MASON
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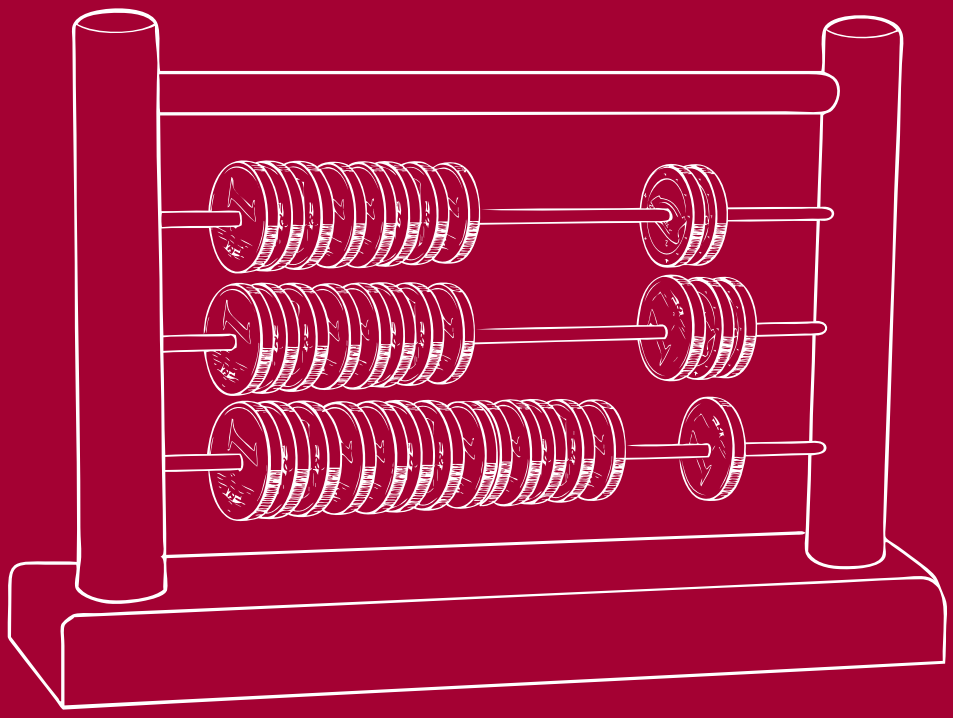
Investment Funds In Ireland

Dublin, London & New York



Investment Funds

MASON HAYES & CURRAN

Investment Funds In Ireland

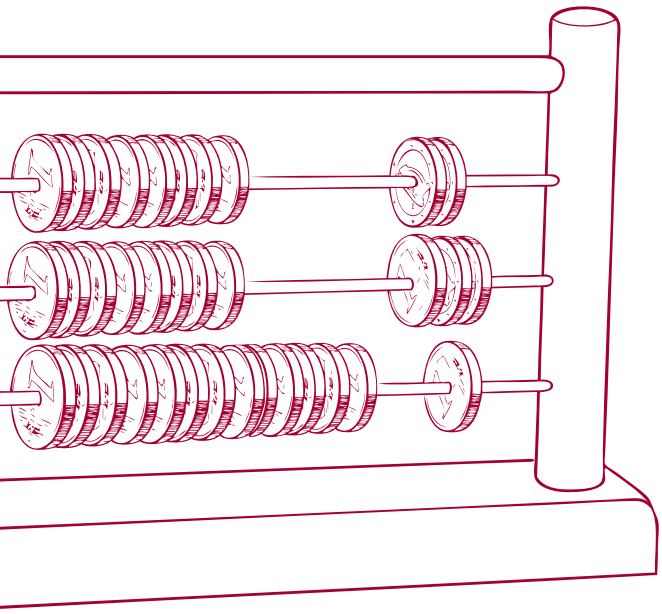
Mason Hayes & Curran is a full-service, business law firm with 66 partners and over 300 employees. With offices in Dublin, London and New York the firm delivers sophisticated legal services to an extensive Irish and international client base.

Founded on the principles of close client/lawyer relationships, Mason Hayes & Curran is well known for its straight-talking and solution-driven approach to business which has seen it build a first-class reputation with clients.

We are particularly focused on understanding clients' requirements and fulfilling their expectations by delivering the most pragmatic business oriented solutions while closely aligning with the market's changing needs.

This approach has seen Mason Hayes & Curran build a leading business law practice in a diverse range of areas, establish a strong international presence and become the preferred legal service provider of many multi-nationals operating in Ireland. In particular, we represent many international clients operating in the investment funds and financial services sectors in Ireland.

Further information on our Investment Funds practice is set out in Section 13.



Investment Funds

Overview

Over the last 20 years, Ireland has earned a reputation as a leading domicile for regulated investment funds. Over 43% of global alternative investment funds (both Irish and non-Irish domiciled) are also serviced in Ireland.

Ireland's growth in investment funds is attributed to the successful establishment in 1987 of the International Financial Services Centre ("IFSC") in Dublin. In fact, Dublin is one of the world's fastest growing locations for financial services and it is host to more than half the world's largest banks as well as leading international names in mutual funds, insurance, life assurance, corporate treasury, asset financing and securities trading. In particular, Ireland has been recognised as a centre of excellence for investment funds. There is currently over US$1.42 trillion in fund assets domiciled in Ireland and the Irish funds industry currently services close to US$2.75 trillion in assets (including assets of funds domiciled in Cayman, Bermuda and elsewhere).

Irish funds are now distributed in over 70 countries. The attraction to establish or service an investment fund in Ireland is based on a unique combination of the Irish legal and regulatory system, the specialist skills and expertise of its workforce, the country's pro-business approach, infrastructure, competitive tax environment and government support.

In addition, the willingness of the Irish regulatory authorities, most notably the Central Bank of Ireland (the "Central Bank") and the Irish Stock Exchange, to adapt and develop their regulation to keep pace with developments in the global investment funds marketplace has contributed hugely to Ireland's success. As a result, the investment funds industry in Ireland has developed rapidly, with more than 12,000 people now directly employed in investment funds related activities.

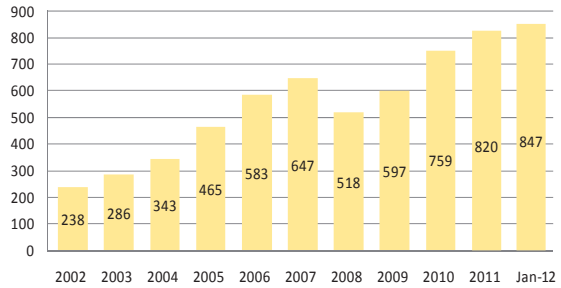
A noticeable trend has been for institutions which have existing facilities in other countries where there are labour shortages and/or high operating costs to establish complementary Irish operations to take advantage of Ireland's high-quality labour pool and lower operating costs.

Another trend has seen the regionalisation of the financial services industry, with many major participants establishing additional fund servicing operations outside Dublin. These companies have thus harnessed a larger workforce and lower operating costs.

To summarise, Ireland presents the international investment funds industry with an unparalleled set of attractions both as a domicile for investment funds and as a centre from which to administer, market and service funds domiciled in other international locations.

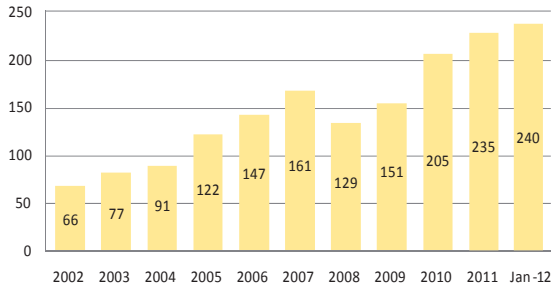
This publication summarises the legal and regulatory structures under which investment fund schemes may be established in Ireland. We also outline the procedure for authorisation, the primary legal and regulatory considerations applicable when establishing an investment fund in Ireland and all relevant supplementary matters to be considered.

Total Assets of Irish Domiciled UCITS Funds
Eur Billion



Source: Central Bank of Ireland

Total Assets of Irish Domiciled Non-UCITS Funds
Funds including Sub-Funds



Source: Central Bank of Ireland

1. Introduction

The Central Bank is the statutory regulator of all investment funds in Ireland. It operates an "open door" policy with regard to fund managers and welcomes the opportunity to meet new applicants to discuss potential projects. Its innovative and proactive approach to regulation, combined with its accessibility, has earned it a deserved reputation as a first-class regulatory authority.

In Ireland, each regulated collective investment scheme (a "fund") is authorised as either a UCITS or a non-UCITS. The essential difference between the two regulatory frameworks is that UCITS funds are authorised pursuant to European legislation and once authorised in Ireland, can be marketed cross-border throughout the EU (and increasingly in regions such as the Far East, the Middle East and Latin America) without the need for further authorisation in the target countries.

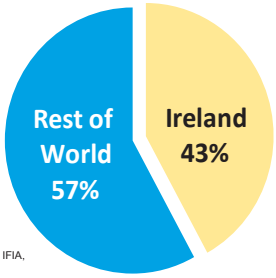
Non-UCITS funds are, on the other hand, authorised under indigenous Irish legislation. As such, they are not as constrained in terms of standard European investment and leverage restrictions but neither can they benefit from the "passport" available under the UCITS regime.

The Central Bank became the regulator of authorised investment funds in Ireland pursuant to the Central Bank Reform Act 2010. Prior to the commencement of this legislation in October 2010 this role was carried out by the Irish Financial Services Regulatory Authority, known as the "Financial Regulator".

Funds are authorised by the Central Bank in accordance with the requirements set out in the Central Bank's UCITS Notices or Non-UCITS Notices (as appropriate) and Guidance Notes (collectively the "Notices"). Copies of these Notices are available on the Central Bank's website: www.centralbank.ie

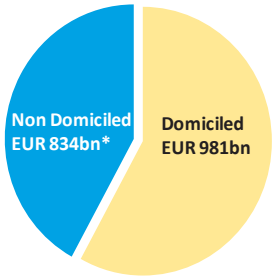
The Notices deal with all aspects of fund regulation including investment restrictions and borrowing powers. A fund must adhere to these requirements, subject to any specific derogation which may be granted. Such investment and borrowing restrictions may be disapplied on a case-by-case basis in the case of Professional Investor Funds and are automatically disapplied for Qualifying Investor Funds. Further details on these types of funds are set out in Section 3.

