



Mason Hayes+Curran

A Practical Guide to the Redomiciliation of Investment Funds to Ireland



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Contents

1.	INTRODUCTION	3
2.	REASONS FOR REDOMICILIATION	4
3.	ADVANTAGES OF THE CURRENT REDOMICILIATION PROCESS	5
4.	EFFECT OF A REDOMICILIATION	6
5.	PRACTICAL STEPS IN THE REDOMICILIATION PROCESS	7
6.	ABOUT MASON HAYES+CURRAN	10
	CONTACTS	11



1.

Introduction



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Irish company law enhancements approved in 2009 introduced a new straightforward procedure to re-domicile corporate investment funds to Ireland.

In September 2010, Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey, the Isle of Man and Jersey were approved as jurisdictions from which corporate funds could redomicile to Ireland pursuant to this legislation.

Following this, the Irish regulatory authority, the Central Bank of Ireland (the “Central Bank”) issued guidance on the practical steps involved in the redomiciliation process for both corporate funds and unit trusts (the “Guidance Letter”) and a first wave of funds has now completed the process and redomiciled to Ireland.

The Investment Funds practice at Mason Hayes+Curran advises on all aspects of the Irish investment fund regime and provides a comprehensive advisory service to investment promoters or managers wishing to redomicile funds to Ireland.

Members of the team have extensive specific experience of advising in relation to a wide range of offshore funds and this enables them to add value for clients in such transactions.

The primary drivers for fund promoters to consider redomiciling funds are the increasing investor preference for regulated on-shore jurisdictions, the desire for tax certainty and the need to ensure that funds are structured and located such that they can maximise the opportunities to attract new investors.

There are a range of advantages to having a fund domiciled in Ireland which address all of these concerns and are based on the regulatory environment, tax efficiency, industry expertise and distribution opportunities available. The following points are some of the key considerations in this regard:

2.1 Regulatory and Legal Environment

- Ireland is a member of the EU, the OECD and the FATF;
- Ireland is a common law jurisdiction;
- the Central Bank has a strong track record of prudential supervision of Irish investment funds and the regulated firms providing services to them, but has also proven to be adaptable in amending its regulations to ensure they remain appropriate and relevant;
- Ireland is a member of the Euro zone; and
- funds that comply with the requirements of EU legislation as implemented in Ireland may take advantage of pan European marketing opportunities (see “Distribution Opportunities” below).

2.2 Tax Efficiency

- Irish regulated funds are exempt from tax on their income and gains irrespective of an investor’s residency;
- no on-going or yearly tax is charged on the net asset value of the fund;
- under domestic legislation, no withholding tax is applied on income distributions or redemption payments by a fund to a non-Irish resident investor;

- no Irish stamp duty is applied on the establishment, transfer or sale of units or shares in an Irish regulated fund;
- Ireland is not regarded as a tax haven and is listed on the OECD’s “white list” for internationally agreed tax standards;
- Ireland is party to over 60 double tax treaties, the provisions of which may be accessed by funds or structures involving funds;
- the Irish Revenue has clarified that funds redomiciling to Ireland may make use of a declaration on behalf of the fund that to the best of their knowledge there are no Irish resident investors; and
- Ireland has signed up to the EU Savings Tax Directive’s information exchange provisions and therefore, unlike certain EU Member States, it does not need to apply withholding tax on fund distributions.

2.3 Industry Expertise

- over 12,000 professionals work in the funds industry in Ireland;
- in addition, there is a large pool of experienced support professionals including lawyers, tax advisors, consultants and auditors; and
- there are over 50 authorised fund administrators in Ireland, the majority of which are subsidiaries of large global firms. Many of these firms also have sister companies offering custody operations; and
- over 40% of global hedge funds are currently administered in Ireland so in many cases the redomiciling fund will have already appointed an Irish administrator.

3. Advantages of the Current Redomiciliation Process

2.4 Distribution Opportunities

- Irish funds are distributed in over 70 countries;
- funds authorised as UCITS in Ireland can avail of pan-European registration possibilities;
- funds authorised in Ireland as non-UCITS, for example Qualifying Investor Funds, will automatically be largely compatible with the terms of the Alternative Investment Fund Managers Directive and accordingly will be able to avail of pan-European marketing possibilities from 2013;
- Irish authorised funds, both UCITS and non-UCITS, constitute “regulated” funds which facilitates their distribution to institutional investors on a global basis; and
- Ireland is in the same time zone as London and only one hour removed from mainland Europe. The business day overlaps to an extent with that of both Asia and the US.

