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ICAV - New Irish Corporate Fund Structure

On 17 December 2013, the Irish Minister for Finance published the General Scheme of the Irish Collective Asset-management Vehicle (ICAV) Bill which will allow for a new corporate structure to be used within the Irish fund industry, sitting alongside the existing public limited company (“PLC”) structure. This new structure, which will provide a greater choice for fund sponsors, will be known as the Irish Collective Asset-management Vehicle or “ICAV”.

Although subject to change during the legislative process, the General Scheme provides a good indication of what the ICAV legislation will look like. As the Minister has stated that he will prioritise the drafting of the legislation, our hope is that the ICAV legislation will be enacted later this year.

Publication of the ICAV Bill is part of the Irish Government’s commitment – see its *IFSC Strategy Statement 2011 – 2016* – to the development of proposals designed to enhance the attractiveness of Ireland as a domicile for investment funds.

Introduction to ICAVs

The ICAV will be a new corporate vehicle for Irish corporate investment funds which will not replace the current PLC regime but will, instead, sit alongside the PLC regime. Establishing an ICAV will be a more simple process than for a PLC as the ICAV will be incorporated once it is authorised by the Central Bank of Ireland (“**Central Bank**”), rather than the current position for PLCs which requires them to be first incorporated at the Companies Registration Office and subsequently authorised by the Central Bank.

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ICAVs will be able to be established as UCITS or as AIFs. AIF type ICAVs will be able to be open ended, open ended with limited liquidity or closed ended.

Key Driver for ICAVs

The key driver behind the creation of ICAVs is to create a separate and distinct corporate fund regime that will simplify the establishment and maintenance of corporate funds in Ireland and overcome two particular difficulties faced by investment funds established as PLCs (which exist by way of legislative provisions that are bolted onto existing company law, much of which is more applicable to trading companies rather than corporate investment funds), namely:

- ▣ ICAV will be able to elect its classification under the US “check-the-box” taxation rules. If the ICAV elects to “check-the-box” to be treated as a partnership for US tax purposes, it will avoid certain adverse tax consequences for US taxable investors which arise if the structure is deemed to be a passive foreign investment company (PFIC) for US federal income tax purposes.
- ▣ because the ICAV structure is tailored to the requirements of electing investment schemes, it will remove the need for compliance with certain requirements under general Irish and European company law that apply to investment funds established as PLCs. This should result in ICAVs being able to avoid administrative burden and costs associated with compliance with rules and regulations more appropriate to trading companies.

ICAVs Better by Design

Some of the features distinguishing of ICAVs from PLCs are summarised below:

Simplified Legislative Structure

When the new consolidated Irish Companies Act is issued later this year, the PLC will be governed by an extremely broad piece of legislation covering many areas which are not appropriate to investment funds. The ICAV legislation, which will be specific to ICAV corporate investment funds, will be much more readily accessible to fund practitioners and Fund sponsors alike.

Instrument of Incorporation

The ICAV will not have a Memorandum and Articles of Association. Its constitutive document will be called an ‘Instrument of Incorporation’ (“IOI”). Amending the IOI will not necessarily require the consent of investors, leaving it open to the Central Bank to permit amendment of the IOI where the Depositary certifies that the changes do not prejudice the interests of investors. This flexibility is currently available for changes in the constitutive document Trusts but not PLCs.

Investment Diversification Requirements

PLCs are subject to a statutory requirement to spread investment risk which will not apply to ICAVs.

AGMs

It is likely that the ICAV will be able to dispense with the need to have an Annual General Meeting by notifying all of its shareholders.

Financial Statements

Financial statements for ICAVs should be less complex than those of PLCs as ICAVs will not be subject to reporting rules that apply to investment funds and trading companies established as PLCs. It is envisaged that the requirements imposed on ICAVs will be limited to those imposed through the Central Bank's AIF Rulebook and UCITS Notices/proposed UCITS Rulebook, in addition to whichever accounting standard the ICAV decides to implement.

Sub-Fund Financial Statements

To date unit trusts are the only investment vehicles which can also produce financial statements on a fund by fund basis. It is proposed that, unlike PLCs, ICAVs will be able to avail of this flexibility.

PLCs v ICAVs

We will have to wait for the ICAV legislation to be enacted and for the Central Bank to issue its guidance in order to see the full range of differences between the regulatory and legislative provisions applicable to PLCs and ICAVs. At this stage, the ICAV looks like it will be a more straightforward vehicle to establish and maintain but the decision to establish as a PLC or an ICAV will depend on the circumstances applicable to each fund sponsor and their target investors and should be reviewed on a case by case basis.

Existing funds established as PLCs will have the option to convert to ICAV status. However, although the proposed ICAV legislation does not amend the existing PLC structure in any way, so established PLCs can co-exist with the new ICAV.

Conclusion

The new ICAV structure, together with its flexibility, will complement existing fund structures available in Ireland. These structures (namely the existing PLC structure, the Unit Trust, the Common Contractual Fund and the Investment Limited Partnership) will continue to be available to sponsors who wish to use them. The development of the ICAV can only help to enhance Ireland's reputation as an investment fund "domicile of choice".

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