

# International **Comparative** Legal Guides



## Alternative Investment Funds **2021**

A practical cross-border insight into alternative investment funds work

**Ninth Edition**

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# Ireland

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## 1 Regulatory Framework

### 1.1 What legislation governs the establishment and operation of Alternative Investment Funds?

Irish Funds Legislation, which governs the establishment and operation of Irish AIFs authorised and regulated by the Central Bank of Ireland (the “**Central Bank**”), is set out in question 1.3 below. Additionally, Irish AIFs structured as European long-term investment funds (“**ELTIFs**”) are impacted operationally by Regulation (EU) No 2015/760 (the “**European Long-term Investment Funds Regulation**”).

The governing legislation of Irish AIFs not subject to authorisation by the Central Bank depends on the legal form of those AIFs; e.g. the Companies Act, 2014 will apply to corporate AIFs established as investment companies with fixed capital.

All Irish AIFs are impacted operationally by:

- the European Communities (Alternative Investment Fund Managers) Regulations 2013 (S.I. 257 of 2013) as amended (the “**Irish AIFM Regulations**”), which transposed Directive 2011/61/EU (the “**AIFM Directive**”) into Irish law; and
- Commission Delegated Regulations and Commission Implementing Regulations adopted by the EU Commission in specified areas in order to ensure that the AIFM Directive is implemented consistently across the EU, the principal one of which is the Commission Delegated Regulation (EU) No 231/2013 supplementing the AIFM Directive with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.

### 1.2 Are managers or advisers to Alternative Investment Funds required to be licensed, authorised or regulated by a regulatory body?

#### AIFMs

Irish AIFMs managing Irish AIFs established under Irish Funds Legislation are required to be authorised under the Irish AIFM Regulations. However, an Irish registered AIFM may manage an Irish AIF marketed to qualifying investors (a “**QIAIF**”) for a two-year start-up period during which the Central Bank will not require the QIAIF to have an authorised AIFM. After the start-up period, an authorised AIFM must be appointed.

Non-Irish EU AIFMs managing Irish AIFs are required to be authorised in their home jurisdiction and to have availed of the passporting provisions pursuant to Article 33 of the AIFM Directive.

Although non-EU AIFMs currently have no passporting rights under the AIFM Directive and will not have such rights

until such time as they are extended to non-EU AIFMs by the European Commission, non-EU AIFMs may avail of transition benefits allowed by the Central Bank for such entities and consequently may manage an Irish QIAIF, provided they are designated by the QIAIF as the AIFM and certain rules as set out in question 1.8 below are complied with. However, in such circumstances, the non-EU AIFM must be approved by the Central Bank to act as an investment manager of Irish authorised collective investment schemes (see below).

An Irish AIF constituting a collective investment scheme authorised and supervised by the Central Bank under Irish Funds Legislation and marketed to retail investors (a “**RIAIF**”) must have an authorised AIFM. Consequently, a non-EU AIFM cannot avail itself of the transition benefits allowed by the Central Bank as referred to above and manage a RIAIF on the basis that it is designated by the RIAIF as the non-EU AIFM.

#### Non-AIFM Irish Management Companies/General Partners

RIAIFs and QIAIFs, depending on their legal form, may be required to appoint a management company/general partner to carry out the management of those AIFs. Where such a management company/general partner is not acting as the AIFM, it must be approved by the Central Bank and meet the requirements relating to such entities as set out in the Central Bank’s AIF Rulebook (the “**AIF Rulebook**”), e.g.:

- a minimum capital requirement of at least EUR 125,000 or one quarter of its total expenditure taken from the most recent audited accounts (whichever is higher);
- organisational requirements such as the appointment of a compliance officer who must be located in the State, policies and systems to identify, control and monitor risk, accounting policies and procedures, maintenance of records, etc.; and
- adequate management resources.

#### Investment Managers

Investment managers or sub-investment managers, which are one of the following entities, will not usually be subject to an additional regulatory review process by the Central Bank:

- UCITS management companies;
- MiFID investment firms;
- EU credit institutions; and
- externally appointed authorised AIFMs.

Investment managers which are not one of the entities listed above may only be appointed where (i) a Memorandum of Understanding (“**MoU**”) is in place between the Central Bank and the competent authority in the home jurisdiction of the investment manager, and (ii) the Central Bank has approved the investment manager following receipt of a completed Investment Manager Clearance Form.

