



# ICLG

The International Comparative Legal Guide to:

## **Alternative Investment Funds 2013**

**1st Edition**

A practical cross-border insight into Alternative Investment Funds work

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# The International Comparative Legal Guide to: Alternative Investment Funds 2013

# GLG

Global Legal Group

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# Ireland

Dillon Eustace

Brian Kelliher



Sean Murray



## 1 Regulatory Framework

### 1.1 What legislation governs the establishment and operation of Alternative Investment Funds?

Currently non-UCITS collective investment schemes may be established in Ireland as:

- (a) unit trusts under the Unit Trusts Act 1990;
  - (b) investment companies under Part XIII of the Companies Act 1990;
  - (c) investment limited partnerships (“ILPs”) under the Investment Limited Partnerships Act 1994; and
  - (d) common contractual funds (“CCFs”) under the Investment Funds, Companies and Miscellaneous Provisions Act 2005;
- (collectively referred to as the “**non-UCITS funds legislation**”).

Under the non-UCITS funds legislation, the Central Bank of Ireland (the “**Central Bank**”) is responsible for the authorisation and supervision of these AIF and has the power to impose conditions on them. The current conditions which the Central Bank imposes are contained in the NU series of Notices which contain, *inter alia*, detailed provisions on the operation of these AIF.

The EU Alternative Investment Fund Managers Directive (2011/61/EU) (the “**AIFM Directive**”) is expected to be transposed into Irish legislation in the second quarter of 2013 (the “**Irish AIFM Regulations**”) and will come into effect on 22 July 2013. The EU Commission Delegated Regulation dated 19 December 2012 supplementing the AIFM Directive with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision (the “**Commission Delegated Regulation**”) will have direct effect in Ireland as of 22 July 2013. In addition, the Central Bank intends to replace, effective as of the 22 July 2013, its NU series of Notices with an AIF Handbook which will set out in definitive form the conditions which the Central Bank will impose on AIFMs and on Irish regulated AIFs which are additional to those imposed directly by legislation (the “**AIF Handbook**”). A second draft of the AIF Handbook was issued by the Central Bank in February 2013 but it is expected to be further revised prior to being finalised before 22 July 2013.

Effective from 22 July 2013, the non-UCITS funds legislation will continue to apply to the above referenced AIF. However the Irish AIFM Regulations and the Commission Delegated Regulation will have an impact on the regulation and operation of such AIFs (whether the AIF has an external AIFM or is an internally managed AIF).

Certain AIFs (such as exempt unit trusts, etc.) are not currently subject to the domestic regulatory regime although as AIFs they will be subject to certain requirements under the AIFM Directive.

### 1.2 Are managers or advisers to Alternative Investment Funds required to be licensed, authorised or regulated by a regulatory body?

Irish AIFMs will be required to be authorised under the Irish AIFM Regulations and non-Irish AIFMs providing services in Ireland will be required to avail of the passport provisions in the AIFM Directive.

Irish regulated non-UCITS unit trusts and CCFs must appoint a management company to carry out the management of those AIFs. In addition, an Irish regulated ILP must appoint a general partner to carry out the management of that AIF. Furthermore an Irish regulated non-UCITS investment company may (although it is not compulsory) appoint a management company to carry out the management of that AIF. Although management companies/general partners of such AIF are not subject to authorisation by the Central Bank, such entities are subject to regulation and supervision of the Central Bank by virtue of their roles as management companies/general partners of Irish regulated AIFs.

Effective from 22 July 2013, where such management companies/general partners constitute AIFM of those AIFs, they must be authorised under the AIFM Directive.

Currently Irish regulated AIFs must have an investment manager responsible for discretionary portfolio management. Such entities must be regulated entities in their home jurisdiction under the EU MiFID Directive (“**MiFID**”) or equivalent. Where not authorised under MiFID, investment managers must demonstrate that they have net shareholders’ funds of at least €125,000.

Currently the appointment of non-discretionary investment advisors in relation to Irish regulated AIFs does not need to be pre-cleared by the Central Bank and no regulatory requirements from an Irish regulated AIF’s perspective apply in respect of the regulatory status of such advisors.

