

A new era for investment funds: The Irish Collective Asset-management Vehicle (ICAV)

By Anne-Marie Bohan, Partner, and Michelle Ridge, Associate, Matheson

The publication of the ICAV Bill 2014 (the “Bill”) in July 2014 ushered in a new era for Irish investment funds. As a bespoke, corporate investment fund vehicle available for both Undertakings for Collective Investment in Transferable Securities (UCITS) and alternative investment funds (AIFs), the ICAV was conceived specifically with the needs of investment funds in mind, and will have a range of advantages for fund promoters looking to establish a new corporate fund vehicle or convert or migrate an existing one.

Background to the ICAV

Tax exempt fund vehicles, with many different characteristics, can be established in Ireland under a range of different legal structures, namely as investment companies, unit trusts, common contractual funds and investment limited partnerships, each of which can be tailored to suit investor requirements and meet ever increasing investor demands. The ICAV will be the latest offering in the available range of fund vehicles, complementing the existing options.

While Ireland already offers an investment fund corporate vehicle, known as the Part XIII investment company, those investment companies rely on the provisions governing normal public limited companies under the Irish Companies Acts. Over time, however, the framework of the Companies Acts has been increasingly influenced by changes mandated at an EU level. As the fundamental legislative framework relating to corporate entities at a national or an EU level has not been designed with variable capital investment companies specifically in mind, changes to the legislative provisions applicable to ordinary trading companies have required increasing assessment, and often derogations,

to counter any unintended consequences for investment companies.

At an industry level, the benefits of a bespoke investment fund corporate vehicle had become increasingly apparent over time, leading to the proposal for the ICAV. The project to introduce the ICAV has involved significant commitment from and collaboration between both Government and industry, ensuring a sensible balance between organisational and operational flexibilities and appropriate investor protections.

Features of the ICAV

Similar to the existing Irish investment company, the ICAV can be established as a self-managed or externally managed, stand-alone or umbrella, open or closed-ended vehicle, and can be authorised as a UCITS or as an AIF. As is the case for the existing range of fund vehicles in Ireland, an umbrella ICAV will benefit from the concept of segregated liability between sub-funds, meaning that the assets and liabilities of each sub-fund within the umbrella will be ring-fenced and will not impact on the other sub-funds.

Unlike the existing investment company structure, which is incorporated with the Companies Registration Office and then authorised and regulated by the Central Bank of Ireland (the “Central Bank”), (which is the regulatory authority responsible for the authorisation and supervision of all Irish fund vehicles), an ICAV will only have to deal with the Central Bank, which is expected to lead to a more efficient and streamlined process overall. ICAVs will firstly be registered by the Central Bank and will then require its authorisation before being permitted to carry on business. The precise authorisation process will

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depend on whether the ICAV is intended to be authorised as a UCITS or an AIF, but will follow the same procedures as currently apply for existing investment fund structures.

The ICAV will have a governing document known as an instrument of incorporation (IOI). This will be similar to the memorandum and articles of association (M&A) of an investment company, and will be the constitutional document of the ICAV. The primary reason for differentiating between the M&A and an IOI is to emphasise the distinction between the ICAV and existing investment companies as different types of corporate entity. In practice, it is expected that the IOI will take a very similar form to the M&A of an investment company, with some added benefits which are outlined below.

Like an investment company, an ICAV must have a board of directors to govern its affairs, and there will be no difference between the responsibilities of ICAV directors and directors of existing investment companies. Similar to other collective investment schemes, the ICAV may either be managed by an external management company or be a self-managed entity. The same depositary requirements as those that currently apply to investment companies will apply to an ICAV (which will vary depending on whether the ICAV is a UCITS or AIF).

The ICAV may be listed on a stock exchange. Investors will own shares in the ICAV and the ICAV will be able to issue and redeem shares continually according to investor demand, subject to the ability to structure an ICAV as a closed ended scheme in line with Central Bank rules. In this regard, there is no difference between the ICAV and other open-ended collective investment schemes.