### Investment Advisors

The Central Bank does not apply an approval process to investment advisors in order for such entities to provide investment advice in relation to a RIAIF/QIAIF, provided that the managers/directors of the RIAIF/QIAIF confirm that the advisors in question will act in an advisory capacity only and will have no discretionary powers over any of the assets of the RIAIF/QIAIF.

### 1.3 Are Alternative Investment Funds themselves required to be licensed, authorised or regulated by a regulatory body?

Irish AIFs established under “Irish Funds Legislation” as detailed below are required to be authorised by the Central Bank, which has the power to impose conditions on them. The current conditions that the Central Bank imposes are contained in an AIF Rulebook:

- (a) unit trusts under the Unit Trusts Act 1990;
- (b) investment companies under Part 24 of the Companies Act 2014;
- (c) investment limited partnerships (“ILPs”) under the Investment Limited Partnerships Act 1994 as amended by the Investment Limited Partnership (Amendment) Act 2020;
- (d) common contractual funds (“CCFs”) under the Investment Funds, Companies and Miscellaneous Provisions Act 2005; and
- (e) Irish collective asset-management vehicles (“ICAVs”) under the Irish Collective Asset-management Vehicles Act 2015, (collectively referred to as the “Irish Funds Legislation”).

In addition, Irish AIFs structured as ELTIFs must be authorised by the Central Bank pursuant to the European Long-term Investment Funds Regulation.

### 1.4 Does the regulatory regime distinguish between open-ended and closed-ended Alternative Investment Funds (or otherwise differentiate between different types of funds or strategies (e.g. private equity vs. hedge)) and, if so, how?

The Central Bank allows RIAIFs/QIAIFs to be structured as follows:

- (a) Open-Ended  
An AIF is considered open-ended by the Central Bank where it:
  - provides redemption facilities on at least a (i) monthly basis in the case of a RIAIF, and (ii) quarterly basis in the case of a QIAIF;
  - redeems, when requested, at least (i) 10% of net assets in the case of a RIAIF/QIAIF that redeems on a monthly basis or more frequently, or (ii) 25% in the case of a QIAIF that redeems on a quarterly basis; and
  - does not impose a redemption fee in excess of (i) 3% of the net asset value per unit in the case of a RIAIF, or (ii) 5% in the case of a QIAIF.

An AIF, which provides for a period of greater than 30 days in the case of a RIAIF and 90 days in the case of a QIAIF between the dealing deadline and the payment of redemption proceeds, will not be subject to the above requirements provided it classifies itself as open-ended with limited liquidity.

- (b) Open-Ended with Limited Liquidity  
A RIAIF/QIAIF is classified as open-ended with limited liquidity if it does not meet one or more of the requirements for an open-ended AIF but does permit the redemption of units throughout the life of the AIF.
- (c) Closed-Ended  
The Central Bank considers a closed-ended RIAIF/QIAIF to be one which does not facilitate the redemption of units at the request of the unitholders during the life of the AIF.

### 1.5 What does the authorisation process involve and how long does the process typically take?

#### RIAIFs/QIAIFs

The application for authorisation of a RIAIF/QIAIF must be made by (i) the AIFM, together with (ii) the corporate AIF or management company/general partner in the case of a non-corporate AIF, and (iii) the depositary, in the case of a unit trust or CCF.

All parties to a RIAIF/QIAIF must have been authorised or otherwise deemed acceptable to the Central Bank prior to the application for authorisation (e.g. the management company, general partner, AIFM, directors in the case of a corporate AIF, depositary, other service providers such as the fund administrator, investment manager, etc.).

The directors of any entity authorised by the Central Bank (including, *inter alia*, the directors of a corporate RIAIF/QIAIF) are required to meet certain standards of fitness and probity. As part of the Central Bank’s fitness and probity requirements, any director proposed to be appointed must be pre-approved by the Central Bank. In this regard, an individual online questionnaire must be completed by the proposed director and validated and submitted on behalf of the appointing entity by a certain time period in advance of the proposed authorisation date for the RIAIF/QIAIF (i.e. at least 20 working days in the case of a RIAIF and at least five working days in the case of a QIAIF).

A RIAIF/QIAIF is not subject to any minimum capital requirements unless it is internally managed and therefore constitutes the AIFM.

In relation to the authorisation of QIAIFs, there is no prior filing of QIAIF documentation for review by the Central Bank. Instead, there is a self-certification regime (i.e. certification has to be given that the Central Bank’s disclosure requirements relating to the QIAIF documentation are met). Because there is no prior review by the Central Bank, the timeframe for authorisation of a QIAIF is within the control of the relevant parties based on the length of time it takes to negotiate and agree the QIAIF documents (subject to the pre-clearance of any persons or parties required by the Central Bank). Once the documentation is filed online by 3pm on the business day prior to the date for which authorisation is sought, a QIAIF will be authorised on the requested date without a prior review. The Central Bank may carry out a “spot check” post-authorisation review.