Effective from 22 July 2013, an AIFM will be responsible for performing the investment management function of the AIFs it manages and the competent authorities of the AIFM’s home Member State will need to be satisfied that any delegation arrangements of the AIFM (including, *inter alia*, the delegation of investment management and/or investment advice) meet the AIFM Directive’s requirements.

### 1.3 Are Alternative Investment Funds themselves required to be licensed, authorised or regulated by a regulatory body?

Please refer to question 1.1 above.

### 1.4 Does the regulatory regime distinguish between open-ended and closed-ended Alternative Investment Funds (or otherwise differentiate between different types of funds) and if so how?

The legal structures of Irish regulated AIFs are currently broken down into three distinct regulatory categories (i.e. funds sold to retail investors, funds sold to professional investors (“PIFs”) and funds sold to qualifying investors (“QIFs”)) pursuant to which the Central Bank’s conditions vary – with the conditions relating to funds sold to retail investors being the most restrictive and the conditions relating to QIFs being the most flexible.

Currently QIFs can be structured as:

- (i) Open-Ended – which provides redemption facilities for investors (at their request) on at least a quarterly basis;
- (ii) Open-Ended with Limited Liquidity – which provides redemption facilities on a less than quarterly basis but at least once a year;
- (iii) Limited Liquidity – which provides that, at some stage during the life of the QIF, there will be an option for investors to request redemption; and
- (iv) Closed-Ended – which do not provide any capacity for investors to request redemption during the life of the QIF.

Currently funds sold to retail investors can be structured as:

- (i) Open-Ended – which provide redemption facilities on at least a monthly basis (although it is possible to seek a derogation from this requirement); and
- (ii) Closed-Ended – which do not provide any capacity for investors to request redemption during the life of the fund.

Going forward, the Central Bank intends to restrict the regulatory categories of Irish regulated AIFs to retail AIF (“**Retail Investor AIF**”) and AIF sold to qualifying investors (“**QIAIF**”). Based on the latest draft AIF Handbook, it is expected that the Central Bank will allow both Retail Investor AIF and QIAIF to be structured as open-ended, open-ended with limited liquidity, limited liquidity or closed-ended.

### 1.5 What does the authorisation process involve?

Currently the authorisation process for Irish regulated AIFs has two main elements – the authorisation process for the AIF itself and the approval process for its promoter, service providers and (where applicable) directors.

Currently promoters of Irish regulated AIF are required to submit to the Central Bank an application seeking approval to act as promoter of the AIF which application must include, *inter alia*, latest audited accounts and details of its shareholders, overseas regulatory status and financial resources (the promoter must have minimum shareholder’s funds of €635,000 for as long as it acts as promoter). However effective from 22 July 2013, the promoter regime will be discontinued for QIAIFs but will remain for Retail Investor AIFs.

Where an Irish management company is established and AIFM authorisation is not required, the management company must meet certain requirements of the Central Bank relating to capital (i.e. a minimum paid-up share capital equivalent to €125,000 or one-quarter of its total expenditure taken from the most recent annual accounts, whichever is the greater), operating conditions,

organisational requirements, etc. In addition, a minimum of two directors of the management company must be Irish resident and all the directors of an Irish management company are required to meet certain standards of fitness and probity.

Where a management company constitutes an AIFM of an Irish regulated AIF, it must be authorised under the AIFM Directive and would therefore need to comply with the operational, organisational and capital requirements applicable to AIFM.

Other service providers of an Irish regulated AIF (such as the investment manager, administrator, depositary) must be approved/cleared in advance by the Central Bank.

The Directors of an Irish regulated AIF are required to meet certain standards of fitness and probity. A minimum of two directors must be Irish resident.

In relation to the authorisation of funds sold to retail investors, currently certain documents must be submitted to the Central Bank for review (e.g. the prospectus and agreement/deed appointing the depositary). However before such documentation may be submitted to the Central Bank for review, an application for approval of the promoter must be submitted to the Central Bank and the latter must approve in principle the promoter of the fund. Other documentation can be submitted duly executed in support of the application for authorisation of the fund provided it is certified that it complies with the Central Bank’s requirements.