Advantages of the ICAV

Unlike the existing Irish corporate fund vehicle which grew organically out of the pre-existing

companies legislation, one of the primary advantages of the ICAV will be the fact that it will not be automatically impacted by amendments to European and domestic company legislation which are targeted at trading companies rather than investment funds. The Bill therefore represents the first of its kind for an Irish corporate fund structure - a bespoke piece of legislation which will be enacted solely for the benefit of an investment fund vehicle.

The ICAV will have an array of additional benefits, which will include the ability to dispense with an annual general meeting (AGM) in specific circumstances, to produce more streamlined audited accounts and to amend the IOI in a more flexible manner.

Significantly, the ICAV will also be able to elect its classification as an under the US check-the-box taxation rules. This represents a positive development for fund promoters looking to market a European fund vehicle to US investors. The existing Irish corporate structure is not currently permitted to check-the-box for US tax purposes, meaning that it is treated as a separate entity and subject to two levels of tax, firstly at the corporate level where the income is earned and then secondly at the shareholder level when distributions are made. As an "eligible entity" i.e. an entity that can elect its classification under the check-the-box rules, the ICAV will be able to elect for alternative, more favourable tax treatment.

In the case of changes to the IOI, it is envisaged that there will be no requirement to obtain prior investor approval where the board and depositary certify that such changes do not prejudice investors' interests. This concept is similar to the existing requirements relating to changes to a unit trust's trust deed, but is not available to Part XIII investment companies, which require investor approval for any change to the M&A, irrespective of how immaterial or whether mandated by legal or regulatory requirements.

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An ICAV will also have the ability to dispense with the requirement to hold an AGM. It will be permitted to prepare separate accounts at sub-fund level, which will be a significant advantage for larger fund umbrellas as fund promoters will be able to provide an investor in one sub-fund solely with the accounts for that sub-fund.

These features are expected to result in significant cost savings, especially for those funds which market into a wide range of different jurisdictions and which currently have to translate AGM notices and accompanying financial statements into numerous languages.

Conversions

It will be possible to convert an existing UCITS or AIF which has been established as an Irish Part XIII investment company to an ICAV. The conversion procedure will be relatively straightforward and the associated conversion costs are likely to be outweighed by the cost saving benefits arising from the additional flexibility afforded by the ICAV. It will not be possible to use the conversion procedure in respect of an existing UCITS or AIF unit trust, investment limited partnership or common contractual fund.

The Bill also specifically anticipates a single, combined, migration and conversion process which will allow for the re-domiciliation of a non-Irish investment company to Ireland as an ICAV by way of continuation. This means that the company's existing legal identity is retained, allowing continued reliance on past performance data and existing contracts.

It will also be possible to merge existing UCITS, irrespective of structure, into ICAV UCITS. It has yet to be ascertained whether existing AIF ICAVs will be able to merge with other Irish authorised AIFs which are not structured as ICAVs. However, it is expected that this will be clarified during the legislative process and that provision will be made for such mergers.

What next?

The Bill is due to pass through the next stages of the Irish legislative process and it is anticipated that it will be enacted during the third quarter of 2014, with the ICAV becoming available as an investment fund corporate vehicle during the last quarter of this year. The Central Bank has stated that it will be in a position to accept ICAV applications within two weeks of the legislation being enacted.

The creation of the ICAV and the upcoming enactment of its bespoke legislative regime is a reflection of the thriving and successful Irish fund industry, and represents a drive to enhance an existing successful offering and continue to satisfy investor appetite. The ICAV will represent an improvement, rather than a significant departure, for the existing fund regime in Ireland as it is an enhanced investment fund corporate vehicle acting as an alternative to, but not a replacement for, the existing investment company structure. With its range of potential cost saving benefits and advantageous features, the ICAV is expected to be the corporate vehicle of choice for Irish domiciled investment funds in the future, regardless of the domicile of the investor base or its regulatory status.

anne-marie.bohan@matheson.com

michelle.ridge@matheson.com

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