This contrasts with the authorisation process for RIAIFs, as the Central Bank requires certain documents (e.g. the prospectus) to be submitted for review and cleared of comment by the Central Bank in advance of the formal application for authorisation being submitted. As a result, a RIAIF with an externally appointed AIFM can take approximately eight to 10 weeks to be authorised by the Central Bank from the date of submission of applicable documents for review.

The only exception to the self-certification regime, where no prior filing of QIAIF documentation is submitted to the Central Bank for review, is where the QIAIF has what are in the Central Bank’s view one or more features of an unusual nature which

may need to be presented to the Central Bank by way of a written submission and approved in advance by the Central Bank.

### Internally Managed RIAIF/QIAIF Constituting the AIFM

Where it is proposed that a RIAIF or QIAIF will be internally managed and constitute the AIFM, a separate application for authorisation of an AIFM must be submitted to the Central Bank (together with other supporting documentation, including, *inter alia*, a programme of activity) and such authorisation must be obtained before formal application for authorisation of the RIAIF/QIAIF may be submitted to the Central Bank.

Any such RIAIF/QIAIF is required to meet the minimum capital requirements of an AIFM as set out in Regulation 10 of the Irish AIFM Regulations (equivalent to Article 9 of the AIFM Directive).

The Central Bank is obliged to inform the AIFM in writing as to whether or not authorisation has been granted, within three months of a complete application. However, the Central Bank may extend this period for another three months where it considers it necessary because of the specific circumstances of the case.

## 1.6 Are there local residence or other local qualification or substance requirements?

### Directors/Resources

A minimum of two directors in a corporate RIAIF/QIAIF, or in any entity which is authorised by the Central Bank and provides non-AIFM fund services to such an AIF (e.g. non-AIFM management company, general partner, fund administrator or depositary), must be Irish-resident. In the case of a RIAIF/QIAIF, an Irish resident is a person present in Ireland for the whole of 110 business days per year.

In the case of an Irish AIFM authorised by the Central Bank which has a Central Bank PRISM impact rating of Medium Low or above, the AIFM must have at least:

- (i) three directors resident in Ireland or, at least, two directors resident in Ireland and one designated person (i.e. a person designated by the board to carry out one or more managerial functions) resident in Ireland;
- (ii) half of its directors resident in the European Economic Area (“EEA”); and
- (iii) half of its managerial functions performed by at least two designated persons resident in the EEA.

In the case of an Irish AIFM authorised by the Central Bank which has a PRISM impact rating of Low, the AIFM must have at least:

- (i) two directors resident in Ireland;
- (ii) half of its directors resident in the EEA; and
- (iii) half of its managerial functions performed by at least two designated persons resident in the EEA.

In a letter to industry dated October 2020, the Central Bank outlined that all Irish authorised AIFMs should have a minimum of three full-time employees (or equivalent), each of whom should be suitably qualified and of appropriate seniority to fulfil the role. The letter sets out that the requirement is “a minimum expectation and only relevant to the smallest and simplest of entities” and notes that other firms “will be expected to have a level and quality of resourcing determined by the nature, scale and complexity of its operations”.

As part of the Central Bank’s fitness and probity requirements, a proposed director/designated person is required to confirm (via the individual questionnaire as referred to in question 1.5 above) his/her time commitment in days that will be provided per year in respect of that directorship or role as

designated person. In addition, the appointing entity, in validating the questionnaire, is required to confirm its expectation regarding the proposed director’s/designated person’s time commitment per year.

### Fund Governance Code

Corporate RIAIFs/QIAIFs or the management companies/general partners of non-corporate RIAIFs/QIAIFs are recommended to adhere to a voluntary corporate governance code for funds put in place by the Irish Funds Industry Association at the request of the Central Bank. Such code provides, *inter alia*, for a majority of non-executive directors and at least one independent non-executive director.

### Fund Service Providers’ Governance Code

Irish fund service providers such as fund administrators and depositaries are recommended to adhere to a voluntary corporate governance code put in place by the Irish Funds Industry Association at the request of the Central Bank. Such code provides, *inter alia*, for at least one independent non-executive director.