Irish Administered Alternative Investment Funds
Total Estimated Irish Administered AIF Assets
Q4 2010 = Eur 985 Bn



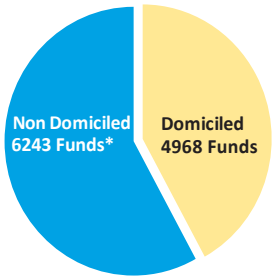
Source: HFMWeek Survey & IFIA, Oct. 2010

Total Assets and Nos. of Funds under Administration in Ireland
Irish Domiciled versus Non-Irish Domiciled



Source: Central Bank of Ireland & IFIA, Oct 2011

*Data as of Q2 2011



Source: Central Bank of Ireland & IFIA, Sept 2011

*Data as of Q2 2011

2. UCITS

UCITS funds are the ideal vehicle for managers seeking access to multiple markets. UCITS are regarded globally as well regulated funds, with robust risk management procedures and a strong emphasis on investor protection. Ireland is renowned as a centre of excellence for UCITS products.

2.1 What is a UCITS?

A UCITS is an Undertaking for Collective Investment in Transferable Securities and may be established in Ireland in any of the following legal forms:

- an open-ended investment company with variable capital;
- an open-ended unit trust; or
- an open-ended common contractual fund.

UCITS have their legislative origin in a 1985 European Directive (85/611/EEC). The objective was to introduce a pan-European mutual fund product, which, once authorised in one EU member state (a "Member State"), could be sold in all other Member States, without the need to be separately authorised in each target jurisdiction. To achieve this, UCITS are required to meet a common European standard in terms of authorisation, investment restrictions, risk diversification and investor protection.

Because of the necessity to comply with this common European standard, UCITS are regarded as the most highly-regulated funds. UCITS operate on the basis of their potential for availability to the retail investor (although most are, in fact, targeted at institutional investors) and their investment and borrowing restrictions are generally not negotiable.

In general terms, the basic investment requirement for UCITS was that at least 90% of its net asset value ("NAV") must be invested in listed transferable securities, money market instruments or securities issued by sovereign states or their local authorities. UCITS can have no more than a 10% exposure to any one issuer (subject to certain exceptions), with the total number of securities held in issuers in which a UCITS invests more than 5% not, in aggregate, exceeding 40% of NAV (this is referred to as the 5/10/40 rule). Borrowings are restricted to 10% of NAV and may only be made on a temporary basis. A UCITS must be open-ended in nature.

As mentioned previously, the principal advantage of a UCITS fund is that, once authorised in one EU Member State, it can, through a "passport" regime, be sold in other Member States (subject to a registration process in the other relevant Member States) without requiring further authorisation in the target Member States.

UCITS are also having an impact outside Europe. The UCITS brand is now globally recognised and due to its reputation as a regulated product with a strong emphasis on investor protection, with robust risk management procedures, regulators in the Far East, the Middle East and in Latin America, for example, are comfortable to allow UCITS to be sold in their jurisdictions. This is critical for managers seeking global distribution opportunities.

It is possible for a fund established as a non-UCITS to later convert to a UCITS.

2.2 UCITS III

Following the initial success of the UCITS product, developments in financial products and the increasing popularity of new and alternative investment strategies highlighted the limited range of assets in which UCITS were permitted to invest. In addition, the original Directive had been transposed into law in some Member States in a manner which resulted in differing interpretations, which generated issues for the cross-border sale of the product in certain cases.

There was growing recognition that, despite its considerable success, the UCITS framework needed to adapt. The initial attempt to do so in the

early 1990s led to the drafting of a second UCITS Directive (UCITS II) but this was later abandoned as it was considered too ambitious at that time.

In 2001, however, two new Directives were successfully adopted. Directive 2001/107/EC (the "Management Company Directive") and Directive 2001/108/EC (the "Product Directive") are together referred to as UCITS III. UCITS III has been transposed into Irish law by the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations, 2003 (as amended).

UCITS III significantly widened the range of investment possibilities for UCITS funds.

Firstly, it introduced a definition of transferable securities for the first time, stating that the following qualify:

- shares in companies and other securities equivalent to shares in companies;
- bonds and other forms of debt instruments;
- any other negotiable securities which carry the right to acquire any such transferable securities by subscription or exchange (financial derivative instruments are excluded from this definition).

Secondly, it enabled a UCITS to invest in a range of other asset classes such as:

- money market instruments;
- units of other collective investment schemes;
- deposits with credit institutions;
- financial derivative instruments; and
- indices.

What are the principal UCITS investment restrictions?

- a UCITS may invest no more than 10% of its NAV in one issuer, with the aggregate of all investments in excess of 5% not to exceed 40% of NAV. The 10% limit is raised to 25% for bonds issued by EU credit institutions that are subject to laws protecting bondholders. The aggregate of any such investments in excess of 5% may comprise up to 80% of the UCITS NAV;
- the limit of 10% above is further raised to 35% if the securities or instruments are issued or guaranteed by a government or its local authorities or by a public international body;
- a UCITS can invest up to 10% of its NAV in unlisted transferable securities and money market instruments;
- a UCITS can invest up to 20% of its NAV in any one CIS. Investment in non-UCITS CIS may not, in aggregate, exceed 30% of NAV;
- a UCITS can invest up to 20% of its NAV in deposits made with the same credit institution, provided that credit institution is in the EEA or other specified country. Up to 20% of NAV can also be held in deposits made with the fund's custodian;
- the risk exposure of a UCITS to a counterparty to an OTC derivative may not exceed 5% of NAV. This limit is raised to 10% in the case of credit institutions in the EEA or other specified countries;
- a combination of two or more of the following issued by, or made or undertaken with, the same body may not exceed 20% of the net asset value of a UCITS:
  - investments in transferable securities or money market instruments;
  - deposits; and/or
  - counterparty risk exposures arising from OTC derivatives transactions;
- the Central Bank may authorise a UCITS to invest up to 100% of its NAV in different transferable securities and money market instruments issued or guaranteed by any government, local authority or public international body subject to certain conditions.

The 2007 Eligible Assets Directive (Directive 2007/16/EC) set down criteria for assessing whether different types of financial instruments are eligible for inclusion in UCITS funds. This measure helped to remove uncertainty as to whether UCITS can properly invest in financial instruments such as asset backed securities, listed closed-ended funds, Euro commercial paper, index based derivatives and credit derivatives.

Among the key clarifications set out in the Eligible Assets Directive is the fact that closed-ended funds and credit derivatives are both regarded as transferable securities, subject to certain requirements. Financial indices, whether comprised of eligible or ineligible assets, can be considered as eligible financial indices once they are sufficiently diversified, represent an adequate benchmark for the market to which they refer and are published in an appropriate manner.

2.3 UCITS IV

Having successfully addressed concerns with the UCITS product under UCITS III, the next challenge addressed was to improve the environment in which that product operates. Directive 2009/65/EC (generally known as "UCITS IV") was adopted by the Council of the European Union in mid 2009 and is in the process of being implemented in each Member State. Full implementation was required by 30 June 2011 and it came into force on 1 July 2011. It was implemented in Ireland on time by means of the European Communities (undertakings for collective Investment in transferable securities) Regulations, 2011 (S.I. 352 of 2011) (the "UCITS Regulations").

The changes set out in UCITS IV were designed to ensure that (i) investors receive appropriate information regarding each UCITS in a more accessible format than was previously the case and (ii) to facilitate the industry in achieving cost savings and creating more efficient structures.

Accordingly, UCITS IV provided for the following key areas of change:

2.3.1 Key Investor Information Document ("KIID")

UCITS IV aims to ensure that UCITS disclose relevant and meaningful information to investors by requiring the preparation of a new concise document, the KIID.

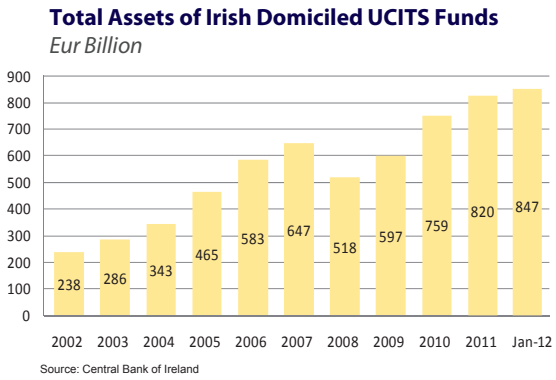
The KIID is required to be short, focused, expressed in plain language and presented in a way that enables comparisons to be easily made between different offerings. It must provide information regarding essential matters including the past performance of the UCITS, its costs and charges and its risk/reward profile. The KIID may be used without alteration (other than translation) in each Member State where the UCITS is sold. It is anticipated that the KIID will address the shortcomings identified in the (previous required) Simplified Prospectus.

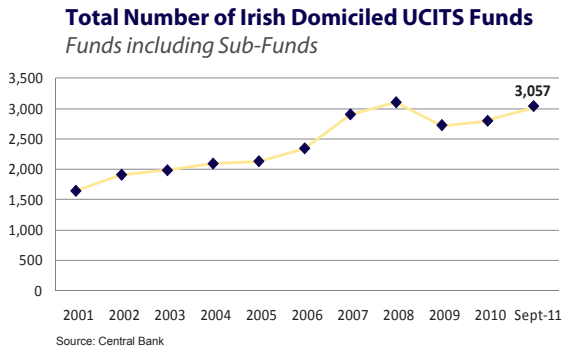
UCITS authorised in Ireland from July 2011 must produce a KIID, but existing UCITS may continue to produce a simplified prospectus until 30 June 2012.

2.3.2 Notification Procedure

The cross-border passporting procedure for UCITS has been overhauled to transform it into a straightforward regulator-to-regulator filing.

The previous notification process was relatively time-consuming and could be costly. UCITS IV provided for the creation of a streamlined notification process for cross-border fund sales, whereby the UCITS notifies its home regulator of its intention to sell





in other Member States. The home state regulator reviews the notification documents and transmits these to the host state regulator, with a confirmation that the UCITS fulfils its obligations under the amended Directive.

Under UCITS IV the marketing of a fund in host Member States is typically authorised within 10 working days. Where the Member State into which the UCITS wishes to sell has not yet implemented UCITS IV it may be necessary to comply with the pre-existing form of registration.

2.3.3 Fund Mergers

UCITS IV provides for pan-European mergers of UCITS, regardless of the legal structure of either of the merging entities. It outlines procedures and requirements for such fund mergers and competent authorities may only refuse merger applications if these have not been observed. This is intended to facilitate the consolidation of European fund products, enabling UCITS to benefit from greater economies of scale.

A decision on whether to approve the merger must be reached by the authorities of the merging UCITS within 20 working days.

