

The image features a night-time photograph of a cityscape with a prominent bridge illuminated by blue lights. The bridge's arch and supporting structure are brightly lit, and the lights reflect on the water below. In the background, city buildings and a dome are visible under a dark sky. A large red rectangle is overlaid on the lower portion of the image, containing the word "Matheson" in white, serif font with a thin white underline. To the left of the red rectangle, there are two overlapping grey rectangular shapes: a larger one on top and a smaller one below it.

Matheson

## Pension Pooling and Asset Pooling in Ireland – Establishing an Irish Common Contractual Fund

UCITS Law Firm of the Year 2017, The Hedge Fund Journal

Ireland's Most Innovative Law Firm, Financial Times 2017

Best Alternative Investments Law Firm Europe 2016, Wealth and Finance International

Most Innovative European Law Firm 2016, Global Fund Awards

Financial Services (International) Investment Funds Deal of the Year 2014 & 2015, ICAV Deal of the Year 2016, Finance Dublin

European Law Firm of the Year 2015, The Hedge Fund Journal

Best AIFMD Law Firm in Europe 2014 & 2015, Wealth and Finance International

Financial Times 2012 - 2015, Matheson is the only Irish law firm commended by the Financial Times for innovation in corporate law, finance law and corporate strategy.

## About Matheson

Matheson's primary focus is on serving the Irish legal needs of internationally focused companies and financial institutions doing business in and from Ireland. Our clients include the majority of the Fortune 100 companies. We also advise 7 of the top 10 global technology brands and over half of the world's 50 largest banks. We are headquartered in Dublin and also have offices in London, New York, San Francisco and Palo Alto. More than 650 people work across our five offices, including 80 partners and tax principals and over 350 legal and tax professionals.

Our strength in depth is spread across more than 20 distinct practice areas within the firm, including asset management and investment funds, aviation and asset finance, banking and financial services, commercial litigation and dispute resolution, corporate, healthcare, insolvency and corporate restructuring, insurance, intellectual property, international business, structured finance and tax. This broad spread of expertise and legal know how allows us to provide best in class advice to our clients on all facets of the law.

Our dedication to client service and excellence has become our hallmark as a firm, and is acknowledged by both our clients themselves and the world's leading legal directories and publications.

## The Asset Management and Investment Funds Group

Matheson is the number one ranked funds law practice in Ireland, acting for 29% of Irish domiciled investment funds by assets under management as at 30 June 2016. Led by 12 partners, the practice comprises 50 asset management and investment fund lawyers and professionals in total. The group's expertise in UCITS and alternative investment funds is reflected in its tier one ranking by Chambers Europe, the European Legal 500 and the IFLR1000, and the team is specifically recognised for its abilities with respect to complex mandates.

We have been named UCITS Law Firm of the Year 2017 by The Hedge Fund Journal and the Best AIFMD Law Firm in Europe 2015 and 2014 by Wealth & Finance International. We have been awarded the Financial Services (International) ICAV Deal of the Year 2016 and Investment Funds Deal of the Year 2015 and 2014 by Finance Dublin. Matheson was also awarded European Law Firm of the Year 2015 from the Hedge Fund Journal. This is the second time we have received this award, reflecting the international recognition of our contribution to the European hedge fund sector. We are the only Irish law firm ever to win the award of European Advisor of the Year from Funds Europe.

With our asset management legal and regulatory advisers working alongside Matheson taxation, structured finance and commercial litigation departments, we offer a comprehensive service for clients. We are one of the few law firms in Ireland with a specialist derivatives practice, which enables us to provide combined asset management, tax and derivatives advice of the highest calibre to our clients.

Matheson's Tax Department is significantly the largest tax practice group amongst Irish law firms. In contrast to the tax departments of other Irish law firms, it operates primarily as a "front-end" service and more than half of its work is on transactions or advisory matters where it has the sole or lead role. The tax department has also developed significant expertise with respect to taxation matters as they impact investment funds and management companies in Ireland and regularly works with the Asset Management Group in this regard. It also is unique amongst Irish law firms in having a dedicated international tax group, which advises on cross-border transactions in conjunction with legal and tax counsel from other jurisdictions. Gerry Thornton is the chair of the Irish Funds International Tax Working Group and a member of Irish Funds Tax Steering Group and has been actively involved in discussions relating to some of the recent double tax treaties, issues relating to directors and PAYE and the use of special purpose subsidiaries.