### Non-Irish Parties

Local requirements regarding the appointment of a non-Irish AIFM, investment manager or investment advisor are detailed in question 1.2 above.

## 1.7 What service providers are required?

The service providers involved in a RIAIF/QIAIF will depend on:

- the legal structure of the AIF as detailed in question 1.3 above (e.g. a management company/general partner will be required to be appointed in the case of a non-corporate AIF);
- the services which the AIFM will itself provide (e.g. whether it will be necessary to appoint an external valuer, an administrator, transfer agent, distributor, etc., if these services are not provided by the AIFM);
- the investment strategy relating to the AIF (e.g. whether a prime broker is required to be appointed in the case of an AIF with a hedge fund strategy); and
- the marketing strategy relating to the AIF (e.g. any local service providers required to be appointed in the jurisdiction where the AIF is marketed).

The appointment of an AIFM and depositary is required under the Irish AIFM Regulations.

A RIAIF/QIAIF must appoint auditors and a money laundering reporting officer and, if a corporate AIF, will need to appoint a secretary.

## 1.8 What rules apply to foreign managers or advisers wishing to manage, advise, or otherwise operate funds domiciled in your jurisdiction?

### AIFMs

The rules applying to non-Irish AIFMs depend primarily on whether they are EU- or non-EU (third country)-based.

Non-Irish EU AIFMs managing Irish RIAIFs/QIAIFs are not subject to any additional rules imposed by the Central Bank.

As stated in question 1.2 above, non-EU AIFMs may currently avail of the transition benefits allowed by the Central Bank for such entities and act as AIFMs of QIAIFs. However, the non-EU AIFM and the QIAIF it manages must comply with the

provisions of the Central Bank's AIF Rulebook that apply in the case of QIAIFs with registered AIFMs, e.g. certain provisions of the AIFM Directive relating to delegation, liquidity management, valuation and transparency obligations.

### Investment Managers

Non-Irish investment managers approved by the Central Bank to act as an investment manager of RIAIFs/QIAIFs, the process for which is detailed in question 1.2 above, are not subject to any rules imposed by the Central Bank. However, any proposed change in the legal/regulatory status or name of the investment manager must be advised to the Central Bank.

### Investment Advisers

Non-Irish investment advisers providing advice in relation to a RIAIF/QIAIF are not subject to any rules imposed by the Central Bank.

#### 1.9 What relevant co-operation or information sharing agreements have been entered into with other governments or regulators?

The Central Bank has entered into numerous national, bilateral and international memoranda of understanding. In particular, the Central Bank has entered into 46 supervisory co-operation arrangements with non-EU competent authorities as part of the implementation of the AIFM Directive. Separately, Ireland has signed comprehensive Double Taxation Agreements with 74 countries, 73 of which are in effect.

## 2 Fund Structures

#### 2.1 What are the principal legal structures used for Alternative Investment Funds?

The principal legal structures of RIAIFs/QIAIFs are set out in question 1.3 above, the main features of which are set out below:

- (a) unit trusts are contractual arrangements created under a trust deed made between a management company and a depositary. Unit trusts do not have their own legal personality and contracts are entered into by the management company and, in certain cases, by the trustee. A unit represents an undivided beneficial interest in the assets of the unit trust;
- (b) investment companies are public limited liability companies incorporated with variable capital, i.e. the actual value of the paid-up share capital is equal at all times to the value of the net asset value of the company. Shares issued do not represent a legal or beneficial interest in the company's assets;
- (c) ILPs are partnerships between one or more general partners and one or more limited partners, constituted by written agreements between the parties known as partnership agreements. A general partner is personally liable for the debts and obligations of the partnership and a limited partner contributes or undertakes to contribute a stated amount to the capital of the partnership;
- (d) CCFs are funds constituted under contract law by means of a deed of constitution executed under seal by a management company. The CCF is an unincorporated body and does not have a legal personality and therefore may act only through the management company. Participants in the CCF hold their participation as co-owners and each participant holds an undivided co-ownership interest as a "tenant in common" with other participants; and

- (e) ICAVs are corporate bodies with limited liability where the actual value of the paid-up share capital is at all times equal to the net asset value of the ICAV and the share capital is divided into a specified number of shares without assigning any nominal value to them. The assets of the ICAV belong exclusively to the ICAV and no shareholder has any interest in the assets of the ICAV.

Each of the above-referenced AIFs may be established as an umbrella fund with separate sub-funds.

It is also possible to have unauthorised AIFs (i.e. AIFs that are not authorised and regulated by the Central Bank under Irish Funds Legislation), the principal legal structures of which are companies, trusts and limited partnerships.