2.3.4 Asset Pooling

UCITS IV introduced the ability to establish master-feeder structures, again facilitating increased economies of scale and lower operating costs.

Specific provisions include:

- the feeder fund is required to have at least 85% of its assets in a single master fund;
- the master UCITS may not be a feeder UCITS or invest into feeder UCITS; and
- the investment policy of the feeder UCITS must be approved by the competent authorities of the home Member State of the feeder UCITS.

2.3.5 Management Company Passport

UCITS IV provides for a new form of EU passport whereby managers may manage UCITS domiciled in other EU Member States (the "Management Company Passport").

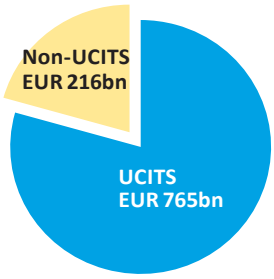
The Management Company Passport enables:

- fund management companies to manage funds (both corporate and contractual) domiciled in Member States other than the Member State in which the management company is established;
- fund managers to sell funds across the EU without having to establish a full suite of administrative functions for every jurisdiction; and
- economies of scale where existing fund management companies are consolidated.

2.4 The Future for UCITS

UCITS IV was a further important step towards a single market in financial services. It is likely to transform the European asset management industry over the coming years, enabling managers to operate freely throughout the EU and facilitating a truly cross-border fund distribution framework. It will also facilitate the creation of a more efficient and flexible European fund sector, with lower overall costs. This will, in turn, enable the European fund sector to compete more effectively with the US where there are a much smaller number of equivalent funds with much greater asset values. Reducing the overall number of UCITS funds, through newly permitted fund mergers and master-feeder structures, will increase the efficiency of the sector, which will ultimately be to the investors' advantage.

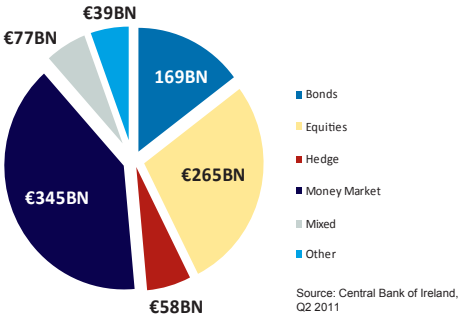
Irish Domiciled Funds – Breakdown in assets between UCITS & Non-UCITS



Source : Central Bank of Ireland, Oct 2011

Irish Domiciled Funds: breakdown by type

Eur Billion



Source: Central Bank of Ireland, Q2 2011

What strategies can be pursued?

Recent market difficulties have led to dramatic changes in investors' appetite for risk. This revision of asset allocation strategies has resulted in an increased demand by investors for regulated products. More and more, this has led hedge fund managers to move into the regulated fund arena, either as a result of their investor base wishing to move away from unregulated hedge funds or as those managers seek to attract new money.

UCITS funds, in particular, are seen as the product of choice, due to their liquidity, transparency, high level of investor protection and distribution opportunities. Also, flexibility: the UCITS product enables hedge fund managers to replicate many of their hedge fund strategies through the use of an appropriate mix of leverage, shorting and derivatives.

UCITS III significantly widened the range of investment possibilities for UCITS funds. Of major significance is the ability of managers to use financial derivative instruments ("FDI") to access strategies which were previously the preserve of hedge fund managers.

The opportunity to structure alternative investment strategies within the robust regulatory framework of UCITS has been critical to the growth of the product. Examples of strategies that are being pursued by UCITS include:

- absolute return
- long/short equity (e.g. 130/30)
- statistical arbitrage
- convertible arbitrage
- global macro
- market neutral
- fixed income arbitrage
- convertible bond
- credit funds
- hedge fund index funds
- commodities index funds
- synthetic ETFs
- fund of funds
- enhanced fixed income
- structured products
- managed futures

UCITS IV now adds Master-Feeder structures to this range.

3. Non-UCITS

Ireland has a specific regime in place to accommodate funds that will not qualify as UCITS funds. Non-UCITS funds are ideal for more highly leveraged or concentrated investment strategies because they are not constrained by investment and borrowing restrictions applied at a European level.

Non-UCITS funds may be established in one of the following legal forms:

- an investment company with variable capital;
- a unit trust;
- a common contractual fund; or
- an investment limited partnership.

The investor profile will dictate the regulatory parameters of the non-UCITS fund and can be broken down as follows, according to the relevant target investor market:

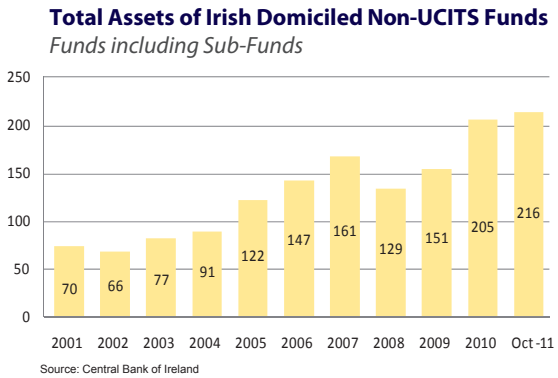
- the retail investor;
- the professional investor; or
- the qualifying investor (institutional/high net worth).

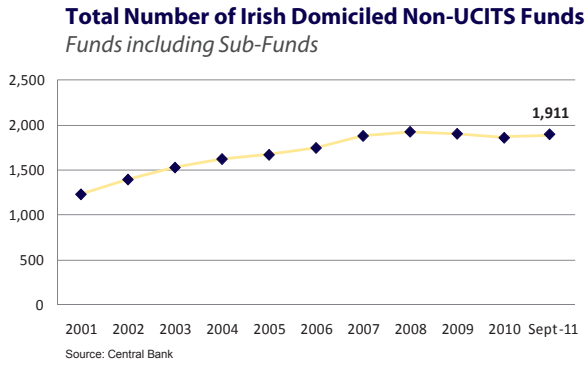
Non-UCITS funds give promoters the opportunity to aggressively use Irish tax exempt vehicles for a range of different fund types depending on the requirements of targeted investors.

3.1 Retail Fund

If a fund has no minimum subscription requirement, or it imposes a minimum subscription of less than €100,000, it will be considered to be a retail fund. This type of fund is regularly used where the principal target market is retail investors outside the EU, although it can, of course, be used within the EU.

Even though its investment and borrowing restrictions are quite stringent, it is a very popular vehicle. A retail scheme's investment restrictions prohibit it from investing more than 20% of its NAV in the securities of any one issuer, although a fund may obtain a derogation from this restriction for the first year provided it observes the principle of risk spreading. Borrowings cannot exceed 25% of NAV.





3.2 Professional Investor Fund ("PIF")

If a minimum subscription requirement of more than €100,000 per investor (previously €125,000) is imposed, a fund can be considered to be a professional investor fund. This means that the standard investment and borrowing restrictions for a retail investor fund can be disapplied to the extent agreed in advance with the Central Bank. Typically, the retail investment restriction levels are doubled for a PIF. Borrowings of up to 100% of NAV will generally be permitted. Funds marketing solely to professional investors are not required to make public the issue and redemption prices of their units/shares, however, these must be made available to unitholders/shareholders on request. Following amendments to the minimum subscription requirement for QIFs, effective from October 2010 and detailed below, it is likely that structuring funds as PIFs will decline.

3.3 Qualifying Investor Fund ("QIF")

The general investment and borrowing restrictions imposed by the Central Bank on investment funds are automatically avoided by structuring the fund as a QIF.

QIFs can pursue investment strategies which include short selling, significant borrowings and leverage, derivatives and investments in other funds, without restriction. Similarly, the limits on the level of investment in any given market or securities which apply to all other types of funds in Ireland do not apply to QIFs.

QIFs are now the most popular form of non-UCITS fund available in Ireland, comprising 65% of the total number of such funds and 75% of the assets of Irish non-UCITS funds.

QIFs are particularly suitable for sale to sophisticated investors such as high net-worth individuals and institutions. As more aggressive investment strategies can be pursued, QIFs are the vehicle of choice for:

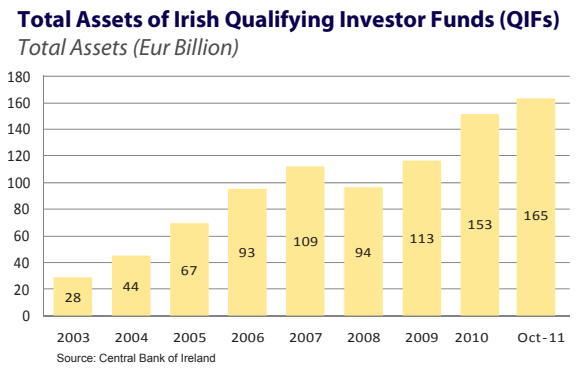
- hedge funds
- real estate funds
- infrastructure funds
- private equity funds
- venture capital funds

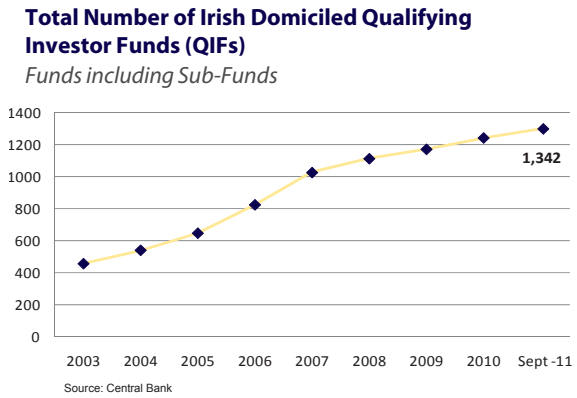
They are the most popular vehicle for regulated European hedge funds, comprising 63% of the total according to recent research.

3.3.1 Qualifying as a QIF

To be authorised as a QIF, a fund must;

- impose a minimum subscription requirement of at least €100,000 per investor (prior to October 2010 this requirement was €250,000). Institutions may not group amounts of less than €100,000 for individual investors;
- be marketed solely to the following qualifying investors:
  - (a) an investor who is a professional client within the meaning of Annex II of Directive 2004/39/EC (Markets in Financial Instruments Directive) (primarily regulated entities, institutional investors and large undertakings, but certain individuals also); or
  - (b) 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 scheme; or





(c) an investor who certifies that they are an informed investor by providing 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
- 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 scheme.

It can be noted that the above criteria were only adopted in October 2010 and differ markedly from the asset and income based criteria previously applied.

Exemptions from the qualifying criteria and minimum subscription requirements may be granted to the promoter (and its group companies), the investment manager, the management company or general partner and the directors and employees of such entities subject to certain conditions.

