis.

3. Managers

3.1 Legal Structures Used by Fund Managers

The most common legal structures used by AIFMs are limited companies, including those listed below:

- Private company limited by shares (LTD) – a simplified entity, an LTD has the capacity of a natural person and can have one director if required and a separate secretary.
- Designated activity company (DAC) – a private company, a DAC's activities are limited to its objectsas set out in its memorandum of association and it must have at least two directors.
- Company limited by guarantee having a share capital (DAC limited by guarantee) – a private company, in which the shareholders have liability under two headings: firstly, the amount (if any) that is unpaid on the shares they hold, and, secondly, the amount they have undertaken to contribute to the assets of the company, in the event that it is wound up, being not less than EUR1. Its activities are limited to its objects as set out in its memorandum of association and it must have at least two directors.

3.2 Regulatory Regime

AIFMs are subject to the full requirements of the Irish AIFM Regulations (which transpose the AIFMD), the Central Bank's Fund Management Company Guidance and the Central Bank's AIF Rulebook. The full rigours of the regulatory regime for AIFMs include capital requirements, ongoing operating and organisational requirements, strict delegations parameters, risk management (including liquidity risk management), financial control and valuation obligations.

In addition, the Central Bank requires that the board of directors of an AIFM retains responsibility for the following six key management functions:

- regulatory compliance;
- fund risk management;
- operational risk management;
- investment management;
- capital and financial management; and
- distribution.

The AIFM's programme of activity (a business plan-type document for AIFMs) must identify the board member or other individual (designated person) who will, on a day-to-day basis, monitor and control each of the individual activities identified above.

An AIFM whose total AIF assets under management are below EUR100 million or, in the case of closed-end (five-year) unleveraged AIFs, EUR500 million, can be a registered AIFM, which means that it will not be subject to the full rigours of the AIFMD regime, however, it also means that it cannot avail of cross-border management or marketing passports.

3.3 Tax Regime

In Ireland, investment managers are most often established as either a private company limited by shares or a designated activity company. Both of these corporate forms enjoy limited liability and have a share capital.

Ireland has two rates of corporation tax:

- a 25% corporation tax rate which applies to "passive" income, ie, interest, dividends, discounts, foreign income, royalties, rental income and certain other types of miscellaneous income; and
- a 12.5% rate that applies to income from trading activities.

In order to access the 12.5% rate, an investment manager must be an Irish-resident company and must carry on an active trade in Ireland. Trading means the carrying on of business or engaging in activities on a regular or habitual basis with appropriate operational substance and normally with a view to realising a profit. The provision of services for reward in the form of fees or commission will generally amount to a trade, unless the activity constitutes a profession. As such, the activities and profits of investment management companies would usually be in the nature of trading and, therefore, subject to tax at a rate of 12.5%.

3.4 Rules Concerning "Permanent Establishments"

Irish tax law provides for an investment management exemption which allows a manager to carry out normal business activities in Ireland, on behalf of a non-Irish-domiciled alternative fund, without those activities inadvertently giving rise to a taxable presence for the non-Irish fund in Ireland. Under Irish corporation tax principles, an alternative fund established as a company could be subject to Irish tax if it was either resident in Ireland or carried on a trade in Ireland through an Irish branch or agency.

If the fund is resident in a jurisdiction with which Ireland has a double-tax treaty, the treaty can often be used to mitigate any tax charge at the level of the Irish management company. Ireland has an extensive network of double-tax treaties; currently 73 agreements are in effect. However, where the alternative fund is resident in a country with which Ireland does not have a double-tax treaty, then the investment manager exemption may be used to mitigate any tax charge at the level of the Irish manager. This exemption has two limbs, as detailed below:

- Section 1035A TCA removes the potential tax charge on all non-residents carrying on a financial trade in Ireland through an agent in certain circumstances. To qualify for this exemption the agent must be a person whose activities are regulated by the Central Bank (or the competent authority in another member state in the EU). It is required that such an agent acts independently of the non-resident and certain other conditions must be met with regard to the arrangements between the Irish agent and the foreign person.
- Chapter 5 Part 27 TCA provides that a fund formed under the law of a member state other than Ireland will not be liable to tax in Ireland by reason only of having a management company that is authorised under Irish law or through an Irish resident branch or agency of a manager authorised in an EEA state.

