



ICAV – KEY CONSIDERATIONS

Introduction

On 4th March 2015, the Irish President enacted the Irish Collective Asset-management Vehicles (ICAV) Act 2015 (the “Act”), providing for a structure specifically designed to meet the needs of the global funds industry with several advantages over the existing corporate structure for collective investment schemes in Ireland, the public limited company (plc).

Background

In 2011, the Irish Government acknowledged, in its report entitled “Strategy for the International Financial Services Industry in Ireland 2011-2016” that product competitiveness was a challenge to the continued success of the Irish Funds Industry. The funds industry itself had highlighted a number of areas where the legal, tax and operating environment could be improved. In particular, Ireland did not offer a corporate structure specifically designed for investment funds, similar to the SICAV in other EU jurisdictions. Accordingly, the Irish Government committed to introduce a legal framework for a corporate fund that was not a public limited company incorporated under the Irish Companies Acts.

Two of the key drivers for the introduction of the ICAV structure in Ireland were:

- To allow investment companies avoid the reporting requirements and restrictions under Irish and European company law that investment funds structured as plcs are currently subject to
 - To attract more US taxable investors to Irish-domiciled funds (the ICAV is able to elect for classification under the US “check-the-box” tax rules so that it is treated as a transparent or flow-through entity (see below for more information))
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Key Legal Features of the ICAV Act

Regulation by Central Bank

The ICAV is regulated by the Central Bank of Ireland (the “Central Bank”) and may be established as a UCITS or a QIAIF.

ICAV Structure

The ICAV structure has been designed specifically for investment funds and as such is not subject to much of the Irish company law and accounting rules which apply to Irish collective investment schemes structured as plcs. Additionally, developments in Irish and European company law do not automatically apply to the ICAV, which should result in lower administrative costs.

Constitutional Document

The constitutional document for the ICAV is known as the 'instrument of incorporation', a document which resembles the memorandum and articles of association used by an Irish fund structured as a plc. A key difference to general company law requirements, is that if it is necessary to amend the instrument of incorporation, there is no requirement to obtain prior shareholder approval where the custodian or depositary certifies that the proposed changes do not prejudice the interests of investors.

Umbrella Funds

An umbrella ICAV can publish audited financial statements on a sub-fund by sub-fund basis, rather than requiring consolidated statements as is currently the case for Irish plcs. The Act also provides for segregated liability between sub-funds.

Risk Spreading/ Diversification

The ICAV is not subject to risk spreading/ diversification requirements, which currently apply to all variable capital companies under Irish company law. This is of particular benefit to certain Alternative Investment structures regulated as QIAIFs, which do have other risk diversification requirements.

Annual General Meetings

An ICAV may dispense with holding an AGM by giving at least sixty days written notice to all of the ICAV's shareholders.

Other Advantages

- ICAVs may issue partly paid shares.
- ICAVs can be structured as open-ended or closed-ended funds.
- ICAV QIAIFs may avail of the Central Bank's 24 hour fast track application process.

Comparison of Key Features of an ICAV and a plc

Set out below is a comparison of some of the key features of an ICAV and a plc:

Key Feature	ICAV	plc
Availability as a UCITS	Yes	Yes
Availability as an AIF	Yes	Yes
Availability as a segregated umbrella	Yes	Yes
Ability to “check the box” for US tax purposes	Yes	No
Outside of the scope of the Irish Companies Acts	Yes	No
Ability to prepare separate accounts at sub-fund level	Yes	No
Ability to dispense with the requirement to hold an annual general meeting	Yes	No

Key Tax Considerations of the ICAV

An Irish fund structured as a plc is treated as a normal corporation for US tax purposes and is not permitted to “check the box” in order to be treated as a transparent entity for US tax purposes.

As a result, Irish funds in corporate form are generally subject to two levels of taxation from a US tax perspective: at the fund level (where the income is earned); and at the investor level (when a distribution is made to investors).