## Establishing a Common Contractual Fund in Ireland

This brochure provides information in relation to Irish common contractual funds ("CCFs") generally, the structures available for use, the relevant tax treatment and the steps necessary to launch a CCF. It also outlines the advantages of Ireland as a fund domicile.



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# 1 Introduction to Common Contractual Funds

## Introduction to Common Contractual Funds

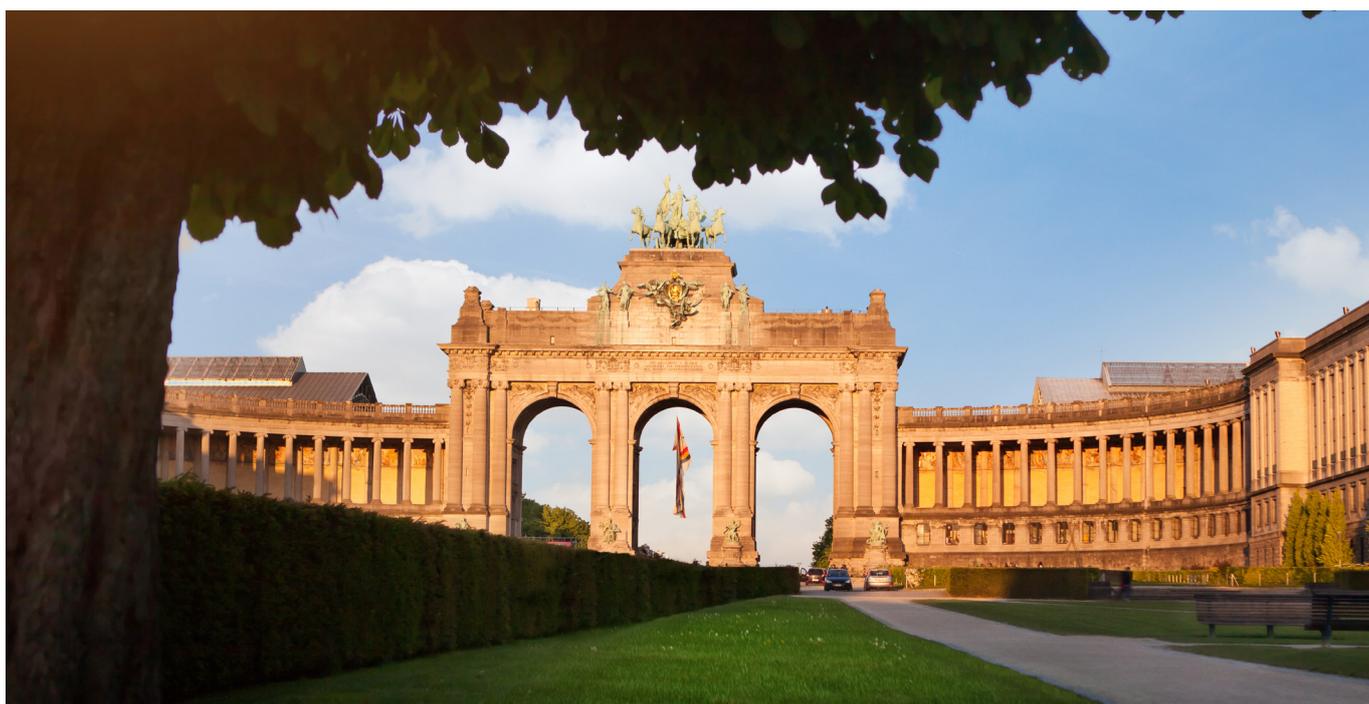
The Irish common contractual fund (“CCF”) is a tax transparent cross-border investment vehicle designed to assist multinationals, their finance professionals and local pension plans to achieve economies of scale and enhanced governance.