In relation to the authorisation of QIFs, currently there is no prior filing with, or review by, the Central Bank. Instead, there is a self-certification regime (certification has to be given that the Central Bank’s QIF requirements are met). Once those certifications can be given, the fund documentation is simply negotiated between the promoter, legal advisers and the other service providers and then executed and filed with the Central Bank. Once the documentation is filed by 3 P.M. on the business day prior to the date for which authorisation is sought, the QIF will be authorised on the requested date without a prior review. A ‘spot check’ post-authorisation review may then take place.

Notwithstanding the current authorisation regime for Irish regulated AIFs, it remains to be seen how this process will be affected if a Retail Investor AIF or QIAIF is internally managed (i.e. it has an internal AIFM) as such AIF would then also be required to be authorised by the Central Bank as an AIFM under the Irish AIFM Regulations in addition to being authorised as an AIF under the applicable non-UCITS funds legislation. In such instances, it is expected that the Central Bank will require the prior filing and review of documentation in support of the application for authorisation as an AIFM.

Irish regulated AIFs are not currently subject to any minimum capital requirements. However under the AIFM Directive, an internally managed AIF will be required to have a minimum capital of at least €300,000.

### 1.6 Are there local residence or other local qualification requirements?

Please refer to question 1.5 above.

In addition, as part of the Central Bank’s fitness and probity requirements, a director is required to confirm (in a questionnaire to be submitted online to the Central Bank seeking their prior approval for his/her appointment as a director) his/her time commitment in days that will be provided per year in respect of that directorship. In addition the AIF/management company in validating the questionnaire is required to confirm its expectation regarding the proposed director’s time commitment per year.



## 1.7 What service providers are required?

Please refer to question 1.5.

In addition, it is necessary for Irish regulated AIFs to appoint auditors and if the Irish regulated AIF is structured as a corporate, it will be necessary to appoint a company secretary. In addition, if it is intended to list the units of the AIF on the Irish Stock Exchange, it will be necessary to appoint an Irish listing sponsor. It is also customary for Irish legal advisers to be appointed.

The appointment of a prime broker is optional. Distributors responsible for the marketing of the AIF may also be appointed.

## 2 Fund Structures

### 2.1 What are the principal legal structures used for Alternative Investment Funds?

The principal legal structures are set out in question 1.1, the principal features of which are set out below:

- (a) Unit trusts are contractual arrangements created under a trust deed made between a management company and a trustee. Unit trusts do not have their own legal personality and contracts are entered into in respect of unit trusts by the management company and, in certain cases, by the trustee. A unit represents an undivided beneficial interest in the assets of the unit trust. The assets are legally held by the trustee.
- (b) Investment companies are public limited liability companies incorporated with variable capital i.e., the actual value of the paid-up share capital is equal at all times to the value of the net asset value of the company. They are subject to Irish company law (with relevant exceptions) as it applies to public limited companies. Their constitutive document is the memorandum and articles of association and ultimate management authority resides with its board of directors. Shares issued do not represent a legal or beneficial interest in the company's assets, those assets being legally held by the custodian and beneficially by the company itself.
- (c) ILPs are partnerships between one or more general partners and one or more limited partners constituted by written agreements between the parties known as partnership agreements. A general partner is personally liable for the debts and obligations of the partnership and a limited partner contributes or undertakes to contribute a stated amount to the capital of the partnership. A custodian is appointed pursuant to the partnership agreement to safe-keep the assets of the partnership.
- (d) CCFs are funds constituted under contract law by means of a deed of constitution executed under seal by a management company. The deed provides for the safekeeping of assets of the CCF by a custodian who is also a party to the deed. The CCF is an unincorporated body and does not have a legal personality and therefore may act only through the management company. Participants in the CCF hold their participation as co-owners and each participant holds an undivided co-ownership interest as a "tenant in common" with other participants.

Each of the above referenced AIFs may be established as an umbrella fund with separate sub-funds.

### 2.2 Please describe the limited liability of investors.

In investment companies, the liability of the shareholders is limited by the memorandum to the amount, if any, unpaid on the shares held by them.

In unit trusts, the limited liability of the unitholders under the trust deed will depend on the contractual provisions in the trust deed.