3.5 Taxation of Carried Interest

Other than narrow legislative provisions in relation to the taxation of carried interest applicable to venture funds which invest in unquoted R&D and innovation companies, there are no specific provisions applicable to the tax treatment of carried interest in Ireland.

In Ireland, "carried interest" can broadly fall under three types of arrangements, which are as follows:

- Firstly, situations where individuals associated with an investment manager (or the investment manager itself) acquire partnership interests in a regulated or unregulated partnership which may be formed in Ireland or in another jurisdiction. These partnership interests entitle the holders to a return which is dependent on the performance of the partnership, which in turn is dependent on the performance of the fund.
- Secondly, the investment manager (or relevant individual managers) subscribe for a special class of shares (or units) in the relevant fund which entitle them to a distribution/equity which is related to the increase in value/profits of the fund.
- Thirdly, the investment manager receives a fee which is performance-related. This is simply treated as investment management fee income for the investment manager.

The second and third types of arrangement are most relevant for the purposes of this guide.

With respect to subscription for units by an individual investment manager, under Irish law, an award of shares or units in an Irish authorised fund by reason of employment in Ireland is subject to income tax, PRSI and USC at marginal rates, deducted by the employer through PAYE. Any gain realised on the sale or redemption of such shares or units by an Irish-resident individual is subject to income tax at 41%. Deemed disposal provisions also apply where the shares or units are held for eight years. By contrast, a non-resident would generally not be subject to any Irish taxes on either receipt, sale or redemption.

3.6 Outsourcing of Investment Functions/ Business Operations

Irish service providers are permitted to delegate or outsource arrangements in accordance with the AIFMD and applicable laws and regulations.

3.7 Local Substance Requirements

The Probability Risk and Impact System is the Central Bank's risk-based framework for the supervision of regulated firms, judging the risks which such firms pose to the economy and the consumer, and mitigating those risks which the Central Bank judges to be unacceptable.

Where the Irish AIFM has a Central Bank PRISM impact rating of "medium-low" or above, the AIFM must have at least:

- three directors resident in Ireland; or
- at least two directors resident in Ireland and one designated person (ie, a person designated by the AIFM's board to undertake one or more managerial functions) resident in Ireland;
- half of its directors resident in the EEA; and
- half of its managerial functions performed by at least two designated persons resident in the EEA.

Where the Irish AIFM has a Central Bank PRISM impact rating of "low", the AIFM must have at least:

- two directors resident in Ireland;
- half of its directors resident in the EEA; and
- half of its managerial functions performed by at least two designated persons resident in the EEA.

As noted above, the AIFM may not have directors in common with the board of the AIF under management. Similarly, the AIFM, the management company, the fund administrator, the investment company or the general partner may not have directors in common with the board of the depositary.

3.8 Local Regulatory Requirements for Non-local Managers

Whether the AIFM is established in Ireland or is located elsewhere, as stated above, there are both local substance requirements for the board of directors of an externally appointed AIFM, and tight restrictions concerning the delegation of the AIFM's responsibilities to the AIF.

4. Investors

4.1 Types of Investor in Alternative Funds
The QIAIF is a regulated investment fund which is suitable for qualifying investors.

The RIAIF is available for investment by retail investors.

Both are described in **2.1 Types of Alternative Funds**.

4.2 Marketing of Alternative Funds
An AIFM may only market an AIF to EU investors if the AIFM is authorised by a relevant EU regulator or complies with national private placement regimes (NPPRs). Marketing is defined in the AIFMD so as to exclude reverse enquiries by investors; thus "passive" marketing by an AIFM is not considered to be "marketing" under the AIFMD.

The AIFMD provides a framework for marketing to professional investors. The definition of professional investor is adopted from the MiFID. Each member state can decide under national private placement rules if it will permit marketing of all or only certain types of EU or non-EU AIFs to retail investors. There is no passport for marketing to retail investors.