The pooling of pension fund assets, life assurance assets or general asset pooling from various jurisdictions into one entity enables a number of cost savings to be achieved through economies of scale. It allows pension funds or life assurance funds in local subsidiaries to diversify their risk by using a larger number of investment managers than would be possible if they were operating on a standalone basis. By pooling pension plans, a multinational can leverage the value of investment talent, limit the extent to which it is required to duplicate structures in each country of operation, reduce the potential liability and workload of local plan trustees and investment managers, permit greater negotiating power in respect of administration, custody and brokerage fees and increase access to securities lending structures. It can also enhance access to market leading investment management schemes, including schemes with higher minimum subscription amounts and it facilitates better governance, enhanced risk management and reporting in respect of plan assets. There will also be advantages for employees through the cost-savings outlined above and the application of a consistent investment policy across different jurisdictions.

A pooled investment vehicle will only be viable if it does not materially increase the tax costs incurred by the local pension and/or life assurance funds. Pension funds are typically entitled to favourable withholding tax treatment on investment income and, as such, it will be important to ensure that the pooled vehicle is completely tax transparent and that the local pension or life assurance fund may continue to claim all available tax treaty benefits on the same basis as if they had invested in the underlying securities directly. A number of collective investment schemes may be considered exempt from tax in their home jurisdiction but regarded as a taxable entity in third party countries in which they invest and this has traditionally been a roadblock to cross-border pooling and remains so in other jurisdictions.

The Irish CCF was created with the express aim of facilitating cross border pooling without any tax-drag for participants. It is completely tax transparent for Irish tax purposes and this tax transparent nature has also been recognised by a large and growing number of countries of investment, including the US, UK, Netherlands, Australia, Austria, Belgium, Germany, Canada, Denmark, Finland, France, Italy, Sweden, Switzerland and Norway. Consequently, profits which arise to an Irish CCF will be treated as profits which arise to the unitholders in the fund. There will be no increase in domestic or foreign withholding taxes and no withholding taxes on distributions by the CCF. By comparison with some other jurisdictions offering similar vehicles, the Irish CCF has been specifically created for the purposes of asset pooling and tax transparency is expressly provided for in the implementing legislation. As a result, the CCF is not liable to be recognised in Ireland as tax transparent for some purposes and non-tax transparent for others. This feature has assisted in ensuring recognition of tax transparency by third party countries.

It should also be noted that, while CCFs were initially designed for pension funds in order to ensure that they can maintain existing favourable tax treatment, they may be used by any entity, other than individuals, which seeks to avail of a tax transparent structure.