In ILPs, the liability of the limited partners is limited to the stated amount of capital they contributed or have undertaken to contribute and except in limited circumstances set down in the Investment Limited Partnerships Act 1994 shall not be liable for the debts or obligations of the partnership beyond the amount so contributed or undertaken.

In CCFs, the liability of a unitholder is limited to the amount agreed to be contributed for the subscription of units.

### 2.3 What are the principal legal structures used for managers and advisers of Alternative Investment Funds?

The principal legal structure used for managers and advisers of Irish regulated AIFs is a private company incorporated with limited liability i.e., the liability of the shareholders is limited by the memorandum to the amount, if any, unpaid on the shares held by them.

### 2.4 Are there any limits on the manager's ability to restrict redemptions in open-ended funds or transfers in open-ended or closed-ended funds?

Although Irish regulated AIFs may apply redemption gates if provided for in the applicable fund documentation, the Central Bank currently imposes limits on the AIF's ability to restrict redemptions on any one dealing day in the context of open-ended funds. For example, if total requests for redemption in an open-ended retail fund or QIF with monthly dealing exceed 10 per cent of the net asset value of the fund or the number of units in issue in the fund in any one dealing day, the AIF may only refuse to redeem any units in excess of 10 per cent. Similarly if total requests for redemption in an open-ended QIF with quarterly dealing exceed 25 per cent of the net asset value of the fund or the number of units in issue in the fund in any one dealing day, the AIF may only refuse to redeem any units in excess of 25 per cent.

The Central Bank proposes to maintain the above restrictions going forward based on the draft AIF Handbook.

### 2.5 Are there any legislative restrictions on transfers of investors' interests in Alternative Investment Funds?

There are no legislative restrictions on transfers of investors' interests in Irish regulated AIF other than in ILPs, a limited partner may assign his partnership interest subject to the consent of all general partners to the assignee being admitted to the partnership as a limited partner.

## 3 Marketing

### 3.1 What legislation governs the production and offering of marketing materials?

The non-UCITS funds legislation governs the production and offering of a prospectus by an Irish regulated AIF but does not extend to other marketing materials used by an Irish regulated AIF.

However Irish investment firms authorised under MiFID to provide investment advice or distribution services relating to shares/units in an AIF are subject to the marketing provisions contained in the Irish MiFID Regulations.

### 3.2 What are the key content requirements for marketing materials, whether due to legal requirements or customary practice?

There are very prescriptive requirements relating to the content of a prospectus of an Irish regulated AIF. These are set out in the current NU series of Notices and draft AIF Handbook (to replace the NU series of Notices).

The prospectus of an Irish regulated closed-ended AIF must comply with the content requirements in the Irish Prospectus Directive Regulations (where applicable).

The Irish MiFID Regulations require Irish investment firms to ensure that information provided to potential clients about, *inter alia*, financial instruments (such as units in an AIF) meet certain prescribed requirements.

### 3.3 Do the marketing or legal documents need to be registered with or approved by the local regulator?

In relation to all Irish regulated AIF, a dated prospectus must be submitted to the Central Bank for its noting prior to its issue.

The prospectus of an Irish regulated closed-ended AIF must be submitted to the Central Bank for approval in accordance with the Irish Prospectus Directive Regulations (where applicable).

### 3.4 What restrictions are there on marketing Alternative Investment Funds?

In relation to the marketing to the public in Ireland of non-Irish AIFs, currently the statutory position is that, in general, the approval of the Central Bank is required.

The Central Bank requirements are set out in its NU series of Notices and in the draft AIF Handbook (which will replace the NU Series of Notices).

In the past, the Central Bank has been willing to consider a derogation from its inward marketing requirements to facilitate the private placement of a non-Irish AIF in Ireland if the nature and extent of the offering in Ireland was sufficiently limited.

Until up to at least 2018 in respect of an EU AIFM of a non-EU AIF and a non-EU AIFM of a non-EU AIF and until up to at least 2015 in respect of a non-EU AIFM of an EU AIF, the relevant AIFM may be able to market in a EU Member State under that Member State's private placement rules.

It is expected that the current statutory provisions referred to above will be amended to facilitate the passport provisions in the AIFM Directive. However it is unclear at this time whether more prescriptive rules/provisions around Ireland's private placement regime for non-Irish AIFs will be introduced.

