International
Comparative
Legal Guides

Practical cross-border insights into public investment funds

Public Investment Funds 2022

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1 Registration

1.1 Are funds that are offered to the public required to be registered under the securities laws of your jurisdiction? If so, what are the factors and criteria that determine whether a fund is required to be registered?

In general, any investment fund that is offered to the public in Ireland must first be registered to do so with the Central Bank of Ireland (the "Central Bank"). Public investment funds in Ireland are typically established as Undertakings for Collective Investment for Transferable Securities ("UCITS") pursuant to the UCITS Directive (2009/65/EC, as amended). However, in Ireland, is it also possible to establish a retail investor alternative investment fund ("RIAIF") pursuant to specific rules established by the Central Bank and in accordance with the provisions of the Alternative Investment Fund Managers Directive ("AIFMD") (2011/61/EU). The RIAIF is a rarely used form of fund structure, primarily because of the success of the UCITS structure but also because the RIAIF does not benefit from the AIFMD EEA marketing passport (which is limited to professional investors only). Both UCITS and RIAIFs are required to be authorised and registered under the relevant Irish securities laws irrespective of any factors or criteria that are specific to the relevant investment fund.

It is also possible to offer foreign investment funds to the public in Ireland pursuant to specific registration requirements, as further disclosed below. However, the sale of shares of a public investment fund on an unsolicited basis (i.e., reverse inquiry) to a resident of Ireland does not trigger licensing or registration issues under the laws of Ireland.

It should be noted that it is also possible to establish a European Long-Term Investment Fund ("ELTIF") in Ireland. ELTIFs are an EU investment vehicle available for all types of investors, including retail. However, the use of ELTIFs has been extremely limited to date.

1.2 What does the fund registration process involve, e.g., what documents are required to be filed?

Whether formed as a UCITS or a RIAIF, prior Central Bank clearance of the investment fund is required. The investment fund must follow a standardised authorisation process whereby specific details of the investment fund together with the primary offering documents (being typically the prospectus) must be filed for review with the Central Bank. All Central Bank comments on the investment fund and the offering documents must be addressed before authorisation will be granted. This process generally takes the form of several rounds of comments from the Central Bank. The additional documents required as part of the establishment of the investment fund (e.g., service provider contracts and key investor information documents) do not undergo prior review by the Central Bank but must meet minimum disclosure and compliance requirements. A certification of compliance with respect to these documents is provided to the Central Bank as a prerequisite of obtaining authorisation. In the case of a UCITS or RIAIF formed as a corporate entity, it is also necessary to obtain prior Central Bank approval of the proposed directors, pursuant to the Central Bank Fitness and Probity standards.

1.3 What are the consequences for failing to register a fund that is required to be registered in your jurisdiction?

The Central Bank has broad powers under the UCITS Directive, AIFMD and domestic legislation to address any breaches of registration or other requirements, including (i) the issuance of a public statement identifying the person responsible and the nature of the breach, (ii) the issuance of an order requiring the person responsible to cease the conduct and to desist from a repetition of that conduct, and/or (iii) the issuance of penalties to the entities involved in the investment fund.

1.4 Are there local residency or other local qualification requirements that a fund must meet in order to register in your jurisdiction? Or are foreign funds permitted to register in your jurisdiction?

It is permissible to register foreign investment funds for public sale in Ireland.

UCITS funds established in other EEA Member States may be "passported" in for sale to Irish residents provided they follow the specific marketing passport procedure as outlined in the UCITS Directive. The UCITS fund is required by the Central Bank to appoint a facilities agent in Ireland from which documentation and information with respect to the UCITS fund may be obtained.

Foreign retail alternative investment funds ("AIFs") may also register for sale in Ireland provided they meet minimum upfront and ongoing obligations imposed by the Central Bank. Such obligations include compliance with the Central Bank guidance on performance fees and compliance with the Central Bank Consumer Protection Code.

2 Regulatory Framework

2.1 What are the main regulatory restrictions and requirements that a public fund must comply with in the following areas, if any? Are there other main areas of regulation that are imposed on public funds?

i. Governance

An investment fund structured as a corporate entity must meet minimum composition requirements for the board of directors (the "Board"), which include having a minimum of two Irish-resident directors. A typical UCITS board comprises a majority of directors who are employed by the promotor of the investment fund with the remaining being non-executive Irish resident directors. It is necessary to also consider the Irish Fund Industry Corporate Governance Code for Collective Investment Schemes (the "Code"), which, whilst voluntary in nature, is expected to be adopted by investment funds. Amongst other matters, the Code requires at least one director who is independent from the promoter and that the Board has a good balance of skills and expertise. All directors must satisfy minimum fitness and probity requirements specified by the Central Bank. The Central Bank does not prescribe the experience and expertise required of each director, but the fitness and probity standards require that a director must: (i) be competent and capable; (ii) act honestly, ethically and with integrity; and (iii) be financially sound.