## 2 Structuring a Common Contractual Fund in Ireland

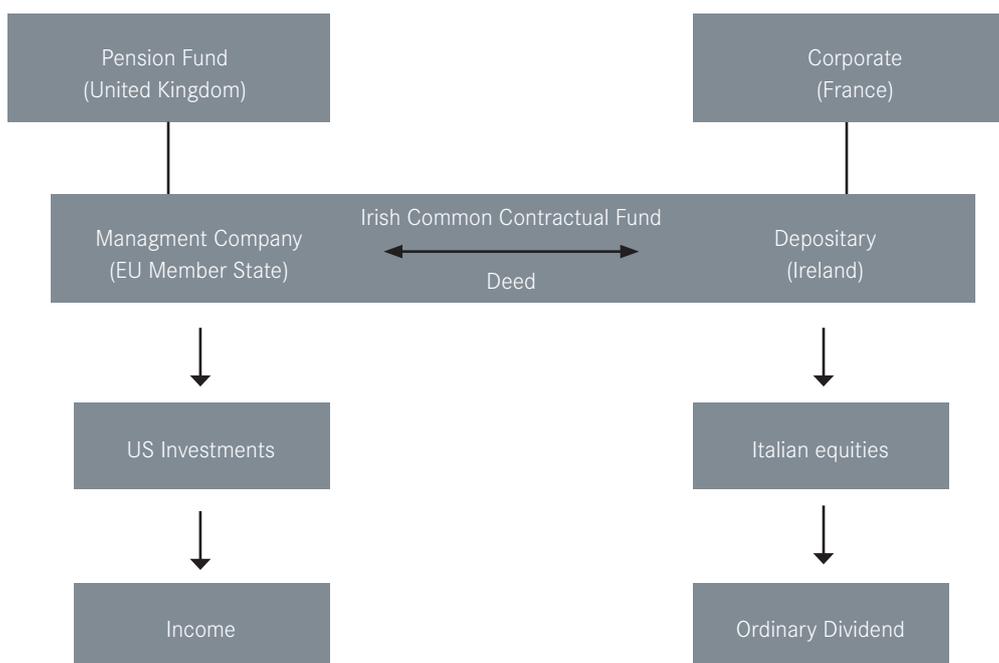
### 2.1 Introduction

The Irish Finance Acts of 2003 and 2005 amended Irish taxation legislation and provided that an investment undertaking that is established under the relevant Irish regulations and is not constituted under company law or trust law (ie, it is constituted under contract law) is not chargeable to tax if it meets certain criteria. For Irish tax purposes it is “tax transparent”. The amendments essentially treat, for tax purposes, the profits that arise under an investment vehicle as being profits that arise to the unitholders themselves. Following the introduction of the legislation a significant number of multinational companies and asset managers have established CCFs for the purposes of pooling pension fund assets of their subsidiary companies.

As part of the ongoing development of the Irish investment funds industry, the Irish government introduced legislation in 2003, specifically facilitating the creation of CCFs as UCITS. The regime was subsequently extended to alternative investment funds (“AIFs”) in 2005.

An Irish CCF is available for investment by all investors other than individuals. The tax transparent nature of the CCF has made it a vehicle of choice for multinational groups or similar entities seeking to implement pension pooling or asset pooling structures.

The chart below illustrates a typical CCF structure. In the example below, the tax liability of the investors located in the United Kingdom (“UK”) and France will be governed by the double taxation treaty between their country of residence for tax purposes and the country in which the CCF has invested, the US and Italian tax treaties respectively. The exact tax liability is derived by reference to those tax treaties and the actual income types in those markets.



### 2.2 Overview of UCITS and AIFs Vehicles

#### UCITS

The UCITS regulatory regime relates to open ended retail investment vehicles investing in transferable securities and other liquid financial assets. The advantage of establishing a fund as a UCITS is that it can generally be sold without any material restriction to any category or number of investors in any EU Member State, subject to filing appropriate documentation with the relevant regulatory authority in the EU Member State(s) where it is to be sold. There are restrictions on the investment and borrowing policies of UCITS and on the use by UCITS of leverage and financial derivative instruments.

The chart below illustrates a typical CCF structure. In the example below, the tax liability of the investors located in the UK and France will be governed by the double taxation treaty between their country of residence for tax purposes and the country in which the CCF has invested, the US and Italian tax treaties respectively. The exact tax liability is derived by reference to those tax treaties and the actual income types in those markets.

**Alternative Investment Funds**

AIFs offer greater flexibility with respect to investment styles and restrictions. AIFs may be established as retail investor AIFs (“**RIAIFs**”) or qualifying investors AIFs (“**QIAIFs**”). RIAIFs are subject to general investment diversification and borrowing restrictions whereas QIAIFs are subject only to minimal investment restrictions and are not subject to any leverage restrictions. AIFs are managed by authorised alternative investment fund managers (“**AIFMs**”) and can be marketed throughout Europe on a passported basis under alternative investment fund managers directive (“**AIFMD**”).

Further information in relation to UCITS and AIFs and the Irish regulatory regime for collective investment schemes is set out in the Publications section of our website or upon request.