The Central Bank does not impose any investment or leverage restrictions on QIFs but disclosure is required of the extent, if any, to which leverage will be used.

3.3.2 24 Hour Authorisation

QIFs enjoy a fast-track approval process whereby eligible funds can be approved in one day. This is available where the promoter, directors and investment manager have been pre-approved by the Central Bank. Whilst Ireland's robust but flexible regulatory environment has always been seen as one of its principal attractions, speed to market has been added as a result of this streamlined procedure.

3.3.3 Use of SPVs

QIFs can invest in underlying assets through wholly owned special purpose vehicles ("SPVs"). This is of particular interest, for example, for real estate funds where each real estate investment can be made through an SPV in order to ringfence liability relating to each project. The SPV structure can also be used for tax efficiency purposes, by holding underlying assets through an Irish SPV.

Although the SPV will be subject to Irish corporation tax at a rate of 25% on its taxable profits, its transactions are generally structured so that the level of taxable profit is negligible or zero. This is done by ensuring that the SPV's income is matched by tax deductible expenditure. As a tax exempt vehicle, the QIF will not suffer any Irish tax on interest income and dividends received from the SPV. For further information on this structure, please see Section 10 "Taxation".

Other Key Features of QIFs

- audited annual accounts must be sent to the Central Bank and shareholders within four months of the year end;
- semi annual accounts are not required;
- any amendments to the QIF's prospectus or material contracts need to be filed with the Central Bank one business day prior to coming into effect;
- QIFs can issue a separate prospectus for a share class within a QIF or within a sub-fund of an umbrella QIF, provided the existence of other share classes is disclosed to investors; and
- a QIF may issue notes, on a private basis, to lending institutions to facilitate financing arrangements, provided that details of the note issue is clearly disclosed in the prospectus.

4.
Global Distrubition of Irish Funds

Irish funds are distributed in over 70 countries. 358 fund promoters, based in over 50 countries, have chosen to domicile their investment funds in Ireland, making it one of the world's leading jurisdictions for the cross-border distribution of funds.

In accordance with UCITS IV, registration of UCITS for sale in another EU Member State (a "Host State") is now a straightforward regulator-to-regulator notification. The UCITS notifies the regulator in the Member State in which it is domiciled (the "Home State"), of its intention to market units in a Host State and 10 business days later it may proceed to carry this out, unless notified to the contrary.

Previously, where a UCITS was to be sold a into Host State under the passport it was required to initially notify the local regulator in that Host State and supply key documentation prior to commencing any sales or marketing there.

It could only commence marketing two months after this notification has been effected provided it did not receive notification before the expiry of that period from the local regulator that the arrangements made for the marketing of units did not comply with the UCITS requirements. Where the Host State has not implemented UCITS IV yet, the UCITS may still need to comply with this procedure.

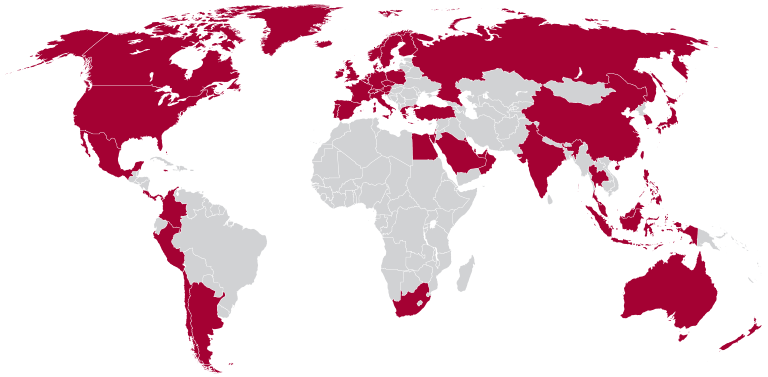
When advertising and conducting marketing in a Host State the UCITS must comply with the generally applicable local laws, for example, local advertising standards. It is also necessary to ensure that adequate measures have been taken to provide facilities in the Host State for making payments to unit holders, repurchasing or redeeming units and making available the information which UCITS are obliged to provide. In practice this usually requires the appointment of a local distributor.

Although the right to "passport" only applies to other Member States, due to the high level of investor protection afforded by UCITS, registration of such schemes in countries outside the EU is facilitated, in some cases by a specific "fast-track" approval process. Some of the primary markets for distribution of Irish UCITS outside the EU are: Bahrain, Chile, Hong Kong, Singapore, Switzerland and Taiwan.

Non-UCITS are usually sold outside Ireland on a private placement basis or under exemptions applicable to institutional investors under local laws in the target country. The greater popularity of more easily distributed UCITS is illustrated by the fact that AUM in Irish UCITS is over three times that of Irish non-UCITS funds, notwithstanding the applicable restrictions.

Global Distribution of Irish UCITS

Source: Lipper FMI & IFIA, 2010



5.
Legal Structures of Fund Vehicles

Having considered the available regulatory categories of funds, distinguishing between UCITS and Non-UCITS, the legal structures available under each of these categories should be examined.

LEGAL STRUCTURES

UCITS	*Non-UCITS*
1. Variable Capital Investment Company	1. Variable Capital Investment Company
2. Unit Trust	2. Unit Trust
3. Common Contractual Fund	3. Common Contractual Fund
	4. Investment Limited Partnership

Although from an administrative point of view each vehicle functions in a similar way, with the value of its shares/units/participations fluctuating in line with the value of its underlying assets, each vehicle represents a distinct legal structure subject to different legal provisions.

5.1 Variable Capital Investment Company

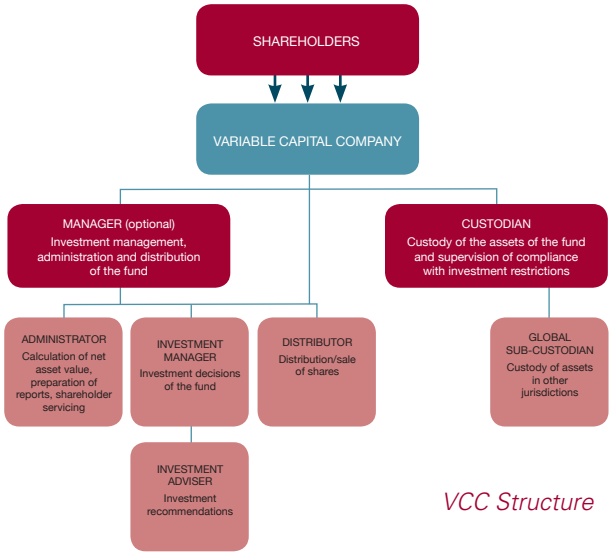
A variable capital investment company ("VCC") can be established pursuant to the provisions of Part XIII of the Companies Act, 1990, as amended (for non-UCITS funds) or the UCITS Regulations (for UCITS funds). The VCC is, by far, the most common structure used for Irish-domiciled funds.

A VCC is an incorporated entity with its own legal capacity as provided in its memorandum and articles of association. It has the capacity to enter into contracts and to sue and be sued. The day-to-day management and control is provided by a board of directors. The assets of a VCC are the property of the company in which the investors hold shares and those assets are held by a custodian.

A residual requirement (as a result of a quirk in Irish company law) is that in the case of a VCC (but not in the case of a unit trust), the prospectus must state that the VCC will at all times observe the principle of risk spreading. This is of relevance for QIF VCCs which, unlike QIF unit trusts, cannot therefore have a 100% exposure to a single issuer/counterparty.

Where borrowings are to be incurred (as opposed to leverage through investment policies), they will be incurred by the VCC itself as borrower. The position on borrowings is, however, quite different for unit trusts, as explained below.

Below is an example of the contractual structure of a fund established as a VCC, demonstrating the typical division of functions.



VCC Structure

It is a requirement of Irish company law that each VCC, whether UCITS or non-UCITS, must have a minimum of two directors. Furthermore, the Central Bank requires that a VCC must have at least two Irish resident directors. The membership of the board is usually decided upon by the promoter of the fund. The Central Bank must approve each director in advance to ensure they satisfy the Central Bank's fitness and probity test.

A VCC which does not employ the services of a separate management company is required to have a minimum level of paid up share capital in place and must satisfy conditions similar to those set out in Section 9 "Management Companies".

Provided the central management and control is exercised in Ireland, the fund can obtain a certificate of Irish tax residency from the Irish tax authorities. However, it must be remembered that access to Ireland's double tax treaty network requires both counterparties' approval.

5.2 Unit Trust

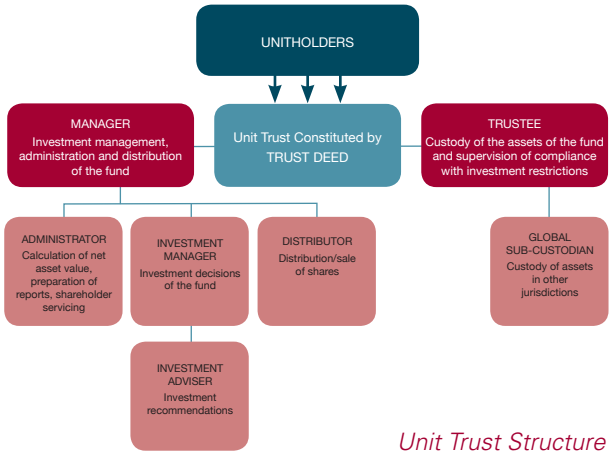
A unit trust can be established in Ireland pursuant to the Unit Trusts Act, 1990 (for non-UCITS funds) or pursuant to the UCITS Regulations (for UCITS funds).

A unit trust is a contractual type of vehicle and is constituted by a deed between the manager and the trustee. Both of these entities must be domiciled in Ireland. A unit trust does not have a separate legal existence, does not have the capacity to enter into contracts and cannot be sued.

The assets of a unit trust are held by its trustee (in its capacity as custodian) and are managed by a management company, which will, most often, delegate discretionary asset management to one or more investment managers. Contracts in relation to the management and administration of the unit trust are entered into by the manager, whereas the trustee will enter contracts in relation to the assets themselves such as bank deposits, security agreements etc. It is the manager and/or the trustee who may be sued in relation to the management, compliance or custody functions relating to the unit trust.

Where a fund has been established as a unit trust, the Central Bank will require that the company acting as manager to the unit trust has a minimum of two Irish resident directors. Further conditions relating to management companies are set out in Section 9.

Below is an example of the contractual structure of a fund established as a unit trust, demonstrating the typical division of functions.



