



ICLG

The International Comparative Legal Guide to:

Public Investment Funds 2018

1st Edition

A practical cross-border insight into public investment funds

Published by Global Legal Group, with contributions from:

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Published by
Global Legal Group Ltd.
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London SE1 3PL, UK
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Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
April 2018

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ISBN 978-1-912509-00-3
ISSN 2516-4821

Strategic Partners



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Ireland



Ian Dillon



Cormac Commins

Arthur Cox

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?

There are two broad categories of regulated investment funds in Ireland. The first category comprises undertakings for collective investment in transferable securities (“UCITS”). The second category essentially comprises all non-UCITS funds, which are defined as alternative investment funds (“AIFs”). While AIFs includes a category of retail AIFs, these are not as widely sold, and therefore this section focuses on the primary publicly sold fund type: UCITS. In order to offer funds to the public in Ireland (as opposed to private offerings to qualifying investors), funds must come under the category of UCITS. UCITS are collective investment schemes established and authorised under a harmonised EU legal framework. Under this framework, UCITS established and authorised in one EU Member State can be sold cross-border into other EU Member States without the requirement for additional authorisation. Irish UCITS go through an authorisation process with the Central Bank of Ireland and non-Irish UCITS must follow a simple home regulator to foreign regulator notification process in order to be registered for sale in Ireland.

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

The Central Bank is the regulatory authority responsible for the authorisation and supervision of all regulated investment funds in Ireland. In order for a UCITS to be authorised by the Central Bank, various fund documents need to be put in place which meet the Central Bank’s requirements. Some of the fund documents are reviewed by the Central Bank in advance of the application being made for authorisation of the UCITS. The principal documents which are reviewed by the Central Bank in advance of the UCITS authorisation are the prospectus and the depositary agreement, along with the business plan and the risk management process, if required. Other fund documents (such as the investment management, distribution and administration agreements) are not reviewed by the Central Bank, but executed versions of the agreements are filed with the Central Bank for noting on the day the filing is made, seeking authorisation from the UCITS.

Once draft fund documentation (i.e. Prospectus, Depositary Agreement, etc.) are filed with the Central Bank for review, a UCITS is typically

approved by the Central Bank within six to eight weeks from the date of submission of the documents to the Central Bank, depending on its complexity. The review process typically involves two or three drafts of the principal fund documents being submitted to the Central Bank for review. A UCITS is authorised once the fund documents are cleared of comment and the prospectus and signed fund documents are filed with the Central Bank, seeking its authorisation on that day.

Any subsequent amendments to the fund documents are subject to prior approval from the Central Bank.

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

The Irish Central Bank has in place various supervision and enforcement legislation that will apply in circumstances where an Irish entity is held out as authorised when it is not, or where a foreign fund is sold in Ireland when it is not suitably registered for sale.

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?

Under the UCITS Regime – Foreign (i.e. other EU Member State) UCITS funds may register for sale in Ireland through a simple home regulator to foreign regulator notification process.

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

A UCITS is required to have a minimum of two Irish-resident directors appointed to its board and must comprise at least three directors. The size of a board of the fund may depend on the requirements of the promoter – boards would typically comprise four or more directors. The Central Bank must approve all appointments to the board of directors in advance, but will only do so once it is satisfied that a proposed director meets certain fitness and probity standards. These standards require that the proposed director is fit

and proper in terms of: (i) competence and capability; (ii) honesty, integrity, fairness and ethical behaviour; and (iii) financial soundness. Letters of appointment must be put in place with each director setting out the terms of their engagement. The Central Bank must also be notified of all resignations from a board of directors.

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

A UCITS must appoint an investment manager who manages the investments made by a UCITS. The investment manager does not need to be located in Ireland and, for the most part, is typically not located in Ireland. Any investment manager (and discretionary investment adviser) to be appointed by a UCITS must be approved to act as such by the Central Bank. Essentially, the Central Bank must be satisfied that the discretionary manager is authorised by an appropriate regulatory authority and is subject to ongoing supervision in its home jurisdiction. If a UCITS proposes to appoint either a UCITS management company, MiFID firm, EU bank authorised to provide portfolio management under MiFID or an EU-authorised AIFM to act as its discretionary investment manager, then this involves only a notification to the Central Bank to enable the Central Bank to verify the authorisation status of the proposed investment manager. Any other entity to be appointed as an investment manager which is not listed above would need to seek Central Bank approval to act as such. This approval process is straightforward and involves submitting to the Central Bank an application form which includes sufficient background information to enable the Central Bank to be satisfied that the applicant has the appropriate personnel, experience, financial resources and regulatory status to perform the role. This approval process typically takes two to three weeks. Once approved to act as a discretionary investment manager of a UCITS, which remains subject to regulation in its home state, the entity has no further obligations to the Central Bank, other than to notify it in advance of any change in its regulatory status, name and registered address.

iii. Capital structure

A UCITS management company must be appointed in respect of all Irish unit trusts and common contractual funds. A UCITS established as an investment company or an ICAV may also appoint a management company in the fund structure. Alternatively, a UCITS established as an investment company or an ICAV can be structured without a management company in which case it is called a self-managed UCITS. All management companies must at all times maintain a minimum capital requirement of €125,000 or one-quarter of its preceding year's fixed overheads, whichever is the greater. However, additional capital requirements apply to a UCITS management company which manages assets in excess of €250 million where the management company must maintain additional capital of 0.02% of the value of the assets under management in excess of €250 million, subject to a maximum level of capital of €10 million.

iv. Limits on portfolio investments

The UCITS Directives (and national implementing legislation) provide full details of investment restrictions that apply to UCITS funds including concentration limits, eligible investments, use of FDI, etc. A UCITS can invest in a diverse range of investments such as transferable securities, bank deposits, money market instruments, financial derivatives and units of other funds, either as a fund of funds or a feeder fund. A UCITS cannot invest in real estate or invest directly in commodities, but may be able to gain exposure to commodities using derivatives.