2.5 Other Advantageous Considerations

The Irish Stock Exchange, which is an EU recognised exchange, is the world’s leading stock exchange for listings of investment funds and Irish authorised funds receive automatic derogations from a number of their requirements.

In the past, prior to the enactment of the Companies (Miscellaneous Provisions) Act 2009 (the “Act”), which introduced legislation permitting redomiciliations, due to the absence of specific re-domiciliation provisions under Irish company law, a re-domiciliation to Ireland would typically be 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. While this did enable continuity, the Irish entity was effectively a new structure.

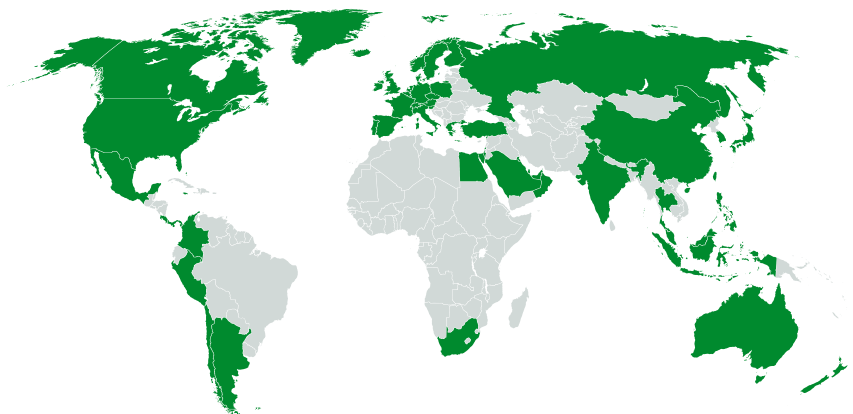
Under the new regime, a fund can migrate directly to Ireland retaining its corporate identity, track record and existing contractual arrangements.

The key advantages of the redomiciliation process provided for under the Act include the following:

- the existing corporate identity of the migrating company is retained;
- there is no need to incur the cost of establishing a new legal entity;
- there is no tax inefficient transfer of assets between funds;
- the fund authorisation by the Central Bank and the corporate registration with the Irish Companies Registration Office take place simultaneously, accordingly the entity is exempt from tax as soon as the redomiciliation is effected; and
- the fund retains its existing contractual arrangements, its track record and its listing history.

Global Distribution of Irish UCITS

Source: Lipper FMI & IFIA, 2010



4.

Effect of a Redomiciliation

As the redomiciliation will not cause a change in the entity that constitutes the fund, it will be possible for it to continue to use its track record and the existing shareholders' shares can remain unaffected. However, some aspects of the fund will be required to change. For example, the registered office will be amended to an Irish address, an appropriate Irish corporate suffix (plc or Public Limited Company) will be introduced to the name and the fund documentation (including the offering memorandum, the constitutional documents and the contractual agreements) will be amended to reflect the redomiciliation and applicable Irish law.

Additional changes may also be required in order to comply with Irish regulatory requirements. For example, the board will need to include at least two Irish resident directors and depending on the type of regulatory authorisation being sought, the fund's strategy may need to be amended (for example if the fund is to redomicile as a UCITS).

The redomiciling of companies is restricted to those that are to be authorised as Irish investment funds. Accordingly, it will be necessary to select one of the following types of authorisation and to ensure that the fund complies with the applicable requirements.

4.1 UCITS

A UCITS is an "Undertaking for Collective Investment in Transferable Securities". UCITS are currently established in Ireland pursuant to the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations (S.I. 352/2011), (the "UCITS Regulations"). UCITS are regarded as the most highly-regulated funds and operate on the basis of their potential for availability to retail investors (although most are, in fact, targeted at institutional investors).

The basic investment requirement for UCITS is that at least 90% of its net asset value ("NAV") must be invested in (i) listed or soon to be listed (max 10%) transferable securities or securities traded on a market which is regulated, operates regularly, is recognised and open to the public; (ii) money market instruments; (iii) units of other funds; (iv) deposits with credit institutions; or (v) financial derivative instruments.