### 3.5 Can Alternative Investment Funds be marketed to retail investors?

QIAIFs may only be marketed to qualifying investors as detailed in question 3.6. However Retail Investor AIFs may be marketed to retail investors.

### 3.6 What qualification requirements must be carried out in relation to prospective investors?

Currently QIFs may only be sold to qualifying investors and a minimum subscription of €100,000 applies. A qualifying investor is:

- (i) an investor who is a professional client within the meaning of MiFID; or
- (ii) an investor who receives an appraisal from an EU credit institution, a MiFID firm or a UCITS management company that the investor has the appropriate expertise, experience and knowledge to adequately understand the investment in the QIF; or
- (iii) an investor who certifies that they are an informed investor by providing the following:
  - confirmation (in writing) that the investor has such knowledge of, and experience in, financial and business matters as would enable the investor to properly evaluate the merits and risks of the prospective investment; or
  - confirmation (in writing) that the investor's business involves, whether for its own account or the account of others, the management, acquisition or disposal of property of the same kind as the property of the QIF.

Qualifying investors must self-certify in writing to the QIF that they: (i) meet the minimum initial investment per investor and appropriate expertise/understanding tests; and (ii) are aware of the risk involved in the proposed investment and of the fact that inherent in such investments is the potential to lose all of the sum invested.

An exemption from the minimum subscription requirement for QIFs and an exemption from the QIF qualifying investor criteria are available to the promoter, manager, investment manager, directors and a limited number of other persons and entities that are closely connected with the management of the QIF.

A fund which has no minimum subscription requirement or has a minimum subscription which is less than €100,000 per investor is considered to be a retail fund.

Going forward, the Central Bank proposes that the above detailed requirements will be maintained for Retail Investor AIFs and QIAIFs.

### 3.7 Are there additional restrictions on marketing to public bodies such as government pension funds?

No, there are not.

### 3.8 Are there any restrictions on the use of intermediaries to assist in the fundraising process?

Currently where a distributor is appointed by an Irish regulated AIF or management company or is paid out of the assets of the AIF, the Central Bank does not need to be notified in advance provided certain confirmations and an executed copy of the distribution agreement are filed with the Central Bank. The prospectus of the AIF must provide for the appointment and the amount of any fees/costs payable or that such fees/costs will be at normal commercial rates. There are no regulatory or disclosure requirements relating to the appointment of sub-distributors, intermediaries or placement agents by a distributor where the fees of such third parties are paid by the distributor.

### 3.9 Are there any restrictions on the participation by financial institutions in Alternative Investments Funds (whether as sponsors or investors) arising from the 2008 financial crisis?

There are no restrictions directly arising from the 2008 financial crisis on financial institutions participating in Irish regulated AIFs.

## 4 Investments

### 4.1 Are there any restrictions on the types of activities that can be performed by Alternative Investment Funds?

Irish regulated AIFs may not raise capital from the public through the issue of debt securities. However this restriction does not operate to prevent the issue of notes by QIFs (to be replaced by QIAIFs), on a private basis, to a lending institution to facilitate financing arrangements.

Irish regulated AIFs may not grant loans or act as a guarantor on behalf of third parties. This is without prejudice to the right of the AIF to acquire debt securities and it does not prevent AIFs from acquiring securities which are not fully paid. However the Central Bank has committed to re-look at this restriction in the context of QIAIFs.

### 4.2 Are there any limitations on the types of investments that can be included in an Alternative Investment Fund's portfolio whether for diversification reasons or otherwise?

In issuing the draft AIF Handbook, the Central Bank has sought to redesign its AIF regime to achieve certain outcomes, one of which was the creation of a higher risk AIF option to UCITS for retail investors. Consequently the Central Bank is proposing a more flexible regime for Retail Investor AIFs than the existing regime currently in place for Irish regulated retail funds.

QIAIFs are subject to very few investment restrictions and no borrowing or leverage limits (subject to appropriate disclosure).

### 4.3 Are there any restrictions on borrowing by the Alternative Investment Fund?

Currently in Irish retail funds, borrowings may not exceed 25 per cent of the net assets of the fund at any time.

