

CBI Clarifies Expectations on Non-Discretionary Investment Advisors

On 20 December 2021, the Central Bank of Ireland ("Central Bank") issued the 44th edition of its AIFMD Q&A¹ and the 36th edition of its UCITS Q&A² (together the "Q&As").

Among the updates included in the AIFMD Q&A is a new Q&A on the use of non-discretionary investment advisors. This clarifies the Central Bank's expectations on arrangements for a Qualifying Investor AIF ("QIAIF") involving a non-discretionary investment advisor ("Advisor"), where the Advisor receives a higher proportion of fees than other service providers to the QIAIF.

This is of particular interest to any firm managing (or considering the establishment) of a QIAIF with a private equity strategy or otherwise investing in physical assets which do not qualify as financial instruments, and which will rely on the services of Advisors.

The Q&As also detail the Central Bank's expectations on compliance with ESMA's guidelines³ on performance fees in UCITS and certain alternative investment funds ("ESMA Guidelines").

Expectations on Advisors

Delegation to an Advisor is permitted provided that the following prospectus disclosures and appropriate processes and procedures for oversight of delegated activities are in place:

- *Identification of the Advisor and Services*
The Advisor's identity and the services provided should be comprehensively disclosed in the QIAIF prospectus. These services may include the identification and origination of investment proposals, due diligence and other operational activities relating to the assets or proposed investments of the QIAIF.
- *Fees*
The Central Bank acknowledges that an Advisor's fees may be disproportionately greater than those paid to other service providers. The methodology for accrual and payment of such fees must be disclosed in the prospectus. Where such fees are payable directly from the QIAIF's assets, the maximum fee and the potential to pay out-of-pocket expenses on normal commercial terms of each such service provider must be disclosed. Where a single figure is disclosed covering all fees payable out of the QIAIF's assets, the prospectus must, where relevant, disclose that the Advisor will receive a fee greater than that typically paid to a non-discretionary investment advisor. In order to provide context for this fee, this disclosure should cross-reference details of the services the Advisor is providing to the QIAIF.

¹ <https://www.centralbank.ie/docs/default-source/regulation/industry-market-sectors/funds/aifs/guidance/qa/aifmd-qa-44th-edition.pdf>

² <https://www.centralbank.ie/docs/default-source/regulation/industry-market-sectors/funds/ucits/guidance/ucits-qa-36th-edition.pdf>

³ https://www.esma.europa.eu/sites/default/files/library/esma34-39-992_guidelines_on_performance_fees_en.pdf

- **Oversight**
The role of the alternative investment fund manager with respect to its ongoing oversight and review of Advisor services must be detailed in the QIAIF prospectus, including the discharge of functions under AIFMD Level 2 general principles on delegation.

Performance Fee Clarifications

The new Q&As also update the ESMA Guidelines, confirming that where there has been a global underperformance of a fund which reflects the performance of different delegated portfolio managers, performance fees should not be paid to the underperforming portfolio managers.

Welcome Clarity

The clarification on the use of Advisors is a very positive development and should facilitate the growth of Ireland as a domicile for private markets / closed-ended funds, particularly when considered in combination with the recently upgraded Irish investment limited partnership ("ILP") regime. For further information on the ILP, see: The Irish Investment Limited Partnership – A Guide for Asset Managers⁴.

While the Central Bank has reserved the right to carry out additional supervisory initiatives and request information to demonstrate that a service is truly advisory in nature, QIAIFs using sub-advisors which fall within the foregoing parameters may now proceed without filing a Central Bank pre-submission application.

How We Can Help

Our Irish Funds & Investment Management Group has extensive experience in advising on the establishment of Irish regulated private markets, real estate, infrastructure, and other closed-ended fund products, including advising

on the very first ILP authorised by the Central Bank under the new regime.

Further Information

For further information, please liaise with your usual Maples Group contact or any of the persons listed below.

Dublin

Eimear O'Dwyer

+353 1 619 2065

eimear.odwyer@maples.com

Caitriona Carty

+353 1 619 2157

caitriona.carty@maples.com

Stephen Carty

+353 1 619 2023

stephen.carty@maples.com

Ian Conlon

+353 1 619 2714

ian.conlon@maples.com

Ronan Cremin

+353 1 619 2756

ronan.cremin@maples.com

John Gallagher

+353 1 619 2073

john.gallagher@maples.com

Philip Keegan

+353 1 619 2122

philip.keegan@maples.com

Deirdre McIlvenna

+353 1 619 2064

deirdre.mcilvenna@maples.com

Aaron Mulcahy

+353 1 619 2104

aaron.mulcahy@maples.com

⁴ <https://maples.com/-/media/files/pdfs/articles-and-chapters/the-irish-investment-limited-partnership--a-guide-for-asset-managers-may-2021.pdf>

Niamh O'Shea

+353 1 619 2722

niamh.oshea@maples.com

Emma Conaty

+353 1 619 2708

emma.conaty@maples.com

London**Adam Donoghue**

+44 207 466 1711

adam.donoghue@maples.com

Fearghal De Feu

+44 207 466 1714

fearghal.defeu@maples.com

Cayman Islands**Pádraig Brosnan**

+1 345 814 5441

padraig.brosnan@maples.com

Hong Kong**Michelle Lloyd**

+852 3690 7504

michelle.lloyd@maples.com

The Maples Group's Irish legal services team is independently ranked first among legal service providers in Ireland in terms of total number of funds advised (based on the most recent Monterey Insight Ireland Fund Report, as at 30 June 2020).

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