The primary advantage of the ICAV is that the ICAV is able to elect its classification under the U.S. “check the box” taxation rules to be treated as a transparent entity for U.S. federal income tax purposes. This results in an ICAV being treated as a "partnership" (if it has more than one investor) or a "disregarded entity" (if it has only one investor) for US tax purposes. This allows U.S. taxable investors to avoid certain adverse tax consequences that would normally apply to “passive foreign investment companies” under the PFIC regime.

It is expected that the "check-the-box" elections will be available at a sub-fund level such that one sub-fund of an umbrella fund can be treated as a pass-through entity while another can remain treated as a corporate entity for US federal income tax purposes.

Given the ICAV’s ability to “check the box” for US tax purposes, there is an opportunity for existing offshore funds to re-domicile to Ireland and continue to maintain favourable tax treatment for their US taxable investors. The ICAV enhances the attractiveness of Irish funds to investment managers seeking to market their funds in the US.

The Act provides for the efficient and effective re-domiciliation of funds to Ireland while maintaining the funds legal identity. Existing offshore funds seeking to re-domicile to Ireland are permitted to do so if the legislation of their original territory allows outward and inward re-domiciliation. As there is no change in legal identity, the migration should not constitute a taxable event for investors. The simplified procedure for re-domiciling a corporate fund to Ireland can be measured against other jurisdictions, where the process is less straightforward.

Existing plcs are able to convert to an ICAV. It is expected that a large number of existing plcs will take advantage of this option, in particular, to avail of the tax treatment benefits available for US taxable investors.

In the past, Irish master-feeder funds that required “pass-through” treatment for US investors generally used a unit trust at the master level. However, as these are not typical corporate “check the box” entities, they were not widely used by US investors. The ICAV can now be used at the master level while the feeder fund may take the form of a different fund structure e.g. an investment limited partnership or a unit trust.

Although the ICAV may elect to “check the box” for US federal tax purposes, we expect that its status as a corporate entity will, in general, be recognised by foreign jurisdictions. This will allow the ICAV to avail of the favourable tax benefits that are available under Ireland’s extensive double tax treaty network.

For the various reasons outlined above, the addition of the ICAV to the suite of available Irish fund structures is a significant development for the attraction of US managers and US investors to Irish domiciled funds.

Irish Taxation of ICAVs

An ICAV can avail of the benefits of Ireland’s tax regime for regulated funds, which includes the following attractive tax provisions:

- Regulated funds are exempt from Irish income tax at the fund level
- No hidden taxes (such as subscription or wealth tax) apply
- No transfer taxes or capital duty is applied on the issue, transfer or selling of shares
- No obligation to charge VAT and most of the services required by the fund are VAT exempt
- No Irish withholding tax or exit tax on all distributions to non-Irish investors (and certain categories of Irish investors)
- Full access to Ireland’s extensive double taxation agreements which can minimise or eliminate foreign withholding taxes on returns earned in foreign jurisdictions

Conversion to an ICAV - Practical Considerations

Some of the practical considerations needed to be taken into account by a board of directors of an existing plc collective investment scheme in determining whether to convert to an ICAV include:

- Is the target investor base of the collective investment scheme likely to want a look through tax structure or would there be significant preference to maintain the current tax treatment of the plc?
- Are the current costs of complying with Irish company law so significant that the conversion from the existing structure to an ICAV is worthwhile?
- What would the likelihood be of obtaining shareholder approval to the proposed conversion from a plc registered under the Irish Companies Acts to an ICAV?
- Would the fact that an ICAV can prepare accounts on a sub-fund level be important for the collective investment scheme (for example if there are a number of sub-funds)?

While these are some of the practical considerations that a board of directors may need to consider in deciding to remain as a plc or convert to an ICAV, no one collective investment scheme is the same as another and each collective investment scheme will need to consider all factors in determining whether to convert to an ICAV structure or not.

Summary of Conversion Process

Part 7 of the Act sets out the necessary steps to convert an existing plc into an ICAV. Any company which is incorporated under the Irish Companies Acts and authorised by the Central Bank as a collective investment undertaking (a “Converting Company”) can, subject to the terms of the Act, convert to an ICAV registered with the Central Bank by way of continuation.