The Central Bank has recently focused governance requirements on management companies as opposed to the investment funds themselves and has introduced a focus on director time commitments, Board diversity and director tenure.

It is typically expected that the Board meets on at least a quarterly basis in Ireland. An Irish-based corporate secretary must also be appointed.

ii. Selection of investment adviser, and review and approval of investment advisory agreement

The appointment of an investment adviser with investment discretion over the assets of the investment fund (such entity is more commonly referred to in Ireland as an investment manager) is a delegation of the portfolio management function pursuant to the UCITS Directive (for UCITS investment funds) or AIFMD (for a RIAIF). Any such delegation must meet the minimum criteria for delegation as outlined in the UCITS Directive or AIFMD as applicable. The most important aspect of any such delegation is that such mandate may only be given to entities that are authorised or registered for the purpose of asset management and are subject to prudential supervision. The Central Bank will only permit certain entities to undertake this role and such entities must be cleared to act by the Central Bank in advance of their appointment. An application for clearance can take one of two forms, distinguished by the location and regulation of the applicant entity. An EU entity authorised as being under prescribed European asset management legislation can avail of a fast-track approval process on production of evidence of its regulatory status. A non-EU applicant is subject to prior review by the Central Bank and must provide more detailed information and documentation, including its track record, assets under management ("AUM") detail, CVs for portfolio managers and the firm's financial resources and ownership structure. The Central Bank can raise queries around the details provided and, where necessary, request further information. Importantly, only certain non-EU jurisdictions that have a memorandum of understanding in place with the Central Bank are deemed permissible.

Once the relevant entity has been cleared to act by the Central Bank, it may then be appointed pursuant to an investment advisory agreement. There are limited minimum standards the Central Bank prescribes with respect to such an agreement.

iii. Capital structure

As standard, there are no minimum regulatory capital requirements imposed on a UCITS that has appointed a UCITS management company, or a RIAIF that has appointed an Alternative Investment Fund Manager ("AIFM"). In such circumstances, the minimum regulatory capital requirements are obligations for the UCITS management company or AIFM themselves, as appropriate. By way of example, a UCITS management company authorised and regulated by the Central Bank must maintain a minimum regulatory capital of either: (i) €125,000 (plus additional funds of 0.02% of AUM where AUM exceeds €250 million), subject to an aggregate maximum of €10 million; or (ii) a quarter of its preceding year's fixed overheads.

iv. Limits on portfolio investments

The UCITS Directive and accompanying Irish legislation and Central Bank requirements/guidance impose various obligations and restrictions on each UCITS. UCITS are subject to restrictions on the types of assets they may invest in and must comply with strict portfolio concentration and borrowing rules. By way of example, UCITS may only invest in "eligible assets" which broadly include transferable securities, money market instruments, other UCITS (or UCITS-equivalent funds) and deposits.

UCITS can invest in financial derivative instruments ("FDIs") for investment purposes, subject to a variety of conditions relating to: (i) the nature of the exposure taken; (ii) the leverage generated through such positions; (iii) the process employed by the UCITS to manage the risks from derivative investments; (iv) rules relating to over-the-counter counterparty exposure; and (v) the valuation of derivative positions. This is supported by the requirement for the UCITS to complete a risk management process that sets out how the fund will comply with such rules.

In addition, the UCITS Directive imposes various concentration rules in order to ensure that the UCITS portfolio is appropriately diversified. One such rule, commonly known as the "5/10/40" rule, essentially means that no more than 10% of the UCITS's net assets may be invested in securities of a single issuer and that the total value of securities and issuers in which a fund has invested more than 5% of its net assets must not exceed, in aggregate, 40% of its net assets.

The Central Bank UCITS Regulations set out high-level FDIs rules, including a summary of permitted FDIs, cover requirements and risk management requirements.

With respect to RIAIFs, the Central Bank imposes similar eligibility and concentration rules as those outlined above.

v. Conflicts of interest

The UCITS Directive imposes certain conflicts of interest requirements on the UCITS management company of a UCITS investment fund. Similarly, AIFMD imposes conflicts of interest requirements on the AIFM of a RIAIF. In general, it is necessary to manage, monitor and disclose conflicts of interest inherent in the investment fund.

vi. Reporting and recordkeeping

UCITS are required to publish an annual audited report for each financial year and an unaudited semi-annual or half-yearly report. The annual report must be published within four months of the year end, the semi-annual report within two months of the period ending, and both must be sent to the Central Bank. Both must also be offered to investors free of charge before the conclusion of a contract and supplied to investors free of charge upon request. Periodic reports must also be provided to the Central Bank.