Unit Trust Structure

5.3 Common Contractual Fund

Irish law facilitates the establishment in Ireland of an internationally recognised pooled contractual investment structure, either as a UCITS or a non-UCITS fund, namely the common contractual fund ("CCF"). A CCF is an unincorporated body constituted under contract either pursuant to the Investment Funds, Companies and Miscellaneous Provisions Act 2005 (for a non-UCITS) or the UCITS Regulations (for a UCITS) and does not have a separate legal personality.

Investors participate as co-owners of the assets of the fund, which is constituted by way of deed of constitution between the manager and the custodian.

Such vehicles are completely tax transparent, in that income and gains are treated as arising to each investor, as if the income never passed through the fund. The investors are treated for tax purposes as if they directly own a share of the underlying investments. CCFs may also avail of existing withholding tax exemptions available to other collective investment undertakings. Originally the position was that CCFs could only be used exclusively for the pooling of pension funds, however, Irish legislation has extended the eligible investor base for CCFs to all institutional investors.

The CCF structure is seen as having a number of advantages over other fund structures:

- lower costs and obvious efficiencies associated with the pooling of assets under one fund structure;
- wider risk spreading;
- exemption from tax on income and gains; and
- no withholding taxes on distributions.

CCFs are established within a similar framework to that used for unit trusts and investment companies. For example:

- where a CCF is established as an umbrella, the assets and liabilities of the various sub-funds can be segregated;
- the liability of participants is limited to their subscription amount; and
- the custodian has the same duties and responsibilities as with other fund types.

The assets of the CCF are held by the custodian in the usual way, but the assets are under the common ownership of the investors, as tenants in common. As it is an unincorporated body, it cannot assume liabilities. As with a unit trust (as described above), the manager and custodian enter the various agreements on behalf of the CCF.

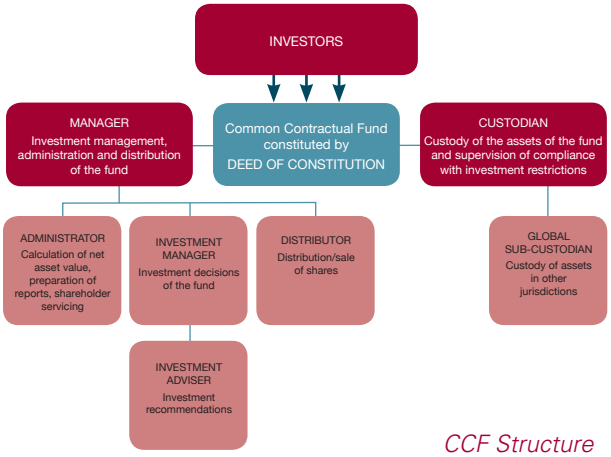
Among the conditions attaching to the tax transparency of a CCF, are those requiring the CCF to:

- distribute all income annually;
- publish an annual breakdown of income by type and source;
- not have a redemption charge;
- not have meetings of unitholders; and
- not permit the transfer of holdings.

The benefits to pension funds and institutional investors of investing in CCFs will depend on how the tax transparency of the CCF is viewed by tax authorities of the investor's own jurisdiction.

It is also crucial that the tax authorities in the countries where the underlying investments are based take a similar view, so that the relevant double taxation agreement relief between those countries and the pension fund's or institutional investor's home jurisdiction will apply.

Below is an example of the contractual structure of a fund established as a CCF, demonstrating the typical division of functions.



CCF Structure

5.4 Investment Limited Partnership

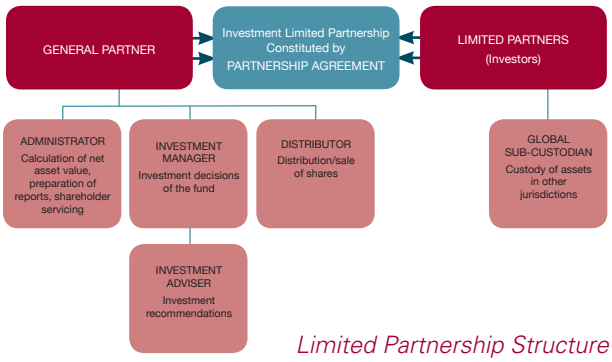
An investment limited partnership ("LP") may be established pursuant to the Investment Limited Partnerships Act, 1994 as a non-UCITS fund only. An LP is a partnership between one or more general partners and one or more limited partners. The principal business of an LP, which is set out in its partnership agreement, is the investment of its funds in property or securities. Unlike a unit trust or a VCC, an LP may be established for private or public participation. The partnership agreement is required to constitute a valid written agreement of the partners, which is stated to be governed by Irish law and subject to the exclusive jurisdiction of the Irish courts.

The LP is not incorporated and therefore, is not a separate legal entity, cannot sue or be sued and cannot enter into contracts in its own name.

The general partner would usually enter into contracts on behalf of the LP.

The rules relating to the LP are set out in its partnership agreement. One general partner, which must be Irish resident, is appointed and this entity has the responsibility of running and managing the LP. All investors subscribe to the partnership as limited partners. A limited partner shall not be liable for the debts or obligations of an LP beyond the amount of capital contributed, except where a limited partner takes part in the conduct and business of the partnership. It is the general partners who are responsible for the management of the LP's business and are liable for the debts and obligations of the LP.

Below is an example of the contractual structure of a fund established as an LP, demonstrating the typical division of functions.



Limited Partnership Structure

5.5 Single or Umbrella Investment Fund?

Unit Trusts, VCCs and CCFs can each be structured as single stand-alone funds or as umbrella funds. In a single fund, investors subscribe for shares/units in the fund which has a single set of investment objectives and policies. Additional sub-funds cannot be incorporated into the structure at a later date. Single funds can, however, issue shares in one or more share classes which may provide, for example, for different fee levels, subscription amounts, currencies of denomination and/or distribution policies.

An umbrella fund is, essentially, one in which the fund structure accommodates one or more sub-funds each with a distinct investment strategy. An investor's investment is represented by shares/units in the specific sub-fund selected.

The principal rationale behind using an umbrella structure is to enable a variety of different products to be offered within one structure. The promoter also benefits from time and cost efficiencies by housing different portfolios within one legal structure, rather than establishing a separate legal structure for each product. Each sub-fund will hold a separate pool of assets and they can be structured as protected cells, thereby segregating the liabilities of the sub-funds from each other.

It is possible to establish an unlimited number of sub-funds within an umbrella scheme, starting at the outset with at least one sub-fund and then adding new sub-funds on an ongoing basis. Each sub-fund may also contain different classes of shares/units. Umbrella funds are probably now the most frequently used structures given the fact that they are highly cost effective and provide the flexibility to efficiently add further products at a later date.

Subject to certain disclosures and limits, it is now possible for one sub-fund of an umbrella fund to invest in other sub-funds of the same umbrella.

6.
Certain Specialised Fund Types

An outline of some of the special features and potential strategies available to Irish-domiciled investment funds is set out below.

6.1 Hedge Funds

Hedge funds are not defined, as such, under Irish law but are typically understood to refer to leveraged funds which appoint a prime broker and pursue alternative investment strategies. Following the adoption of UCITS III, many hedge fund managers have taken advantage of the wider investment options now available under UCITS to restructure their schemes as UCITS. However, as hedge funds typically use more aggressive strategies than those that are available to retail funds they are usually established as PIFs or QIFs.

Such funds may pass their assets to prime brokers in accordance with the Central Bank's conditions and requirements, which can be summarised as follows:

- the assets passed to the prime broker which may be pledged, lent, hypothecated or otherwise utilised by the prime broker for its own purposes must not exceed 140% of the hedge fund's indebtedness to the prime broker in the case of a PIF. In the case of a QIF there is no limit on the extent to which assets may be passed to the prime broker;
- arrangements must be put in place to mark positions to market daily;
- the prime broker must agree to return the same or equivalent securities to the fund;
- the prime broker agreement must incorporate a legally enforceable right of set-off for the hedge fund;
- the prime broker or its parent company must have a minimum credit rating of A1/P1; and
- the prime broker must be regulated as a broker by a recognised regulatory authority and it, or its parent company, must have shareholders' funds in excess of €200 million.

A prime broker must be appointed as sub-custodian to a fund where it will hold assets of a fund in circumstances other than as set out above. UCITS may not appoint prime brokers.

6.2 Funds of Funds

Both UCITS and non-UCITS funds can be structured as funds of funds investing principally in other funds.

UCITS funds are subject to the following conditions:

- collective investments schemes ("CIS") in which UCITS funds of funds invest must be subject to supervision by a regulatory authority in their home jurisdiction;
- under such supervisory regime, the rules relating to asset segregation, borrowing, lending and short sales of transferable securities must be equivalent to those provided for a UCITS fund;
- UCITS funds of funds may not invest more than 30% of their assets, in aggregate, in units of non-UCITS CIS;
- UCITS funds of funds may not invest more than 20% of their assets in units of a single CIS, however, in the application of this limit, each sub-fund of an umbrella fund is considered to be a separate CIS;
- UCITS funds of funds are not allowed to invest in other funds of funds.

A non-UCITS fund of funds may be established as a fund of regulated or unregulated funds. A retail non-UCITS fund of funds may not invest more than 20% of its NAV in the units of any one CIS except that this limit may be raised to 30% in the case of one CIS. Like a UCITS, a non-UCITS fund of funds may not invest in other fund of funds. A non-UCITS retail fund of funds which invests more than 10% (up to a maximum of 20% in any one scheme) in unregulated CIS is subject to certain additional requirements.

A non-UCITS PIF fund of funds may invest up to 40% of its NAV in the units of any one regulated CIS and up to 20% in any one unregulated CIS. A non-UCITS QIF fund of funds may invest up to 50% of its NAV in any one regulated or unregulated CIS.

6.3 Feeder Funds

A feeder fund is a fund, the principal object of which is investment in a single CIS (the "underlying scheme"). The underlying scheme must be authorised in Ireland or in another jurisdiction which provides an equivalent level of investor protection to that provided in Ireland for similar funds.

The Central Bank may be prepared to provide a derogation from this requirement, in the case of a QIF, in circumstances where:

- the underlying scheme is managed within the promoter's group;
- the group involved is large with a proven relevant track record. In general it is expected that the group will have:
  - capital in the region of €100m and assets under management in the region of €4bn;
  - carried out an asset management activity for a minimum of ten years; and
- the group provides adequate comfort to the Central Bank in relation to its control and supervision of the unregulated scheme.

The prospectus for the feeder fund must contain sufficient information on the underlying fund (or master fund) to enable investors in the feeder fund make an informed judgement. The prospectus must also contain comprehensive information relating to charges and expenses in respect of the underlying fund.