Currently in Irish QIFs, borrowing and leverage are not subject to any regulatory limit.

Going forward, the Central Bank proposes that the above borrowing requirements will be maintained for Retail Investor AIFs and QIAIFs.

## 5 Disclosure of Information

### 5.1 What public disclosure must the Alternative Investment Fund make?

Except as set out below, Irish regulated AIFs are not required to make their annual reports or the identity of their investors public:

- (i) certain documents in relation to ILPs required to be filed and maintained with the Central Bank are a matter of public record (e.g. the partnership agreement and annual report); and
- (ii) Irish regulated closed-ended AIF whose securities are admitted to listing on a regulated market are required to make their annual and half yearly reports public in accordance with the EU Transparency Directive. Such an AIF must also make public other information including, *inter alia*, any change in the rights attaching to the various classes of shares.

### 5.2 What are the reporting requirements in relation to Alternative Investment Funds?

A Retail Investor AIF and QIAIF must publish an annual report. The annual report must be published within six months of the end of the financial year.

A Retail Investor AIF must publish a half-yearly report covering the first six months of the financial year. The half-yearly report must be published within two months of the reporting period.

An AIFM and a non-AIFM management company must publish an annual report and a half-yearly report covering the first six months of the financial year. The annual report must be published within four months of the end of the financial year and the half-yearly report must be published within two months of the reporting period.

### 5.3 Is the use of side letters restricted?

Currently only side letters can be entered into outside an Irish regulated AIF by the AIF's service providers.

Although an AIFM is subject to certain operating conditions including, *inter alia*, an obligation to treat all AIF unitholders fairly and ensure that no unitholder in an AIF obtains preferential treatment unless such preferential treatment is disclosed in the relevant AIF's constitutional document, the draft AIF Handbook provides that subject to certain specified exceptions, the unitholders in a share class of a Retail Investor AIF and QIAIF must be treated equally and where more than one share class exists, all the unitholders in the different share classes must be treated fairly.

## 6 Taxation

### 6.1 What is the tax treatment of the principal forms of Alternative Investment Funds?

The tax treatment of regulated AIFs in Ireland is one of the key reasons for the success of the Irish funds industry. AIFs are not subject to any taxes on their income (profits) or gains arising on their underlying investments. While dividends, interest and capital gains that an AIF receives with respect to its investments may be subject to taxes, including withholding taxes, in the countries in which the issuers of investments are located, these foreign withholding taxes may, nevertheless, be reduced or eliminated under Ireland's network of tax treaties to the extent applicable (this "Taxation" section deals only with the taxation of regulated AIFs).

### 6.2 What is the tax treatment of the principal forms of investment manager / adviser?

Compensation paid to managers and advisers (such as management/advisory fees, as well as performance fees) of AIFs is generally subject to corporation tax at the trading rate (i.e. 12.5 per cent).

### 6.3 Are there any establishment or transfer taxes levied in connection with an investor's participation in an Alternative Investment Fund or the transfer of the investor's interest?

There are no such establishment taxes. Furthermore, there are no transfer taxes payable in Ireland on the issue, transfer, repurchase or redemption of units in an AIF. Where any subscription for or

redemption of units is satisfied by the *in specie* transfer of securities, property or other types of assets, Irish stamp duty may arise on the transfer of such assets.

#### 6.4 What is the tax treatment of (a) resident and (b) non-resident investors in Alternative Investment Funds?

AIFs are not subject to any taxes on their income (profits) or gains arising on their underlying investments.

##### *AIFs (other than CCFs)*

*Non-Residents* – There are no Irish withholding taxes in respect of a distribution of payments by AIFs to investors or in relation to any encashment, redemption, cancellation or transfer of units in respect of investors who are neither Irish resident nor ordinarily resident in Ireland, provided the AIF has satisfied and availed of certain equivalent measures or the investors have provided the AIF with the appropriate relevant declaration of non-Irish residence.

##### *Irish Residents*

*Exempt Investors* – Again, no Irish withholding taxes apply in respect of a distribution of payments by the AIF to such investors (which would include approved pension schemes, charities, other investment funds, etc.) or any encashment, redemption, cancellation or transfer of units in respect of investors that have provided the AIF with the appropriate relevant declaration.