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.

The 2001 UCITS Product Directive (Directive 2001/108/EC), which, together with the 2001 UCITS Management Company Directive (Directive 2001/107/EC), is referred to as UCITS III. UCITS III significantly widened the range of investment possibilities for UCITS. A major change occasioned by UCITS III was the introduction of the ability of UCITS to use financial derivative instruments ("FDI") to follow strategies which were previously the preserve of hedge funds. The Eligible Assets Directive (Directive 2007/16/EC) further clarified the range of investments open to UCITS.

4.2 Non-UCITS

Non-UCITS funds may be authorised as Retail, Professional Investor, or Qualifying Investor (institutional/high net worth) Funds. The investor profile will dictate the appropriate regulatory category of non-UCITS:

(a) Retail Fund

If a fund has no minimum subscription requirement, or one of less than €100,000, it will be considered to be a retail fund. Applicable investment and borrowing restrictions are quite stringent and are broadly similar to those applicable to UCITS.

(b) Professional Investor Fund ("PIF")

If a minimum subscription requirement of more than €100,000 per investor is imposed, a fund can opt to be considered either a PIF or a QIF. For a PIF the standard investment and borrowing restrictions for a retail investor fund can be disapplied to the extent agreed in advance with the Financial Regulator. Typically, the retail investment restriction levels are doubled for a PIF. Due to the recent reduction in the minimum subscription for QIFs (from €250,000 to €100,000), new PIFs are likely to be rare.

(c) Qualifying Investor Fund ("QIF")

The general investment and borrowing restrictions imposed by the Central Bank on investment funds are not applicable to QIFs and accordingly, QIFs are typically used for hedge funds, real estate funds, venture capital funds and private equity funds. QIFs can be fast-tracked for approval in one day, subject to certain conditions.

To be authorised as a QIF, a fund must impose a minimum subscription requirement of at least €100,000 per investor and be marketed solely to qualifying investors, which are defined by reference to the MiFID requirements.

5.

Practical Steps in the Redomiciliation Process

5.1 Prior Steps

(a) Authorisations

- (i) The promoter of the fund will need to be authorised prior to any redomiciliation. The promoter is often, but not necessarily, the investment manager of the fund and is viewed by the Central Bank as the entity that is the driving force behind its establishment. The promoter of an Irish fund is not required to have any financial or contractual obligation to the fund and nor is it required to have any physical operations in Ireland. In order to ensure that the promoter is an entity of substance it must have €635,000 in shareholders' funds.
- (ii) The investment manager (if different from the promoter), will also need to be approved by the Central Bank. In relation to the administrator and custodian, it is a requirement that these be appropriately authorised Irish entities.
- (iii) All of the directors of a corporate investment fund will need to be approved by the Central Bank, with two of them required to be Irish resident.
- (iv) Depending on the type of authorisation which the migrating entity will be seeking in Ireland it may be necessary to submit draft documentation to the Central Bank for review prior to the redomiciliation filing. This is discussed in greater detail below.

(b) Corporate Approvals

- (i) There is no requirement under Irish law for a migrating company to obtain shareholder approval for the migration. However, it would be appropriate to confirm whether the applicable law in the country from which the company is redomiciling requires such approval or if it is required under the terms of its constitutional documents.
- (ii) In practice, the migrating company will amend its constitutional documents (e.g. the memorandum and articles of association) to ensure that they comply with Irish law and again, it is necessary to ensure that the requisite approval is obtained to effect this in accordance with the internal requirements applicable to the migrating company. The actual adoption of the amended constitutional documents will be timed to co-incide with the registration of the company in Ireland.

5.2 The Redomiciliation Process

The actual redomiciliation process itself takes the form of simultaneous registrations with the Central Bank and the Irish Companies Registration Office (the "CRO").

(a) Application to the Central Bank

The Central Bank has clarified in the Guidance Letter that the standard authorisation procedure for new funds will apply to funds redomiciling to Ireland. This means that it will be possible for funds which are seeking authorisation as QIFs to avail of the 24 hour authorisation process, where all of the relevant conditions have been met. The general authorisation process applicable to all other types of funds is dealt with in brief below.