#### 2.2 Please describe the limited liability of investors in respect of different legal structures and fund types (e.g. PE funds and LPACs).

In investment companies and ICAVs, the liability of the shareholders is limited to the amount, if any, unpaid on the shares held by them.

In unit trusts, the limited liability of the unitholders under the trust deed will depend on the contractual provisions in the trust deed.

In ILPs, the liability of the limited partners is limited to the stated amount of capital they have contributed or undertaken to contribute and, except in limited circumstances set down in the Investment Limited Partnerships Act 1994 as amended, does not extend to the debts of the partnership beyond the amount contributed.

In CCFs, the liability of a unitholder is limited to the amount agreed to be contributed for the subscription of units.

The statutory limited liability of investors based on the legal structure of the AIF applies in respect of any fund type established using such legal structure.

#### 2.3 What are the principal legal structures used for managers and advisers of Alternative Investment Funds?

The principal legal structure used for managers and advisers of RIAIFs/QIAIFs is a private company incorporated with limited liability.

#### 2.4 Are there any limits on the manager's ability to restrict redemptions in open-ended funds or transfers in open-ended or closed-ended funds?

Although RIAIFs/QIAIFs may apply redemption gates if provided for in the applicable fund documentation, the Central Bank currently imposes limits on an AIF's ability to restrict redemptions on any one dealing day in the context of open-ended funds. These limits are detailed in question 1.4 above.

#### 2.5 Are there any legislative restrictions on transfers of investors' interests in Alternative Investment Funds?

There are no legislative restrictions on transfers of investors' interests in RIAIFs/QIAIFs other than in ILPs. A limited partner may only assign his partnership interest subject to the consent of all general partners to the assignee being admitted to the partnership as a limited partner.

## 2.6 Are there any other limitations on a manager's ability to manage its funds (e.g. diversification requirements, asset stripping rules)?

Other than the investment restrictions and limitations imposed by the Central Bank on RIAIFs/QIAIFs as referred to in section 4 below and the limitations imposed under the AIFM Directive (e.g. relating to asset stripping), there are no limitations on an AIFM's ability to manage RIAIFs/QIAIFs.

## 3 Marketing

### 3.1 What legislation governs the production and use of marketing materials?

A new harmonised regime for the cross-border distribution of investment funds has been introduced at an EU level via the EU Cross-Border Distribution of Collective Investment Undertakings Directive 2019/1160 and the EU Cross-Border Distribution Regulation 2019/1156, many of the provisions of which will apply from 2 August 2021.

The Irish Funds Legislation and AIF Rulebook govern the production and offering of a prospectus by a RIAIF/QIAIF. Regulation (EU) No. 1286/2014 (the “**PRIIPS Regulation**”) governs the production and offering of the key information document (“**KID**”) by a RIAIF/QIAIF where units are to be offered to retail investors in the EU.

### 3.2 What are the key content requirements for marketing materials, whether due to legal requirements or customary practice?

Pursuant to Article 4 of the EU Cross-Border Distribution Regulation, effective as and from 2 August 2021, EU-authorized AIFMs will be obliged to ensure that all marketing communications addressed to investors of an AIF are identifiable as such and describe the risks and rewards of purchasing units or shares of an AIF in an equally prominent manner, and that all information included in marketing communications is fair, clear and not misleading in accordance with ESMA Guidelines (ESMA34-45-1244) issued on 27 May 2021 and which will apply six months after the date of the publication of the guidelines on ESMA's website in all EU official languages. Such AIFMs must also ensure that all marketing communications indicate that a prospectus exists, where applicable a KID is available and ensure that all information contained in marketing communications does not contradict or diminish the significance of information contained in the AIF's prospectus. Marketing communications must specify where, how and in which language investors or potential investors can obtain the prospectus and where applicable the KID and obtain a summary of investor rights and provide hyperlinks to or website addresses for those documents. Finally, such marketing communications will also need to comply with ESMA's finalised guidelines on marketing communications issued on 27 May 2021 and which will apply six months after the date of their publication on ESMA's website in all EU official languages.

An AIF marketing in Ireland to retail investors must comply with the Consumer Protection Code. In addition, where a non-Irish AIF has been approved by the Central Bank to market in Ireland to retail investors (see question 3.6 below), certain wording prescribed by the Central Bank must be included in the non-Irish AIF's prospectus and in any marketing material distributed in Ireland for the purposes of promoting the AIF to retail investors.