4.3 Rules Concerning Marketing of Alternative Funds
An AIFM may only market an AIF to EU investors if the AIFM is authorised by a relevant EU regulator or complies with NPPRs. Marketing is defined in the AIFMD so as to exclude reverse enquiries by investors; thus "passive" marketing by an AIFM is not considered to be "marketing" under the AIFMD.

EU AIFMs managing non-EU AIFs and non-EU AIFMs managing non-EU AIFs may continue to make use of NPPRs. Until the passport is extended, NPPRs are the sole regime available to non-EU AIFs and non-EU AIFMs wishing to market in the EU. However, this is not simply a case of continuing under the terms of pre-existing NPPRs, as the AIFMD imposes mandatory conditions which apply over and above the NPPRs. For example, non-EU AIFMs seeking to privately place non-EU AIF or EU AIF are subject to requirements, including annual reporting, mandatory investor disclosure obligations and regular reporting to the relevant member state authorities with respect to a list of prescribed matters.

EU AIFMs seeking to privately place non-EU AIFs are required to comply in full with the AIFMD, excluding the depositary provisions. In the case of both non-EU AIFMs seeking to privately place non-EU AIFs or EU AIFs and EU AIFMs seeking to privately place non-EU AIFs, there must be co-operation arrangements between the relevant EU and non-EU regulatory authorities involved, and the relevant non-EU jurisdiction concerned must not be listed as a non-co-operative country by the Financial Action Task Force (FATF).

4.4 Local Investors
Local investors can invest in alternative funds in Ireland, provided the investor can satisfy the requirements of a "qualifying investor" for QIAIFs. There are no such similar requirements for local RIAIF investors, who may be retail or professional investors.

4.5 Regulatory Regime
AIFs which propose to market their units in Ireland to investors must be authorised by a supervisory authority set up to ensure the protection of unit-holders, which provides an equivalent level of investor protection to that provided under Irish laws.

An AIF situated in another jurisdiction which proposes to market its units in Ireland to investors must apply to the Central Bank in writing, enclosing specific information and documentation, such as details of the AIF and the AIFM.

4.6 Disclosure Requirements
AIFs in Ireland are not required to disclose the identity of their investors.

4.7 Tax Regime
As described above, where the alternative fund is an investment undertaking, it is subject to the gross roll-up regime and its relevant income or relevant gains are not chargeable under Irish tax (as long as it is resident for tax purposes in Ireland).

"Chargeable Events"
Investors in an investment undertaking may be subject to Investment Undertaking Tax on the occurrence of a "chargeable event". A chargeable event would include:

- any payment to an investor by the alternative fund in respect of their units;
- any transfer, cancellation, redemption or repurchase of units; and
- "deemed disposals" which occur at the end of each fixed eight-year period after the acquisition of units in the alternative fund.

Where a chargeable event occurs, the fund is entitled to deduct the appropriate amount of Investment Undertaking Tax on any payment made to an investor in respect of the chargeable event. Whether the occurrence of a chargeable event with regard to an investor in the fund will be chargeable under Irish tax depends on the residence and type of investor concerned.

Non-Irish-resident investors will not generally be charged Irish tax on the occurrence of a chargeable event, provided that either the fund is in possession of a declaration which confirms that the investor is a non-Irish resident or the fund has agreed to apply certain “equivalent measures” with the Irish Revenue Commissioners.

In addition, the fund will not be required to apply Investment Undertaking Tax if units are held by certain Irish-resident exempt entities, including pension funds and other Irish investment undertakings, provided the fund is in possession of an appropriate declaration as to the status of such entities (ie, exempt Irish investors).

While the fund is not required to withhold Investment Undertaking Tax in respect of exempt Irish investors, those investors may themselves be liable for Irish tax on their income, profits and gains in relation to any sale, transfer, repurchase or redemption of shares in the alternative fund.

Irish-resident investors that are not exempt Irish investors are liable for tax on the occurrence of a chargeable event. Tax at a rate of 41% will be applied by the fund on chargeable events which occur with respect to such an investor.

An Irish-resident investor who is not a company and is not an exempt Irish investor will not be liable for any further income or capital gains tax in respect of any sale, transfer, “deemed disposal”, cancellation, redemption or repurchase, of units or the making of any other payment in respect of their units.