As mentioned previously, redomiciling funds may elect to seek authorisation under any of the categories available in Ireland, including UCITS and each type of non-UCITS.

Where it is decided to register the fund as a UCITS, a Retail Fund or PIF, it will be necessary for relevant documentation to be submitted to the Central Bank for review and approval in advance of the formal redomiciliation application. Specifically, the offering document and custodian agreement (or trust deed) will be required to be submitted as well as (for a UCITS) the business plan and risk management process. It will not be necessary to submit documents in advance in the case of an entity that is seeking to redomicile as a QIF.

The formal application for authorisation will involve filing the constitutional documents, the offering document and executed copies of the agreements appointing service providers including the administrator, investment manager and custodian. Various forms, letters and legal confirmations will also be required.

Once the Central Bank is satisfied that the applicant fund meets its requirements, it will confirm to the CRO that it proposes to authorise it as an Irish fund.

In the case of a QIF, it will be necessary for the directors of the redomiciling fund (or the manager or promoter of a proposed unit trust) to provide confirmation that the existing investors in the fund meet the relevant criteria for investment in a QIF.

It can be noted that where the fund in question is a unit trust, additional documentation will be required to be submitted to the Central Bank, as detailed in Section 5.3 below, but there will be no need for a filing to be made with the CRO.

(b) Application to the CRO

For corporate funds the redomiciliation will also involve an application being made to the CRO for the foreign company to be registered as a company in Ireland by way of continuation. This entails lodging the following documents:

- (i) a certified copy of the certificate of registration (or equivalent certificate or document) issued with respect to the migrating company under the laws of the relevant jurisdiction;
- (ii) a certified copy of the existing memorandum and articles of association of the migrating company;
- (iii) a list setting out the particulars in relation to the directors and secretary of the migrating company required under Irish company law;
- (iv) a statutory declaration of a director of the migrating company made not more than 28 days prior to the date on which the application is made to the effect that:
 - the migrating company is, as of the date of the declaration, established and registered in the relevant jurisdiction, that no petition or other similar proceeding to wind up or liquidate the migrating company has been notified to it and remains outstanding in any place, and no order has been notified to the migrating company or resolution adopted to wind up or liquidate the migrating company in any place;
 - the appointment of a receiver, liquidator, examiner or other similar person has not been notified to the migrating company and, at the date of the declaration, no such person is acting in that capacity in any place with respect to the migrating company or its property or any part thereof;
 - the migrating company is not, at the date of the declaration, operating or carrying on business under any scheme, order, compromise or other similar arrangement entered into or made by the migrating company with creditors in any place;
 - at the date of the declaration the migrating company has served notice of the proposed registration on the creditors of the migrating company;
 - any consent or approval to the proposed registration in Ireland required by any contract entered into or undertaking given by the migrating company has been obtained or waived, as the case may be; and
 - the registration is permitted by, and has been approved in accordance with, the memorandum and articles of association or equivalent constitutional document of the migrating company.
- (v) a declaration of solvency (prepared in accordance with the requirements of Irish company law);
- (vi) a schedule of the charges or security interests created or granted by the migrating company that would, if such charges or security interests had been created or granted by a company incorporated in Ireland, have been registrable under Irish company law including such particulars of those security interests and charges as are specified therein;
- (vii) notification of the proposed name of the migrating company, if different from its existing name; and
- (viii) a copy of the memorandum and articles of association of the migrating company which the migrating company has resolved to adopt, which shall take effect on registration.

When the CRO is satisfied that the appropriate documentation has been filed and it receives notification from the Central Bank that it intends to authorise the Irish fund, it can proceed to issue a certificate of registration.