*Non-Exempt Investors* – If an investor is an Irish resident and not an exempt Irish investor, tax at the rate of 33 per cent (25 per cent where the unitholder is a company and an appropriate declaration is in place) is required to be deducted by the AIF on distributions (where payments are made annually or at more frequent intervals). Tax at the rate of 36 per cent (25 per cent where the unitholder is a company and an appropriate declaration is in place) will have to be deducted by the AIF on any other distribution or gain arising to the investor on an encashment, redemption, etc. of units by an investor who is Irish resident or an ordinary resident in Ireland. While this tax will be a tax liability of the AIF, it is effectively incurred by investors out of their investment proceeds.

##### *AIFs (established as CCFs)*

For Irish tax purposes, a CCF is treated as “tax transparent” which means that the income and gains arising or accruing to it are treated as arising or accruing to its unitholders in proportion to the value of the units beneficially owned by them as if such income and gains did not pass through the hands of the CCF. Consequently, for tax purposes, the profits that arise to this type of investment vehicle are treated as being profits that arise to the unitholders themselves. Currently natural persons cannot invest in a CCF without negatively affecting its Irish tax transparent status. This may change in the future.

#### 6.5 Is it necessary or advisable to obtain a tax ruling from the tax or regulatory authorities prior to establishing an Alternative Investment Fund?

No. Once the AIF has received its authorisation from the Central Bank of Ireland, (then for so long as that authorisation remains in place) the taxation treatment that applies is as set out above.

#### 6.6 Are there any other material tax issues?

*VAT* – Management fees are generally subject to VAT at the current rate of 23 per cent. However under the harmonised VAT legislation,

an exemption applies to the management of investment funds as defined by the EU Member States which, in Ireland, includes all authorised investment funds, therefore the VAT exemptions are wide ranging with regard to the provision of services to funds (for example, fund administration, transfer agency and investment management, etc.).

*Foreign Account Tax Compliance Act (“FATCA”)* – In recognition of both the fact that the stated policy objective of FATCA is to achieve reporting (as opposed to being solely the collecting of withholding tax) and the difficulties which may arise in certain jurisdictions with respect to compliance with FATCA by foreign financial Institutions (“FFIs”), the US developed an intergovernmental approach to the implementation of FATCA. In this regard, the Irish and US governments signed an intergovernmental agreement (“Irish IGA”) on 21 December 2012 and provision has been included in the Finance Act 2013 for the implementation of the Irish IGA which also permits regulations to be made by the Irish Revenue Commissioners with regard to registration and reporting requirements arising from the Irish IGA. The regulations are expected shortly. The Irish IGA is intended to reduce the burden for Irish FFIs of complying with FATCA by simplifying the compliance process and minimising the risk of withholding tax. Under the Irish IGA, information about relevant US investors will be provided on an annual basis by each Irish FFI (unless the FFI is exempted from the FATCA requirements) directly to the Irish Revenue Commissioners, who will then provide such information to the IRS without the need for the FFI to enter into a FFI agreement with the IRS (although some form of registration may be necessary). Under the Irish IGA, FFIs should generally not be required to apply 30 per cent withholding tax.

*Other* – As stated in section 7, Ireland is in the process of introducing the ICAV which will be taxed in line with existing Irish corporate funds.

## 7 Reforms

### 7.1 What reforms (if any) are proposed?

The legislative framework around ILPs is in the process of being updated and coinciding with that, the Irish Finance Act 2013 included measures to treat Irish funds established as ILPs as tax transparent for Irish tax purposes. This new tax treatment (together with the ongoing overhaul of the legislative framework) will ensure that Ireland has a globally recognised and competitive partnership regime which is important with the imminent implementation of the AIFM Directive.

In addition, legislation is also being introduced later this year providing for a new corporate structure specifically for investment funds (the “ICAV”) – which will be able to “check-the-box” to be treated as a partnership for US tax purposes in order to facilitate investment by US taxable investors. Although unit trusts and investment limited partnerships can “check-the-box” to be treated as a partnership for US tax purposes, investment companies are generally considered ‘passive foreign investment companies’ (PFICs) and cannot “check-the-box” to be treated as a partnership for US tax purposes.



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