The prospectus must also clearly disclose both the jurisdiction and type of underlying scheme into which the feeder fund proposes to invest. Where the underlying scheme is an unregulated scheme, full disclosure regarding the nature of the underlying scheme, including information on whether the underlying scheme may be leveraged and the attendant risks, must be contained in the feeder fund's prospectus.

UCITS may now also take advantage of master-feeder structures, as outlined in section 2.3.4 Asset Pooling.

6.4 Closed Ended Funds

A non-UCITS closed-ended fund must provide for a finite closed-ended period in its constitutional documentation. The units or shares of the fund will not be redeemed for the duration of this closed-ended period. Retail funds can have an initial closed-ended period of up to 5 years (which can be raised to 10 years or 15 years in certain circumstances). PIFs can have an initial duration of up to 10 years, extending this to 15 years where realistic provision has been made for liquidity. QIFs can have an initial duration of up to 15 years.

At the end of the closed-ended period the fund is required to either:

- wind-up and apply for revocation of authorisation;
- redeem all outstanding units and apply for revocation of authorisation;
- convert into an open-ended scheme; or
- obtain investor approval to extend the closed period for a further period.

Closed-ended funds (as opposed to open-ended or limited liquidity funds) are subject to the Prospectus Directive unless they can avail of an exemption

The Prospectus Directive requires that a prospectus be published if an issuer is seeking to list its securities on a regulated market or if it wishes to offer its securities to the public. The prospectus must be approved by a "competent authority", which for Irish purposes is the Central Bank. The Central Bank has delegated this responsibility to the Irish Stock Exchange but this is currently being unwound as under European law, the role of prospectus scrutiny must be returned to the Central Bank by 31 December 2011. Once approved in one Member State, the prospectus can be used to passport throughout the EU. Closed-ended funds may not be authorised as UCITS.

7. Investment Through Special Purpose Vehicles

The Central Bank operates an efficient authorisation process for Irish-domiciled funds. QIFs can benefit from a fast-track approval process whereby eligible QIFs are authorised in one day.

All other funds are capable of being authorised within five weeks, largely due to a process whereby the fund's lawyers confirm to the Central Bank that documentation complies with the relevant regulations. More detail on the authorisation procedure is set out below.

7.1 Promoter and Investment Manager Approval

When deciding to establish a fund in Ireland, one of the first things to be determined is the identity of the promoter. The Central Bank requires that a promoter be identified to satisfy it that there is an entity of substance backing the project. There is no legal basis for the concept of promoter and the promoter has no financial or contractual obligation to the fund.

Both the promoter and the investment manager (if different from the promoter) of the fund need to be approved by the Central Bank, in advance of submission of the application for fund authorisation. The promoter/investment manager application(s) will require information regarding their share capital, expertise, references, regulatory status (if any) and financial information. In the case of the promoter, the Central Bank will require confirmation that it has at least €635,000 in shareholders' funds.

The promoter approval process usually takes between three and five weeks, but, in some circumstances the Central Bank will permit the promoter approval to proceed in parallel with the fund's authorisation process, in particular if the promoter is regulated in an OECD member state. Once obtained, this approval is valid for any further funds established in Ireland. The Central Bank's objective in this process is to ensure that the promoter and investment manager are reputable and have the necessary experience.

It should be noted that where an entity wishes to act as both promoter and investment manager to a fund, the Central Bank does not require two approval applications. Once an entity has been approved to act as promoter, it does not require a second approval to act as investment manager/adviser, provided that the initial application encompasses both roles.

There is no requirement for either the promoter or the investment manager to have physical operations in Ireland.

7.2 Fund Authorisation

An application for authorisation of an investment fund is made by lodging the following documentation, in draft form, with the Central Bank:

- prospectus;
- custodian agreement, trust deed or deed of constitution (this will depend on the legal structure of the fund); and
- relevant Central Bank application forms and ancillary letters.

Additional filings will be necessary in the case of a UCITS.

The Central Bank will usually respond with its initial comments within three weeks of receipt of an application. Depending on the nature and complexity of a fund, a typical fund should be capable of authorisation within five weeks.

As mentioned previously, QIFs enjoy a fast track approval process whereby eligible funds can be approved in one day. Please see Section 3.3 for more details on this process.

7.3 Directors

The Central Bank must satisfy itself as to the reputation and experience of all directors by applying its fitness and probity test. Appointments to the office of director of the management company, general partner or investment company must be approved in advance by the Central Bank. A minimum of two directors of the management company, general partner and the investment company must be Irish residents.

7.4 Service Providers

Irish domiciled funds are specifically required to have an Irish-based custodian which has been approved by the Central Bank. A substantial amount of the world's leading financial institutions operating in the fund administration and custody industry are based in Ireland and thus the sourcing of appropriate service providers for Irish domiciled funds presents no difficulty.

Where a fund appoints an Irish administrator certain minimum activities must eith be carried out in Ireland or in accordance with the Central Bank's requirements on outsourcing.

These include the following:

- NAV calculations;
- fund accounting;
- maintenance of members' register;
- preparation of financial reports;
- retention of all investor correspondence and original documentation received; and
- reduction of backup documentation underlying the books and records of a fund.

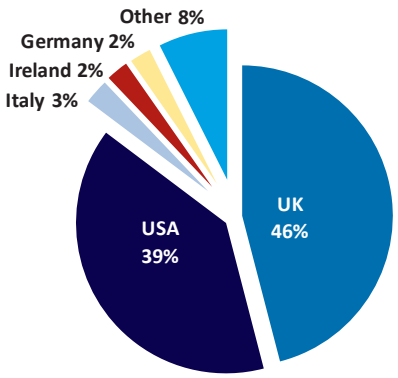
The fund must also have auditors, who will also be Irish based.

There is no requirement for other service providers, such as distributors or investment advisers to be located in Ireland.

Promoter Origin of Irish Domiciled Funds
Percentage of Total Irish Domiciled Assets by Promoter Origin

358 Promoters of Irish Domiciled Funds

Source: Lipper Ireland Fund Encyclopaedia, June 2009



8.
Funds Re-Domiciling to Ireland

Following growing interest from fund managers to have their unregulated funds re-domiciled to Ireland, new legislation has been enacted to provide a clear process to facilitate the re-domiciliation of unregulated funds to Ireland.

8.1 Legislative Changes

New company law enhancements contained in the Companies (Miscellaneous Provisions) Act 2009 introduce a straightforward procedure to re-domicile corporate funds to Ireland. In the past, re-domiciliations to Ireland were typically effected by establishing a new fund structure in Ireland, transferring the assets of the existing fund to the new Irish fund and ultimately winding up the "shell" of the original fund. Under the new regime, a fund can migrate directly to Ireland whilst retaining its corporate identity, track record (provided no significant change to investment policy or fee structure occurs) and existing contractual arrangements.

A streamlined process of document registration has been introduced, resulting in a new single-filing registration process at the Irish Companies Registration Office (CRO). It should be noted that an Irish domiciled fund must be authorised by the Central Bank, a process which will occur simultaneously with registration at the CRO.

8.2 Advantages

The new regime has many advantages, including the following:

- it introduces a legal framework to enhance the efficiency of the process to re-domicile unregulated funds to Ireland;
- it provides for the continuation of foreign investment companies in Ireland and allowing the existing corporate identity of the migrating company to be retained;
- there is no tax inefficient transfer of assets between funds; and
- the fund retains its existing contractual arrangements, its track record and its listing history.

8.3 Procedure

A foreign investment company wishing to migrate to Ireland will apply to the CRO to be registered as a company in Ireland by way of continuation. This will be done by lodging a detailed form accompanied by several documents, including a statutory declaration of a director of the migrating company confirming certain facts about the status of the migrating company. An application to the Central Bank is made simultaneously to this application to the CRO.

As part of the Central Bank's authorisation process, the entity acting as promoter and investment manager to the migrating company will require to be authorised by the Central Bank (if not already authorised as such).

8.4 Non-Corporate Funds

A new authorisation process to facilitate the re-domiciliation to Ireland of unregulated funds structured in non-corporate form, such as unit trusts, has also been prepared by the Central Bank and is currently in operation. This shares all of the advantages listed above in respect of the reclassification of Corporate Structures and avoids the need to involve the CRO.

9. Management Companies

A unit trust and a CCF must have a management company incorporated in Ireland, whereas a VCC may appoint a management company or alternatively can be 'self-managed' by its board of directors.

A management company typically does not perform discretionary investment management functions as this role is normally delegated to a dedicated investment manager or trading adviser, often located outside Ireland. Instead its role involves oversight, control and general organisation of the fund's activities. The requirements for management companies, which differ depending on whether the underlying fund is a UCITS or non-UCITS, are set out below.

9.1. Non-UCITS Management Companies

A non-UCITS management company must have sufficient financial resources at its disposal to enable it to conduct its business effectively and to meet its liabilities.

The principal regulatory requirements applicable to non-UCITS management companies are as follows:

- a minimum of two directors of the management company must be Irish residents;
- approval by the Central Bank is required in respect of any proposed change in ownership or in significant shareholdings;
- a minimum paid up share capital equivalent to €125,000 or one quarter of its preceding year's fixed overheads, whichever is greater;
- adequate information on the expertise and reputation of the proposed directors and managers of the management company must be provided;
- names of the company secretary and of the shareholders must be furnished with audited accounts and overseas regulatory status (if any); and
- appointments to the office of director of the management company must be approved by the Central Bank.

Non-UCITS management companies are approved by the Central Bank, on completion of the appropriate application form, in conjunction with the authorisation of a non-UCITS fund.

9.2 UCITS Management Companies

The regulatory requirements set out above in respect of non-UCITS management companies apply equally to UCITS management companies. In addition UCITS management companies are regulated under the UCITS Regulations.

The 2001 Management Company Directive introduced a regime whereby UCITS management companies may expand the range of activities which they may carry out so that, in addition to the management of unit trusts/CCFs/VCCs (referred to as "collective portfolio management"), they can also carry out the activity of management of portfolios of investments on a client-by-client basis (referred to as "individual portfolio management"), including the management of pension funds, as well as some specific non-core activities linked to their main business.

The UCITS Regulations now provide that UCITS managment companies may provide services cross-border within the EU on either an establishment/branch basis or on a freedom of services basis, including acting as manager to UCITS authorised in another Member State.