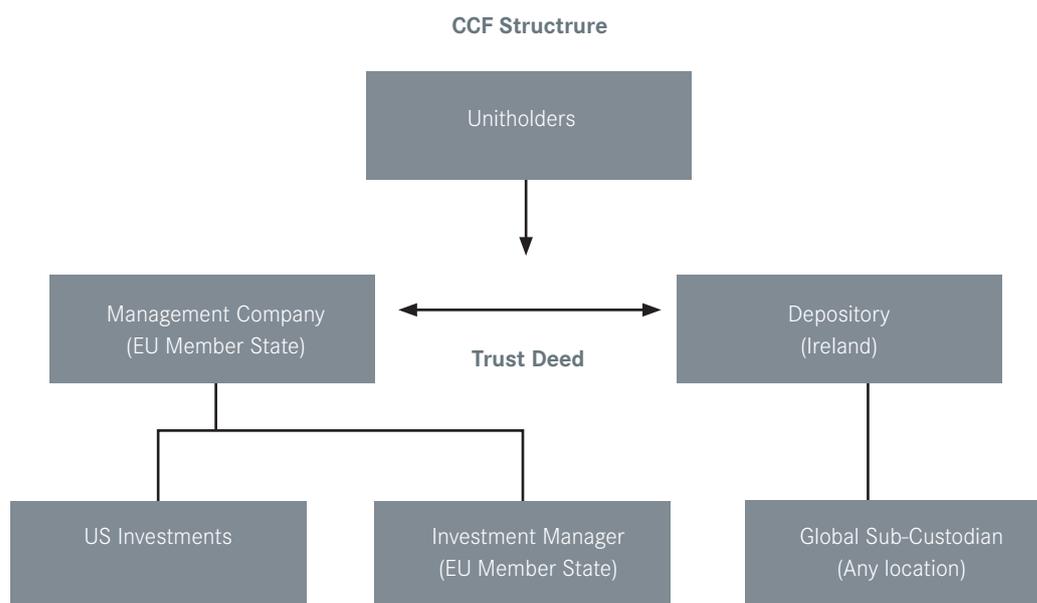
**2.3 Typical Structure of a Common Contractual Fund**

A CCF is established under a deed of constitution pursuant to contract law (and not company law or trust law) which provides that investors participate as co-owners in the assets of the fund. Interests in the fund are represented by ‘units’ which are issued and redeemed in a similar manner to a unit trust and there are a number of other similarities with a unit trust structure. For example:

- where the CCF is established as an umbrella, the assets and liabilities of the various sub-funds are segregated. In particular, Irish law includes an express permission to the effect that a CCF established in an umbrella structure will not be subject to cross liability between sub-funds in the umbrella in the same way as for a unit trust;
- the liability of unitholders is limited to their subscription amount; and
- the depositary has the same duties and responsibilities as with other fund types.

The deed of constitution creating the CCF will be executed under seal by the manager and the depositary of the proposed fund. The manager will have primary responsibility for the management and administration of the fund and will generally discharge this obligation by appointing an investment manager, who will take charge of the day-to-day management of the investments of the fund, and an administrator with responsibility for the processing of subscriptions and redemptions, calculation of net asset values, maintenance of the books and records of the fund and the preparation of accounts on behalf of the fund.

The depositary will have responsibility for the safekeeping of the assets of the fund and the settlement of trades. In accordance with the requirements of the Central Bank, the depositary is also under a duty to supervise the investment activities of the fund and to report to the unitholders on an annual basis as to whether the fund and the manager have operated in accordance with the prospectus and the applicable regulations. The depositary may arrange for the holding of assets of the fund through its global sub-custody network.



1 QIAFs which are established as direct lending vehicles are subject to a leverage limit of 200% of gross asset value.

A typical CCF structure is illustrated below. The unitholders in a CCF will hold a co-ownership interest in the assets of the fund as tenants in common with the other unitholders. No unit shall confer any interest in any particular part of the assets of a CCF but shall determine the portion of the underlying assets of the CCF to which each unitholder is beneficially entitled.

As CCFs can be structured as umbrella funds, one approach which we have seen in the market has been the creation by a multinational or fund promoter of umbrella CCFs, the initial sub-fund of which is used for pooling its own pension assets. As a fee generating mechanism, further sub-funds within the structure may then be made available to the pension plans of multinationals lacking the scale required to establish their own pension pooling vehicles.