Where the Irish-resident investor is a company which is not an exempt Irish investor, additional rules apply in calculating the tax payable.

Personal Portfolio Investment Undertaking

Where an investment undertaking is deemed a personal portfolio investment undertaking (PPIU) – meaning that an Irish-resident investor can influence the selection of some or all of the property of the alternative fund – a specific tax rate applies on the occurrence of a chargeable event. A gain arising on a chargeable event in relation to a PPIU will be taxed at a rate of 60%.

A fund will not be regarded as a PPIU if the opportunity to select the property concerned is widely available to the public at the time the property is actually available for selection by the investor. This wide availability must be evidenced in marketing or promotional material published by the fund.

4.8 FATCA/CRS Compliance Regime

FATCA

Ireland implemented the US Foreign Account Tax Compliance Act (FATCA) through an intergovernmental agreement (IGA) on 21 December 2012. Under the IGA, an entity classified as a Foreign Financial Institution (FFI) that is treated as being resident in Ireland is expected to provide the Irish Revenue Commissioners with certain information in respect of its US account-holders (ie, investors or noteholders). The Irish Revenue Commissioners then share that information with the IRS.

Funds structured as investment undertakings, CCFs and ILPs will generally constitute FFIs and will be required to comply with the requirements of the IGA and the Irish legislation. If it does so, the fund should not be subject to FATCA withholding on any payments it receives and may not be required to withhold on payments it makes.

A fund which is an FFI for FATCA purposes will have registration, due diligence and reporting obligations and can appoint a service provider to assist with these duties.

CRS

Ireland has provided for the implementation of the CRS through Section 891F TCA and the enactment of the Returns of Certain Information by Reporting Financial Institutions Regulations 2015 (CRS Regulations).

Funds structured as investment undertakings, CCFs and ILPs will generally be treated as “reporting financial institutions” for CRS purposes and will be required to comply with Irish CRS obligations. In order to satisfy its CRS obligations, the fund will require its investors to provide certain information in respect of their tax residence and may, in some cases, require information in relation to the tax residence of the beneficial owners of the investors. The fund, or a person appointed by the fund, will report the information required to the Irish Revenue Commissioners which will share the appropriate information with the relevant tax authorities in participating jurisdictions.

DAC6

On 25 June 2018, Council Directive (EU) 2018/822 (DAC6) introduced rules regarding the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

DAC6 imposes mandatory reporting requirements on EU-based intermediaries who design, market, organise, make available for implementation or manage the implementation of potentially aggressive cross-border tax-planning schemes. It also covers persons who provide aid, assistance or advice in relation to potentially aggressive cross-border tax-planning schemes,

where they can reasonably be expected to know that they have performed that function. If the intermediary is located outside the EU or is bound by legal professional privilege, the obligation to report may pass to the taxpayer.

Ireland implemented DAC6 from 1 January 2020. Certain transactions undertaken by investments funds may fall within the scope of mandatory disclosure rules under DAC6 or equivalent local law provisions and thus, may qualify as reportable cross-border arrangements within the meaning of such provisions. In these circumstances, any person that falls within the definition of an “intermediary” with respect to the fund may be required to report certain transactions entered into by the fund to the relevant EU tax authority.

The Maples Group, through its leading international law firm, Maples and Calder, advises global financial, institutional, business and private clients on the laws of the British Virgin Islands, the Cayman Islands, Ireland, Jersey and Luxembourg. With offices in key jurisdictions around the world, the Maples Group has specific strengths in areas of corporate commercial, finance, investment funds, litigation and trusts and is an independent provider of fiduciary, fund services, regulatory and compliance, and entity formation and management services. The Group comprises over 2,000 professionals in 18 offices and leverages its local expertise to deliver an integrated service offering for global business initiatives. There are currently 53 professionals and 13 partners in the firm's Irish funds and investment management group, each with broad knowledge and experience in financial services. The funds and investment management team has radically reshaped the Irish legal advisory market for Irish investment funds; it advises on all aspects of the establishment, structuring, financing and distribution of Irish retail and alternative funds, also providing strategic regulatory, compliance and advisory services on related areas, including AIFMD, UCITS, MiFID II, FATCA, EMIR, CRS and other global reforms in financial services.

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