Set out in Appendix I of this Briefing Paper is a summary of the conversion process.

Legal Effects of Registration

From the date of registration, the Converting Company shall be deemed to be an ICAV formed and registered under the Act and the provisions of the Act shall apply to the Converting Company. In particular, the Act does not operate:

- To create a new legal entity
- To prejudice or affect the identity or continuity of the Converting ICAV as previously established and registered under Irish law
- To affect any contract made, resolution passed or any other act or thing done in relation to the Converting ICAV during the period it was so established and registered
- To affect the rights, authorities, functions and liabilities or obligations of the Converting ICAV or any other person
- To render defective any legal proceedings by or against the Converting ICAV

Contacts

For further information in respect of any of the above, please contact your usual William Fry contact or any of the Partners listed below.



Dan Morrissey

T: +353 1 639 5220

E: dan.morrissey@williamfry.com



Tara O'Reilly

T: +353 1 639 5232

E: tara.oreilly@williamfry.com



Cormac Commins

T: +353 1 639 5234

E: cormac.commins@williamfry.com



Ian Dillon

T: +353 1489 6434

E: ian.dillon@williamfry.com



Patricia Taylor

T: +353 1639 5222

E: patricia.taylor@williamfry.com



Paul Murray

T: +353 1639 5230

E: paul.murray@williamfry.com



Ross Little

T: +353 1 639 5134

E: ross.little@williamfry.com

APPENDIX I

Summary of the Conversion Process to ICAV

Set out below is a summary of the conversion process whereby an existing authorised collective investment scheme can convert from a plc structure to an ICAV. This summary is based on the procedure set out in the Act and Central Bank application forms and guidance.

Application to the Central Bank

The Act provides that the following should be submitted to the Central Bank (the “Application Documents”):

- An appropriate application form together with: the Converting Company’s certificate of incorporation and memorandum and articles of association; and the instrument of incorporation in respect of the proposed ICAV
- A list setting out certain particulars of the Converting Company
- An appropriate declaration of solvency (to be sworn by a director of the Converting Company)
- A schedule of charges or security interests created or granted by the Converting Company
- Notification of the proposed name of the Converting Company (if different from its existing name)
- A statutory declaration made by a director of the Converting Company to the effect that:
 - No petition or other similar proceeding to wind up or liquidate the Converting Company has been notified to the Converting Company and remains outstanding in any place, and no order has been notified to the Converting Company, or resolution adopted by it, to wind up or liquidate the Converting Company in any place.
 - The appointment of a receiver, liquidator, examiner or other similar person has not been notified to the Converting Company and, at the date of the declaration, no such person is acting in that capacity in any place with respect to the Converting Company, or its property or any part of its property.
 - The Converting 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 Converting Company with creditors in any place.
 - The conversion is permitted by and has been approved in accordance with the memorandum and articles of association of the Converting Company.
 - Any consented approval to the proposed conversion required by any contract entered into or undertaking given by the Converting Company has been obtained or varied as the case may be.

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Central Bank Review Process and Conversion

The Central Bank will not permit the Converting Company to re-register as an ICAV unless it is satisfied that it meets the requirements of the Act. In particular the Central Bank must be satisfied that:

- The Converting Company has delivered to the Central Bank an application for the purpose of conversion, in the prescribed form and signed by a director of the Converting Company, together with the Application Documents.
- If relevant, the proposed new name of the Converting Company has not been determined (by the Central Bank) to be undesirable.
- The Converting Company is authorised by the Central Bank as a collective investment undertaking pursuant to the relevant requirements.

The application must be accompanied by a further statutory declaration, to be sworn by the solicitor to the Converting Company, that the above requirements have been complied with. Upon receipt of an application for conversion, the Central Bank will, as soon as practicable, publish notice of it in the Irish Companies Registration Office Official Gazette.

When the Central Bank receives a notification, it shall issue a certificate of registration of the Converting Company as an ICAV and enter in a register the details of charges and securities interests of the Converting Company.

Once the Converting Company has been registered as an ICAV it must apply to be de-registered from the Companies Registration Office with effect from the date of registration as an ICAV.