### 3 Tax advantages of an Irish Common Contractual Fund



### 3.1 Introduction

A CCF is not chargeable to tax if all its units are: (i) an asset of a pension fund or are beneficially owned by persons other than an individual; or (ii) are held by a depository or trustee for the benefit of persons other than an individual.

### 3.2 Irish Tax Treatment of a Common Contractual Fund

For Irish tax purposes, a CCF is “tax transparent” which means that the income and gains arising or accruing to it are treated as arising or accruing to its unitholders in proportion to the value of the units beneficially owned by them, as if such income and gains did not pass through the hands of the CCF. Essentially therefore, for tax purposes, the profits that arise to this type of investment vehicle are treated as being profits that arise to the unitholders themselves.

The main tax advantages of such a fiscally transparent investment vehicle are as follows:

- the character of the income received by the investor does not change;
- there is no increase in domestic or foreign withholding taxes;
- the CCF is exempt from tax on its income and gains; and
- there is no withholding taxes on distributions from the CCF.

It is intended that, as the CCF is a fiscally transparent entity for tax purposes, it should enable the unitholders to access double taxation treaty benefits of their home jurisdiction.

The intention is that, for example, a UK pension fund investing in US securities would have regard only to the US / UK double taxation treaty. This would depend on how the US and UK tax authorities view the CCF.

### 3.3 How do other jurisdictions view common contractual funds?

It would be necessary that the tax authorities in the jurisdictions in which the individual pension scheme / life assurance fund is established are satisfied that they will be able to certify any double taxation treaty claims made by participants in the CCF. The source country tax authorities (ie the country of issue of the relevant security) must also recognise the fiscal transparency of the CCF and grant double tax treaty relief to the CCF participants (not the fund itself) in respect of income and gains.

The fiscal transparency of the CCF has been recognised by a number of jurisdictions, including the US, UK, Netherlands, Australia, Austria, Belgium, Germany, Canada, Denmark, Finland, France, Ireland, Italy, Sweden, Switzerland and Norway amongst others and it is probable that other organisation for economic cooperation and development (“OECD”) jurisdiction tax authorities would also regard the CCF as tax transparent. In the case of other jurisdictions, it should be possible to seek a specific revenue ruling in advance of any proposed investments.





## 4 Key Steps to Establishing a Common Contractual Fund

## 4.1 Introduction

As with any other investment fund authorised by the Central Bank of Ireland (“**Central Bank**”), the authorisation of a CCF is a standardised process and we have outlined the essential elements of this below.

## 4.2 Investment Manager Approval

The Central Bank must be satisfied with the experience, expertise, reputation and resources of the investment manager(s) responsible for investing the assets of the fund. If an investment manager has been previously approved to act in respect of Irish collective investment schemes, no further authorisations will be required other than the filing of a form with the Central Bank. In the case of an investment manager holding an authorisation under the markets in financial instruments directive (“**MiFID**”) or which is a credit institution regulated within the European Economic Area, the applicant would avail of a fast-track approval process. There is a slightly longer process for an entity regulated by the US Securities and Exchange Commission (“**SEC**”) or similar entity. This process should not take longer than three to five weeks to complete and may be run in conjunction with the drafting of relevant documentation.

## 4.3 Management Company Approval

A CCF must have a management company which will enter into the deed of constitution with the depositary. If it is intended to structure the CCF as a UCITS, then where a new Irish entity is intended, the proposed management company must apply to the Central Bank for authorisation as a UCITS management company and comply with certain minimum requirements set out at EU level. This will include the submission of an application form, business plan and other supporting documentation. Alternatively, a UCITS management company may passport its authorisation from another EU country into Ireland.

An AIF will, pursuant to AIFMD, be required to appoint an external AIFM. An Irish AIFM will need to be approved by the Central Bank or an EU AIFM will need to passport its authorisation in another EU country, into Ireland, in advance of the AIF application for authorisation.