9.2.1 Operating Conditions

There are a number of operating conditions imposed on UCITS management companies. They can be summarised as follows:

- the initial capital requirement is €125,000 but an additional amount of own funds is required to be provided when the value of the portfolios of the management company exceeds €250 million;

- importantly, in considering what are deemed to be the "portfolios of the management company", all of the unit trusts or CCFs or VCCs to which it acts as management company are included but the portfolios that it is managing under a delegation (eg. where it is acting as an investment manager of a fund but not as manager) and assets which it manages for non-fund clients are excluded. There is also a provision whereby 50% of the additional amount of own funds may be provided instead by way of a guarantee from a credit institution or insurance undertaking; and
- the person who effectively conducts the business of the management company must be of sufficiently good repute and sufficiently experienced in relation to the types of UCITS managed by the company. In addition, the conduct of the management company business must be decided by at least two persons meeting such conditions (4 eyes principle).

9.2.2 Delegation

Whilst the board of a management company or a self-managed VCC (the "Board") may delegate one or more of its own functions to a third party, the Board's liability will not be affected by the fact that it has delegated any function to a third party nor can the Board delegate its functions to the extent that it becomes a "letterbox entity".

The Central Bank requires that certain functions of the Board, including the appointment of a chairman and frequency of meetings, be formalised and that certain key managerial functions are carried out.

The Central Bank has identified the following management functions for which the directors must accept responsibility in accordance with good corporate governance principles:

- Decision Taking
- Monitoring Compliance
- Risk Management
- Monitoring of Investment Policy, Investment Strategies and Performance
- Financial Control
- Internal Audit
- Monitoring of Capital
- Supervision of Delegates
- Complaints Handling
- Accounting Policies and Procedures

Both a UCITS management company and the board of self-managed UCITS VCCs are required to obtain authorisation pursuant to the UCITS Regulations. The application primarily comprises an application form and a business plan. The business plan sets out in detail how the management company or board will be run and how the above listed functions will be carried out. The Central Bank requires management companies to have substance and for their "mind and management" to be carried out in Ireland, although this requirement can be fulfilled without the need for employees in the management company.

10. Taxation

10.1 Favourable Tax Environment

Irish regulated funds benefit from the following attractive tax provisions:

- they are exempt from tax on their income and gains irrespective of an investor's residency. This allows investors' returns to roll up on a gross basis;
- under Irish legislation, no withholding tax is applied on income distributions or the redemption of units by a fund to a non-Irish resident investor, provided a relevant declaration is in place (see Finance Act 2010 amendment below). It is not necessary for an investor to be resident in a country with which Ireland has a double tax treaty to avoid withholding;
- no Irish stamp duty is applied on the establishment, transfer or sale of units or shares in an Irish regulated fund;
- many of the services provided to a fund are exempt from VAT, e.g. investment management, administration and custodial services;
- no on-going or yearly tax is charged on the NAV of the fund;
- Ireland is not regarded as a tax haven.

Finance Act 2010 introduced changes with the intention of enhancing Irish Fund's competitive position. One such change is that the Revenue Commissioners ("Revenue") can grant investment undertakings an exemption from the requirement to obtain and maintain declarations of non-Irish tax resident unitholders/shareholders where Revenue is satisfied that the investment undertaking has appropriate measures in place to ensure that the relevant unitholders/shareholders are not resident or ordinarily resident in Ireland.

10.2 Double Tax Treaties

Ireland has signed comprehensive double tax treaties with 63 countries, of which 55 are in effect. The agreements cover direct taxes, which in the case of Ireland are income tax, corporation tax and capital gains tax.

The countries with which Ireland has a double tax treaty are:

Australia, Armenia (signed but not yet in force) Austria, Bahrain (signed but not yet in force), Belarus (signed but not yet in force), Belgium, Bosnia Herzegovina (signed but not yet in force), Bulgaria, Canada, Chile, China, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hong Kong, Hungary, Iceland, India, Israel, Italy, Japan, Republic of Korea, Kuwait (signed 23 November 2010), Latvia, Lithuania, Luxembourg, Macedonia, Malaysia, Malta, Mexico, Moldova, Montenegro (signed 7 October 2010), Morocco (signed 22 June 2010), Netherlands, New Zealand, Norway, Pakistan, Poland, Portugal, Romania, Russia, Serbia, Singapore, Slovak Republic, Slovenia, South Africa (Protocol signed but is not yet in force), Spain, Sweden, Switzerland, Turkey, United Arab Emirates (signed 1 July 2010 but not yet in force), United Kingdom, United States of America, Vietnam, Zambia.

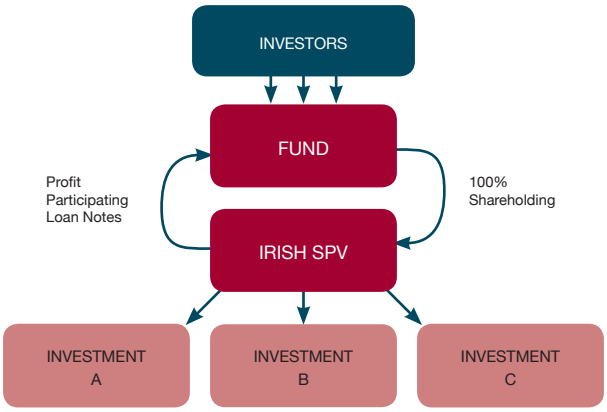
New treaties with Panama, Saudi Arabia, Thailand and Uzbekistan as well as a new agreement replacing the existing treaty with Germany, are expected to be signed shortly.

Negotiations for new treaties with Argentina, Azerbaijan, Egypt, Tunisia and Ukraine are at various stages.

10.3 Effective Use of SPVs

Dividends (if any) and interest which a fund receives with respect to its investments may be subject to local taxes, including withholding taxes, in countries in which the issuers of investments are located. However, a structure can be put in place to benefit from Ireland's double tax treaty network to effectively avoid or reduce any such withholding taxes. Where withholding tax is applied in the foreign source jurisdiction, the Irish fund can be structured to hold its interest in the foreign security through an Irish qualifying special purpose vehicle ("SPV") which avails of the provisions of Section 110 of the Taxes Consolidation Act 1997 ("TCA").

An illustration of the structure is as follows:



Irish tax law includes favourable provisions for qualifying SPVs who hold and/or manage, or have an interest (including a partnership interest) in qualifying assets. Qualifying assets include:

- shares, bonds and other securities;
- futures, options, swaps, derivatives and similar instruments;
- invoices and all types of receivables;
- leases and loan and lease portfolios;
- hire purchase contracts;
- bills of exchange, commercial paper, promissory notes and all other kinds of negotiable or transferable instruments;
- greenhouse gas emission allowances; and
- contracts for insurance and contracts for reinsurance.

The main conditions to satisfy, in order to be a qualifying SPV, are that the company must be Irish tax resident and the de-minimis asset value limit in respect of the first transaction carried out by the SPV is €10 million.

The SPV is typically taxed in Ireland at a corporation tax rate of 25%. However, critically, its transactions are generally structured so that the level of taxable profit is negligible or zero. This is achieved because the return paid in profit participating loan notes is tax deductible thus generally leaving the SPV tax neutral.

The net effect is that an SPV, as an Irish resident taxable company, can avail of Ireland's double tax treaty network to avoid or reduce foreign withholding tax being applied on the foreign security.

11.
Continuing Obligations

Following authorisation, Irish funds are required to comply with certain continuing obligations, as imposed by the Central Bank and also under general Irish law, where applicable.

Irish funds must publish an annual report for each financial year and a half yearly report covering the first six months of the financial year (except QIFs which benefit from an exemption from the requirement to produce the latter).

The annual report must be published within four months of the fund's financial year end and the half yearly report must be published within two months of the end of the period to which it relates. These reports must be filed with the Central Bank, must be supplied to investors free of charge and must be made available for inspection at a specified location.

Monthly returns must also be made to the Central Bank containing information regarding the total gross asset value and the NAV of the fund at month-end together with the number of shares in circulation and the NAV per share at month-end.

Irish domiciled fund management companies and corporate general partners of an LP are required to submit annual audited accounts and half-yearly reports to the Central Bank. The annual audited accounts of the promoter and the investment manager must also be submitted to the Central Bank.

The Central Bank is responsible for the on-going supervision of funds and (other than any requirements imposed by the Companies Acts, 1963-2009) all necessary filings are made with the Central Bank.

The Central Bank enjoys extensive powers of inspection and intervention in the discharge of its statutory functions. Irish domiciled funds are obliged to keep such books and records as the Central Bank may require and must notify the Central Bank of the address of every office at which these are kept.

The Central Bank has power to revoke authorisation where it appears to it that the provisions of the UCITS Regulations, the Units Trusts Act, 1990, Part XIII of the Companies Act, 1990 or the Investment Limited Partnerships Act, 1994, as applicable, have been contravened and that the prudential interests of unitholders/shareholders are threatened.

12.
Listing on the Irish Stock Exchange

A stock exchange quote on the Irish Stock Exchange (the "ISE") is available to both Irish and non-Irish funds. Should the fund wish to list its units/shares on the ISE it will need to appoint an Irish listing sponsor/stockbroker.

12.1 Fund Domicile

The ISE places no restriction on the domicile of funds. It does, however, distinguish between funds domiciled in regulated and unregulated jurisdictions. Funds domiciled in unregulated jurisdictions must have a minimum initial investment amount of US$100,000 (or equivalent) per investor. There is no such requirement for "regulated" funds which are defined as funds which are domiciled and regulated in an EU Member State, the Isle of Man, Jersey, Guernsey, Bermuda or Hong Kong.

12.2 Parties Involved

12.2.1 Investment Manager

The investment manager must have adequate and appropriate expertise and experience in the management of investments. This is usually demonstrated by the value of funds under management, and as a rule of thumb the ISE requires that an investment manager have a minimum of US$100 million in third party (i.e. non proprietary) funds under discretionary management.

12.2.2 Directors

The directors must have, collectively, appropriate and relevant expertise and experience. The board of directors of the fund must contain a minimum of two 'independent' directors. An independent director will generally be any person who has no executive function with the investment manager or their affiliated companies. Funds regulated by the Central Bank are not required to have independent directors, however, such funds must have at least two Irish resident directors. Corporate directors will not be permitted unless such corporate directors are legally required in the jurisdiction in which the fund is domiciled

12.2.3 Custodian

The custodian should be a separate legal entity from the investment manager, administrator and any investment adviser. The custodian must hold all assets (save margin deposits) on a segregated basis. Funds that employ the services of a prime broker may avail of a derogation from these segregation requirements.

12.2.4 Administrator

There must be a separate entity responsible for the determination and calculation of the NAV of the fund and notifying it to the ISE upon calculation.