A RIAIF must publish an annual audited report for each financial year and an unaudited semi-annual or half-yearly report. The annual report must be published within six months of the year end, the semi-annual report within two months of the period ending, and both must be sent to the Central Bank

vii. Other

Specialised investment funds (such as exchange-traded funds ("ETFs") or money market funds) will need to satisfy additional requirements, e.g., in relation to the treatment of secondary market investors and portfolio transparency requirements for UCITS ETFs, as further detailed in question 2.5 below.

2.2 Are investment advisers that advise public funds required to be registered and/or regulated in your jurisdiction? If so, what does the registration process involve?

As set out in question 2.1, point (ii) above, where it is proposed to delegate discretionary portfolio management, the delegate must be cleared to act for Irish funds by the Central Bank (either through the EU fast-track process or non-EU prior review process). Such delegation must be made in writing and any agreement is subject to certain contractual standards set by the Central Bank and any appointment must be registered with the Central Bank.

An entity may also be appointed in an advisory capacity only (i.e., with no investment discretion over the assets of the UCITS). No prior clearance is required in such circumstance. Rather, the written agreement with the adviser should be submitted to the Central Bank along with confirmation from the manager/directors of the UCITS that the advisers in question will act in an advisory capacity only and will have no discretionary powers over any of the assets of the investment fund. The confirmation should also provide that the investment advisory agreement does not (i) provide for any discretionary management powers, and (ii) conflict with regulations and conditions applicable to the UCITS.

2.3 In addition to the requirements above, are there additional regulatory restrictions and requirements imposed on investment advisers that advise public funds?

The answers to questions 2.1, point (ii) and 2.2 above set out the main requirements for both discretionary and non-discretionary delegations. The Central Bank should be kept informed where any appointment is terminated.

2.4 Are there any requirements or restrictions in your jurisdiction for public funds investing in digital currencies?

A UCITS may only invest in assets that can meet the eligible asset criteria for UCITS and where indirect exposure to such assets is capable of being appropriately risk managed. The Central Bank's current view is that digital currencies are not capable of meeting these criteria, noting that these currencies/assets can present significant risks, including: liquidity risk; credit risk; market risk; operational risk (including fraud and cyber risks); money laundering/terrorist financing risk; and legal and reputation risks. Noting these risks and the need for the protection of retail investors, the Central Bank has confirmed that it is highly unlikely to approve a public fund proposing any exposure (either direct or indirect) to these digital assets.

2.5 Are there additional requirements in your jurisdiction for exchange-traded funds?

Ireland is home to almost 50% of Europe's ETFs, the vast majority of which are established as UCITS. A UCITS ETF is able to facilitate the full array of ETF structures, including passive ETFs (both physical and synthetic), active ETFs and smart beta ETFs.

An ETF authorised as a UCITS must identify itself by using "UCITS ETF" in its name. The prospectus for a UCITS ETF must include additional disclosure on the treatment of secondary market investors and information on its policy regarding portfolio transparency. Actively managed UCITS ETFs are subject to the standard UCITS eligible asset and concentration rules and must comply with specific prospectus disclosure (i.e., that it does not track a benchmark) and disclose the identity and quantity of portfolio holdings. Passively managed UCITS ETFs that seek to track a benchmark must comply with UCITS and Central Bank requirements with respect to financial indices.

3 Marketing of Public Funds

3.1 What regulatory frameworks apply to the marketing of public funds?

Irish UCITS are marketed pursuant to the requirements of the UCITS Regulations, as supplemented by the Level 2 Central Bank UCITS Regulations as well as certain EU level requirements, such as the cross-border distribution regime.

3.2 Is licensure with a regulatory authority required of persons (whether entities or natural persons) engaged in marketing activities? If so: (i) are there commonly available exceptions that may be relied on?; and (ii) describe the level of substantive regulation applied to licensed persons.

The marketing of public funds is required to be carried out by suitably licensed entities. A UCITS management company is permitted to market any funds under management pursuant to the "Collective Portfolio Management" licence it obtains under the UCITS Directive. For entities authorised under the Markets in Financial Instruments Directive ("MiFID"), the activity of marketing an investment fund is generally considered to include the regulated activities under MiFID of "receipt and transmission of orders" and/or "investment advice".