v. Conflicts of interest

The Central Bank of Ireland UCITS regulations contain requirements regarding managing of conflicts of interest, which include a requirement to include in the prospectus of the relevant UCITS a description of the

potential conflicts of interest that could arise between the management company, investment manager and the UCITS and, where applicable, details of how such conflicts will be managed. In addition, disclosure is required in relation to soft commission arrangements that may be entered into, and where it is envisaged that a UCITS and connected persons may enter into transactions with each other, the prospectus must disclose the fact that such transactions may occur.

vi. Reporting and recordkeeping

The Central Bank of Ireland UCITS regulations contain requirements regarding reporting and recordkeeping, including the requirement for annual and semi-annual reports, monthly and quarterly returns and other necessary reports.

vii. Other

In circumstances where a UCITS is listed, there may be stock exchange rules to be followed, including in relation to notices, reports and other material changes.

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?

The Central Bank must be satisfied that the discretionary manager is authorised by an appropriate regulatory authority and is subject to ongoing supervision. If a UCITS proposes to appoint either a UCITS management company, MiFID firm, EU bank authorised to provide portfolio management under MiFID or an EU-authorised AIFM to act as its discretionary investment manager, then this involves only a notification to the Central Bank to enable the Central Bank to verify the authorisation status of the proposed investment manager. Any other entity to be appointed as an investment manager which is not listed above would need to seek Central Bank approval to act as such.

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

The above sets out the primary requirements that apply.

3 Marketing of Public Funds

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

Marketing of UCITS funds in Ireland is subject primarily to the UCITS regime, as well as relevant aspects of MiFID or other regimes that may apply depending on the entity undertaking the marketing, e.g. AIFMD.

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.

Yes, entities marketing UCITS must be suitably authorised for the same under a relevant regime including UCITS, AIFMD or MiFID. There are no commonly available exemptions as private placement, etc. would not generally apply to public fund marketing activities.

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

The Central Bank of Ireland UCITS regulations provide for the disclosures that must be made in relation to fees, including the mechanism for altering fees and restrictions regarding paying fees out of capital. In addition, the rules governing distributors under MiFID may provide restrictions against certain commissions or fees being paid in respect of distribution of a UCITS.

ii. Advertising

The Central Bank of Ireland UCITS regulations contain, amongst others, the following provisions:

- (a) The name of a UCITS and its regulatory status shall be shown clearly in any advertisement relating to that UCITS.
- (b) Any advertisement relating to a UCITS shall not contain information which is false or misleading or presented in a manner that is deceptive.
- (c) Any advertisement relating to a UCITS shall refer to the key investor information document and the prospectus issued by the relevant UCITS.
- (d) No advertisement relating to a UCITS shall be inconsistent with any relevant provision of the key investor information document or of the prospectus issued by the relevant UCITS.

In addition, the Central Bank provides more detailed advertising requirements, which include the general provisions that the advertising must be clear, fair, accurate and not misleading, and that the advertisement can be understood easily and clearly.

iii. Investor suitability

Distributors of UCITS funds in Ireland will need to be satisfied with regard to investor suitability, and MiFID in particular has provisions regarding the same which must be followed by entities distributing under the MiFID regime. Note in particular that to the extent that the MiFID II product governance rules apply, a target market assessment will be necessary.

iv. Custody of investor funds or securities

A UCITS must appoint an Irish depository. The depository is responsible primarily for safekeeping the UCITS assets, ensuring that the cash flows are properly monitored and carrying out oversight in relation to the management of the UCITS.

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

The UCITS regime envisages a product suitable for broad distribution to the public and as such does not contemplate many restrictions on to whom they can be sold. Promoters of UCITS funds themselves may effectively restrict the sale of certain fund types to more institutional investor types through setting high minimum investment amounts or other means.

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

The above sets out the main areas of regulation with regard to the marketing of public funds in Ireland.

4 Tax Treatment

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

Unit Trusts, ICAVs, Common Contractual Funds (CCFs) and Variable or Fixed Capital Companies.

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)?

The UCITS will be obliged to account for Irish tax to the Irish Revenue Commissioners if Shares are held by certain Irish-resident (or ordinarily resident) Shareholders (and in certain other circumstances).

Despite the fact the UCITS is exempt from Irish corporation tax on its income and gains, tax can arise on the happening of a “chargeable event” in the UCITS. A chargeable event includes any distribution payments to Shareholders or any encashment, redemption, cancellation or transfer of Shares or appropriation or cancellation of Shares of a Shareholder by the UCITS for the purposes of meeting the amount of tax payable on a gain arising on a transfer. No tax will arise on the UCITS in respect of chargeable events in respect of a Shareholder who is not resident (or ordinarily resident) in Ireland at the time of the chargeable event.

Dividends received by the UCITS from investment in Irish equities may be subject to Irish dividend withholding tax at the standard rate of income tax (currently 20%). However, the UCITS can usually make a declaration to the payer that it is a collective investment undertaking beneficially entitled to the dividends which will entitle the UCITS to receive such dividends without deduction of Irish dividend withholding tax.

No Irish stamp duty (or other Irish transfer tax) will apply to the issue, transfer or redemption of 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?

Assuming that a UCITS conducts its affairs so that it is Irish tax-resident, it should qualify as an “investment undertaking” for Irish tax purposes and, consequently, be exempt from Irish corporation tax on its income and gains.

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The Group advises many leading financial institutions, investment banks and asset management companies on the establishment of their investment fund structures, as well as service providers to funds, and provides ongoing legal and regulatory advice to those clients.

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