12.3 Principal ISE Requirements

12.3.1 Primary Investment Restrictions

Funds listed on the ISE are required to observe certain investment restrictions in order to ensure adequate diversification. These restrictions are generally compatible with the UCITS restrictions but are mainly disapplied for Irish regulated funds. The primary restrictions are:

- Maximum of 20% of the value of the gross assets of a fund can be invested in the securities of a single issuer, which may be increased to 100% for EU/OECD government issuers;
- Maximum of 20% of the fund's gross assets exposed to the creditworthiness of a single

counterparty, which may be increased to 100% for certain approved counterparties;

- Prohibition on taking legal or management control of an issuer of any of the fund's underlying investments;
- Maximum of 40% of the fund's gross assets can be invested in any other fund (except feeder funds);
- Maximum of 10% of the fund's gross assets can be invested in physical commodities;
- Maximum of 10% of the fund's gross assets can be invested in real property (except property funds);
- Maximum of 20% of a fund of funds' gross assets can be invested in other funds of funds; and
- Underlying funds of feeder funds are subject to the same limitations.

12.3.2 Transferability

The ISE requires that the units/shares in a fund be freely transferable and tradable although transfer restrictions will be allowed if such restrictions are to prevent the fund incurring any regulatory, taxation, pecuniary, legal or material administrative disadvantage.

12.3.3 Financial Information

The following must be submitted to the ISE with an application for a listing:

- Newly-incorporated funds: a statement from the directors must be incorporated in the listing particulars to the effect that the fund has not commenced operations, no accounts have been made up and no dividends have been declared as at the date of the listing particulars;
- Funds trading for less than 18 months where no audited annual accounts are available: unaudited portfolio details to a date within one month of the date of the listing particulars; and
- Funds trading for more than 18 months: audited annual accounts relating to the last financial year prepared to a date within 18 months of the date of the listing particulars.

On an ongoing basis, the NAV calculation must be performed at least every calendar quarter. The method of valuation of the assets should be in accordance with applicable accounting standards.

12.3.4 Transactions with Prime Brokers

Funds, such as hedge funds, may not be in a position to limit their exposure to a single counterparty to 20% of the fund's gross assets. Similarly many funds employ a prime broker which provides financing to the fund in return for a collateralisation of the fund's assets. In such instances, the 20% counterparty limit and/or the requirement to keep all assets (save margin) in segregated accounts, may be disapplied if the fund and the prime broker meet certain conditions.

12.3.5 Funds Authorised by the Central Bank

The ISE automatically accepts the suitability of service providers to a fund authorised by the Central Bank, and likewise the fund's dividend policy is deemed to be acceptable. Funds that have been authorised as QIFs by the Central Bank may derogate from all ISE investment restrictions, save the prohibition on taking legal and management control of an issuer and limits on investment in commodities and real property.

12.4 Closed Ended Funds

As set out in Section 5, closed ended funds intending to make a public offer of securities in the EU or having the securities admitted to trading on a recognized market within the EU are required to comply with the requirements of the Prospectus Directive.

12.5 Timing

Under normal circumstances, a listing can be obtained within approximately three to six weeks. The ISE will review the first draft of the listing particulars within five business days but will only take two business days to review any subsequent draft.

12.6 Listing Fees

Application Fees (Payable prior to admission to listing)		
	EU Funds	Non EU Funds
Initial Application Fee	€ 1,900 per application	€ 1,980 per application
Subsequent Application Fee	€ 900	€ 940

Annual Fees (Payable prior to admission in the first year of listing and, thereafter, on each anniversary of listing)		
	EU Funds	Non EU Funds
Per fund or sub-fund up to 5 sub-funds	€ 1,900	€ 1,980
Per sub-fund over 5 and up to 10 sub-funds	€ 1,150	€ 1,200
Per sub-fund over 10 sub-funds	€ 760	€ 800

12.7 Primary Reasons for Listing a Fund

12.7.1 A listing increases a fund's potential investor base.

An ISE listing gives the fund a "listed" security status on an EU regulated exchange. Legal or regulatory constraints mean that certain investors are either restricted or prohibited from investing in unlisted securities or securities which are not listed on a recognised, regulated stock exchange.

12.7.2 A listing increases a fund's prestige and profile.

The ISE is the world's leading exchange for listings of investment funds. A listing on this long established, well regulated and recognised EU stock exchange provides a valuable marketing tool for fund promoters.

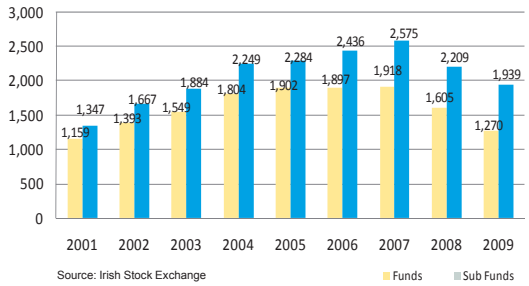
12.7.3 A listing provides publicly available information for investors.

All announcements made by listed funds and NAVs notified are reported through the ISE information dissemination system. These appear on the ISE website and are carried by Reuters, Bloomberg and other international news services.

12.7.4 ISE represents best practice

The ISE's listing rules are updated regularly to take account of changes within the funds industry to ensure they represent best practice.

Irish Stock Exchange Listings
Nos. of Funds and Sub-Funds Listed



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Paul Egan, a senior partner with Mason Hayes & Curran, is a member of the Funds Listing Committee of the ISE.

13.
About Mason Hayes & Curran's Investment Funds Practice

Mason Hayes & Curran is a full service, business law firm with 66 partners and over 300 employees specialising in Irish law. With offices in Dublin, London and New York the firm delivers sophisticated legal services to an extensive Irish and international client base.

Investment Funds at Mason Hayes & Curran

Our investment funds lawyers have a wealth of experience in the investment funds industry and have been involved in the development of policy and regulation in Ireland. We advise on the establishment and ongoing operation of Irish domiciled investment funds. For further information with regard to the topics covered in this guide or Irish investment funds law generally, please see the contacts listed on page 35.

Complementary Services

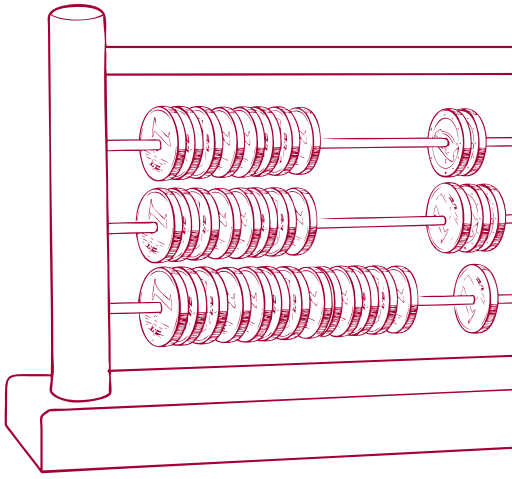
When advising clients, our dedicated team of investment fund lawyers can also draw upon the expertise of specialist lawyers from our tax, corporate, banking, litigation, intellectual property, data protection, regulatory and compliance practices whenever required.

As a full service law firm, we regularly advise financial services clients on a wide range of matters in addition to regulatory issues that need to be considered when setting up in business or establishing an investment fund in Ireland.

These services often include:

- structure formation
- corporate governance
- regulatory compliance
- tax issues
- income repatriation
- employment related issues
- raising finance or grant assistance
- ongoing company secretarial requirements

Consistently recognised as one of Ireland's leading business law firms, Mason Hayes & Curran is committed to providing optimum solutions to promoters, asset managers and fund service providers in Ireland. At Mason Hayes & Curran, we can assist you with every aspect of your business.



What Clients Say About Us...

"Mason Hayes & Curran did great work setting up our Irish UCITS. They had a good sense of key concepts and resolved issues that arose during the process quickly and efficiently. All round, I was very satisfied with their work."

Jeffrey Bronheim, Partner and General Counsel, Cheyne Capital Management (UK) LLP

"Mason Hayes & Curran were highly recommended to us when we were considering establishing a Qualifying Investor Fund in Ireland and I was very satisfied with the outcome regarding quality and time. They were responsive, efficient and very helpful in ensuring a successful start of the Fund."

Götz J. Kirchhoff, Managing Partner, AVANA Invest GmbH

"The firm has great depth. They seemlessly advised on all regulatory, corporate, tax, technology, employment and pensions law issues during our transaction and we got a first-class service from them. I would have no hesitation recommending Mason Hayes & Curran to anyone in the financial services industry."

Peter Schifsky, Chief Legal Officer, LaCrosse Global Fund Services, part of the Cargill Group

"The team worked very much in partnership with us in establishing our UCITS fund. They are very pro-active and innovative in their approach, which was crucial, as we were breaking new ground with our MENA Fund. Their lawyers are technically excellent and also have a real sense of our commercial objectives."

Walid Hayeck, Managing Director, Asset Management, The National Investor, the first Abu Dhabi-based promoter to be approved to establish Irish funds

What Others Say About Us...

This group is primarily dedicated to advising asset managers structuring and domiciling investment funds. Interviewees are keen to highlight the team's client-oriented service and constructive approach. Recent highlights include advising Thornbug Investment Management on the establishment of a new Irish UCITS platform for international distribution, and acting for Cheyne Capital Management on a change of the administrator and custodian to their Irish UCITS fund.

"It is a modern, forward-looking firm with a great ethos."

"It puts in the hours to make sure what we need happens and will reach out to others to make sure that we stay on target."

Chambers & Partners, Europe's Leading Lawyers, 2012

"Mason Hayes & Curran advised Cheyne Capital Management on updating its Irish UCITS fund to comply with UCITS IV. Mark Browne and Fionán Breathnach are recommended."

Legal 500, 2012

"The core funds practice at this full-service firm has undergone an expansion in recent times, including the addition of a new partner. The team provides counsel on all aspects of investment funds law and regulation, such as structuring, establishing and listing funds in Ireland."

Chambers & Partners, Europe's Leading Lawyers, 2011

"Mason Hayes & Curran grew its practice with the partner hire of Mark Browne from the Cayman office of Maples and Calder. The team, headed up by Fionan Breathnach, advised Cheyne Capital on the establishment of a Convertible Bond UCITS. The firm also advises Centaur Fund Services and the National Investor."

Legal 500, 2011

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This Brochure summarises the key legal and regulatory issues to be considered in relation to the establishment of a regulated collective investment scheme in Ireland. Specific issues will require further analysis, consequently, the information in this Brochure is of a general nature and any further advice or clarification can be provided by our Investment Funds team.

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