5.3 Unit Trusts

The redomiciliation of funds structured as unit trusts to Ireland is also possible. Unit trusts are not required to register with the CRO and accordingly, in such cases the Central Bank has clarified in the Guidance Letter that each of the following documents should be furnished to it in conjunction with any redomiciliation of a unit trust (in addition to the documents it requires in respect of all fund redomiciliations):

- (a) if the unit trust is authorised or registered in its home jurisdiction and subject to regulatory supervision or oversight in that jurisdiction:
 - (i) a certified copy of the certificate of registration or equivalent certificate or document issued with respect to the unit trust by the local regulator;
 - (ii) a confirmation from the local regulator that there is no reason why the unit trust cannot re-domicile to Ireland. If this is not possible, a letter from a local legal adviser confirming this fact should be provided to the Central

Investment Funds in Ireland

Bank together with a certified copy of the notices issued on behalf of the unit trust to the local regulator notifying it of the proposal to re-domicile to Ireland;

- (b) if the unit trust is registered in its home jurisdiction but not subject to regulatory supervision or oversight in that jurisdiction:
 - (i) a certified copy of the certificate of registration or equivalent certificate or document issued with respect to the unit trust by the local regulator/registrar;
 - (ii) a confirmation from the local legal adviser that the unit trust is not subject to regulatory supervision or oversight in that jurisdiction and that there is no reason why the unit trust cannot re-domicile to Ireland together with a certified copy of the notice issued on behalf of the unit trust to the local regulator/registrar notifying it of the proposal to re-domicile the unit trust to Ireland;
- (c) if the unit trust is not authorised or registered in its home jurisdiction:
 - (i) confirmation from the local legal adviser that no certificate of registration or equivalent certificate or document has been issued with respect to the unit trust under the laws of the relevant jurisdiction and that no de-registration/de-authorisation process is required;
 - (ii) confirmation from the local legal adviser that there is no reason why the unit trust cannot re-domicile to Ireland;
- (d) a certified copy of the existing trust deed for the migrating unit trust;
- (e) details of the existing manager and trustee together with details of the directors in each case;
- (f) a statutory declaration from both the trustee and manager of the proposed Irish unit trust or from a director of the promoter made not more than 28 days prior to the date on which the application is made addressing the issues specified at 5.2(b)(iv) above;
- (g) declaration of solvency from the trustee of the proposed Irish unit trust or from a director of the promoter in the same form as that required under 5.2(b)(v) above, accompanied by a statement of assets and liabilities and a report from the auditor of the trust.

In the case of unit trusts redomiciling from the Cayman Islands and Bermuda, the Guidance Letter sets out the specific documents which the Central Bank would expect to see accompanying applications for each type of redomiciliation.

For example in the case of Cayman exempt unit trusts registered with CIMA, the Central Bank could require a certified copy of the legislation certificate and certified evidence of the funds' de-regulation with CIMA.

5.4 Post Migration Steps

The migrating company should apply to the registrar of companies in its home jurisdiction to de-register there as soon as the CRO issues its registration in Ireland. Confirmation of de-registration of the migrating company from its original domicile is required to be submitted to the Central Bank within 3 days of registration in Ireland occurring.

Details of the relevant fund will be published in "Iris Oifigiuil", the Irish State gazette and will include details of the jurisdiction from which the entity redomicilled.

If an ISIN has previously been issued to securities of the migrated company, it will be appropriate to obtain a revised number.

Once registered in Ireland and authorised by the Central Bank, it will be necessary for the fund to comply with the applicable Irish corporate and regulatory requirements in the usual manner on an ongoing basis.

For full details of these ongoing requirements please contact one of the team in the Investment Funds practice in Mason Hayes+Curran or see our "Guide to Investment Funds in Ireland", which contains an overview of the funds regime including related matters. This is available on our website: www.mhc.ie

Mason Hayes+Curran is a full service, business law firm with 58 partners and over 270 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 11.

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 Others Say About Us...

"This group has been at the forefront of industry developments with lawyers representing clients in structuring and establishing some of the most innovative fund products in recent years."

"He has a great overview of the industry and understands the minutiae of the development of the market" say sources."

"Mason Hayes+Curran is extremely proactive, and you can trust the group to let it run with its initiative" say clients."

Chambers Europe - The World's Leading Lawyers,
Chambers & Partners, 2010

"At Mason Hayes+Curran, Fionán Breathnach is praised for his 'deep local knowledge' and 'regulatory awareness'. 'The team is experienced in the establishment of UCITS and QIFs.'"

Legal 500, 2010

"Well informed on market developments and extremely adaptable," "dedication to clients' needs and excellent knowledge of how things get done in Ireland"

Chambers Europe - The World's Leading Lawyers,
Chambers and Partners, 2009

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