3.3 What are the main regulatory restrictions and requirements in the following areas, if any, that must be complied with by entities that are involved in marketing public funds?

i. Distribution fees or other charges

UCITS and RIAIFs are subject to substantive disclosure requirements, including in relation to the maximum fees payable to a distributor and other service providers (e.g., investment manager, administrator, distributor) where such fees are paid directly out of the assets of the relevant fund. Certain fees may not be increased beyond the disclosed maximum without the prior approval of the shareholders. Where the distributor is authorised as a MiFID firm, it will also be subject to the relevant MiFID restrictions around inducements and the receipt of certain fees and commissions.

ii. Advertising

The Central Bank imposes certain advertising requirements on including that any advertisement is immediately recognisable as such and the information provided is clear, fair and not misleading. Any advertisement must: (i) include the name of the investment fund and its regulatory status; (ii) not present information in a manner that is deceptive; (iii) cross-refer to the offering documentation; and (iv) not be inconsistent with such offering documentation.

The investment funds are also expected to comply with the ESMA Guidelines on Marketing Communications.

iii. Investor suitability

A MiFID authorised distributor regulated under MiFID will also be subject to MiFID-level product governance rules to assess the market and investor suitability.

The Central Bank also requires disclosure in the offering documentation of a public investment fund on the profile of a typical investor for whom the fund is designed, including, for example, the suggested investment horizon of any investment.

iv. Custody of investor funds or securities

The assets of an Irish public investment fund must be entrusted to an Irish authorised depositary. The assets must be segregated from the assets of the depositary or its agents and shall not be used to discharge liabilities or claims against any other undertaking or entity. Depositaries are subject to specific and detailed requirements for authorisation and ongoing compliance pursuant to the UCITS Directive and AIFMD.

3.4 Are there restrictions on to whom public funds may be marketed or sold?

UCITS funds have been established principally for the retail markets as open-ended diversified, liquid products and the Central Bank does not restrict to whom UCITS may be marketed or sold.

3.5 Are there other main areas of regulation that are imposed with respect to the marketing of public funds?

The Cross Border Distribution Directive has recently been introduced across the EU and seeks to, *inter alia*, align national marketing notification and marketing discontinuance processes.

4 Tax Treatment

4.1 What are the types of entities that can be public funds in your jurisdiction?

There are four primary legal structures that can be used in the establishment of a public investment fund, namely, the Irish Collective Asset-management Vehicle ("ICAV"), variable capital investment companies ("VCC"), common contractual funds ("CCF") or unit trusts. ICAVs and VCCs are both corporate entities and are, by a distance, the most common legal structures used by public investment funds, with the ICAV becoming the most popular since its introduction in 2015. CCFs are based on the law of contract and are created by a deed of constitution between a management company and a depositary. Unit trusts, similarly, are contractual-type funds created by a trust deed between a management company and depositary. CCFs and unit trusts have no legal personality and are created and controlled by a management company.

4.2 What is the tax treatment of each such entity (both entity-level tax and taxation of investors in respect of allocations of income or distributions, as the case may be)?

Ireland's offering of a highly tax-efficient and -transparent environment for investment funds, a low corporate tax rate and access to an extensive and growing network of double taxation treaties (providing favourable effective tax reclaim rates) has attracted many public funds to domicile in Ireland.

Fund level tax

Irish investment funds that are authorised by the Central Bank and conduct their affairs in Ireland are not subject to any Irish taxes on income and gains derived from investments. Where any distributions received by the funds in respect of investments have been subject to local withholding taxes in the countries where the issuers of the investments are located, it is often possible to reduce or eliminate such withholding taxes under Ireland's network of tax treaties.

Investor level tax

Non-Irish resident investors are not subject to any Irish withholding tax in respect of a distribution of payments by the funds or any redemption, cancellation or transfer of their shares.

4.3 If a public fund, or a type of entity that may be a public fund, qualifies for a special tax regime, what are the requirements necessary to permit the entity to qualify for this special tax regime?

As noted above, Irish investment funds that are authorised by the Central Bank are not subject to any Irish taxes on income and gains derived from investments, provided that they qualify as an "investment undertaking" pursuant to Irish tax legislation. To qualify as such, an investment fund must demonstrate that it conducts its affairs in Ireland.

Jeff Mackey focuses his practice on the establishment and authorisation of investment funds, including AIFs, ETFs and UCITS. Most notably, he advised on the establishment of the first Irish authorised actively managed UCITS ETF. Mr. Mackey regularly represents Irish-based fund service providers and many financial institutions that conduct business in Ireland, including investment managers and promoters engaged in credit funds, equity funds, fixed-income funds, money market funds and real estate funds. He also acts for UCITS management companies and AIFMs.

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