A UCITS management company or AIFM will generally delegate its day-to-day functions to third parties (investment manager, administrator, distributor, etc) and have no employees, but it must hold periodic board meetings in Ireland and be tax resident in Ireland. The directors of a management company must be of sufficiently good repute and sufficiently experienced, and a minimum of two persons must conduct the management company’s business. While the authorisation of a management company is relatively straightforward, there is also the option to avail of pre-existing management companies set up by service providers in the Irish market.

## 4.4 Approval of Directors

All directors of Irish domiciled management companies must be pre-approved by the Central Bank. Sufficient information in respect of all directors must be submitted to the Central Bank to demonstrate the appropriate expertise and good reputation of a proposed director. Proposed directors of Irish management companies, whether previously approved or not, are required to submit information to the Central Bank in the form of a prescribed “individual questionnaire”. At least two directors of the management company must be resident in Ireland.

## 4.5 Selection of Depositary and Administrator

It will be necessary to appoint a Central Bank approved depositary for the safe-keeping of assets and a Central Bank approved administrator which is responsible for maintaining the books and records of the fund, calculating the net asset value of the fund and maintaining the shareholder register. In each case the entity must be located in Ireland and the relevant service contracts will form part of the filing with the Central Bank. As noted above, all major fund service providers have a presence in Ireland and a number of service providers have developed expertise in the provision of services to CCFs.

## 4.6 Approval of Documentation by the Central Bank

In the case of a UCITS or RIAIFs, the prospectus and deed of constitution are filed with the Central Bank for prior approval. Once these documents have been cleared of comment by the Central Bank, they may be dated and submitted in final form. The review process will typically take six to eight weeks to complete from first submission. The authorisation procedure for QIAIFs is a streamlined one day process, subject to the provision of the relevant confirmations, and pre-approval of the directors and investment manager. It would only be necessary to seek prior Central Bank approval of documentation in the event that the proposed structure contains any unusual features or might require a derogation from those provisions of the Central Bank’s AIF Rulebook.

## 4.7 Irish Stock Exchange Listing

A CCF may wish to list the fund on the Irish Stock Exchange (the “ISE”). A stock exchange listing on a recognised exchange in an OECD jurisdiction, such as the ISE, can be particularly important for the profile of a fund, attracting certain categories of institutional investors, including certain pension funds or investors in certain jurisdictions who are prohibited or restricted from investing in unquoted securities.

More recently, the ISE has launched its Global Exchange Market for investment funds, which is a multilateral trading facility regulated by the ISE. Investment funds can now choose to list on either the regulated Main Securities Market of the ISE or the exchange-regulated Global Exchange Market (“GEM”) of the ISE. Investment funds listed on GEM will not be subject to the Prospectus Directive, the Transparency Directive or the Statutory Audit Directive.

The listing process can be completed contemporaneously with the Central Bank authorisation process. The listing requirements for Irish domiciled funds which are authorised by the Central Bank have been substantially streamlined and, in the case of Irish domiciled funds, many of the listing requirements are disapplied.

Once the ISE has cleared the relevant listing document (which in the case of the CCF will be the prospectus) of comment, it may be filed with the ISE together with the relevant supporting documents. A fund must allow a period of 48 hours to elapse after this filing before it commences trading.

Matheson offers the full range of ISE listing services, including investment fund and debt securities listing.

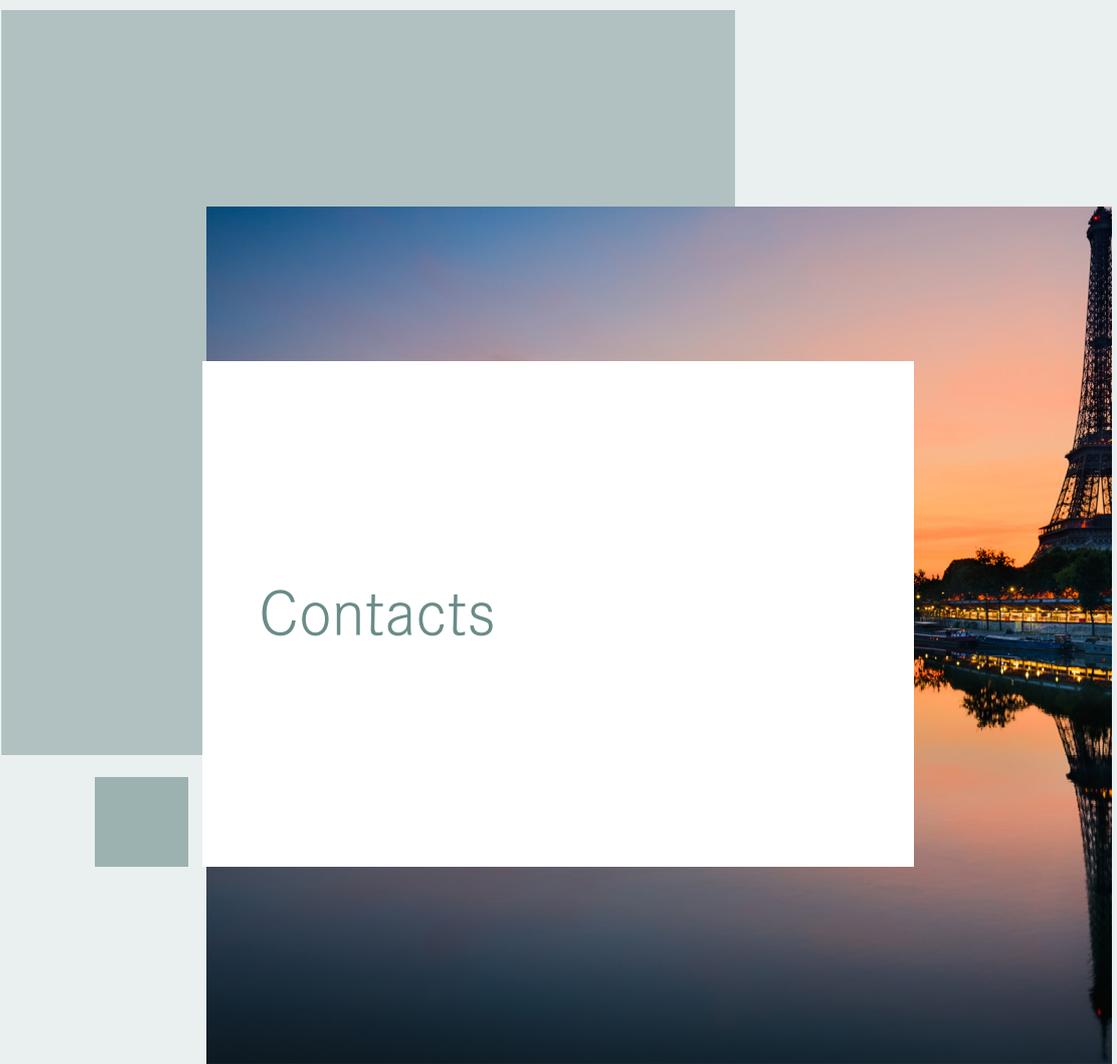
## 4.8 Role of Legal Advisers

The role of the legal advisers to a CCF would generally include the following:

- where required, obtaining Central Bank approval of the management company, AIFM or investment manager of the fund;
- drafting and finalising the prospectus and deed of constitution and investment management agreement;
- preparing documentation in relation to listing on the ISE and obtaining ISE approval of the prospectus and other relevant documentation;
- negotiating the depositary and administration agreements;
- preparing all ancillary documentation for approval of fund by the Central Bank;
- incorporating the management company, if required, and arranging for authorisation of the management company by the Central Bank; and
- co-ordinating the launch board meeting and providing legal advice on any other issues relevant to the establishment of the CCF.

Full details of the Asset Management and Investment Funds Group, together with further updates, articles and briefing notes written by members of the Asset Management and Investment Funds team, can be accessed at [www.matheson.com](http://www.matheson.com).





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