The European Communities (Markets in Financial Instruments) Regulations 2017 (the “**Irish MiFID Regulations**”), which transposed the MiFID II Directive into Irish law, require authorised “investment firms” providing “investment services” (including, *inter alia*, investment advice and certain distribution services) to ensure that information provided to potential clients about, *inter alia*, “financial instruments” (such as units in an AIF) meets certain prescribed requirements.

### 3.3 Do the marketing or legal documents need to be registered with or approved by the local regulator?

In relation to a QIAIF, a dated prospectus, constitutional document and material contracts must be submitted to the Central Bank for noting in advance of the date of authorisation. In relation to a RIAIF, the prospectus must be submitted for review and clearance by the Central Bank in advance of seeking the authorisation of the RIAIF from the Central Bank.

The prospectus of a closed-ended Irish AIF must be submitted to the Central Bank for approval in accordance with the Irish Prospectus Directive Regulations (where applicable).

The Central Bank does not currently require a KID to be filed with it.

Details of the arrangements for the marketing of shares in Ireland must be submitted to the Central Bank by a non-Irish AIF in support of any application for approval to market in Ireland to retail investors (see question 3.6 below).

### 3.4 What restrictions are there on marketing Alternative Investment Funds?

#### Marketing in Ireland to Retail Investors

A non-Irish AIF must be approved by the Central Bank to market in Ireland to retail investors (see question 3.6 below).

#### Marketing in Ireland to Professional Investors

Notification to the Central Bank pursuant to the Irish AIFM Regulations is required in advance of any marketing in Ireland to professional investors of:

- EU AIFs by Irish AIFMs;
- non-EU AIFs by EU AIFMs; and
- AIFs by non-EU AIFMs.

Marketing may only commence once the Central Bank has informed the AIFM that it may commence marketing and is conditional on the applicable requirements set out in the AIFM Directive having been complied with. For example, a non-EU AIFM must comply with the substantive transparency and other requirements set out under Articles 22, 23, 24 and, for private equity funds, 26–30, of the AIFM Directive:

- Article 22: each AIF must be audited in accordance with the prescribed standards.
- Article 23: sets out disclosure requirements such as disclosing to investors the current risk profile of the AIF.
- Article 24: provides requirements to “regularly” report to each Member State in which the AIF is marketed. Member States may require more information on a periodic as well as an *ad hoc* basis.
- Articles 26–30: set out detailed rules applicable to private equity funds only on the acquisition of control, including rules regarding asset stripping.

Non-Irish EU AIFMs marketing EU AIFs to professional investors in Ireland must only comply with their local rules.

Non-Irish registered EU AIFMs (as opposed to non-Irish authorised EU AIFMs that can avail of the passport pursuant to Article 33 of the AIFM Directive) cannot market AIFs that they manage to professional investors in Ireland.

### 3.5 Is the concept of “pre-marketing” (or equivalent) recognised in your jurisdiction? If so, how has it been defined (by law and/or practice)?

The concept of pre-marketing has not to-date been recognised by the Central Bank in Ireland. However, that will change as a result of a new harmonised regime for pre-marketing AIFs in the EU which has been introduced at EU level via the EU Cross Border Distribution of Collective Investment Undertakings Directive 2019/1160. That Directive, which amends the AIFM Directive, entered into force on 1 August 2019 and must be transposed into law by EU Member States before the 2 August 2021.

In the Directive, pre-marketing is defined as the “*provision of information or communication, direct or indirect, on investment strategies or investment ideas by an EU AIFM or on its behalf, to potential professional investors domiciled or registered in the Union in order to test their interest in an AIF which is not yet established, or in an AIF which is established, but not yet notified for marketing in accordance with Article 31 or 32, or in compartments of such AIFs, in that Member State where the potential investors are domiciled or have their registered office, and which in each case does not amount to an offer or placement to the investor to invest in the units or shares of that AIF or compartment*”.

The Directive provides that an authorised EU AIFM engaging in pre-marketing may not present information to investors relating to or containing reference to an established AIF, enabling investors to commit to acquiring units or shares of a particular AIF, or amounting to a constitutional document, a prospectus, a subscription form or similar document whether in a draft or a final form allowing investors to take an investment decision. Any pre-marketing document will have to clearly state that the document does not constitute an offer or an invitation to subscribe to units or shares of an AIF and the information presented in those documents should not be relied upon because it is incomplete and may be subject to change.

AIFMs which engage in pre-marketing must notify their home competent authority in writing within two weeks of engaging in pre-marketing, specifying the Member States, time periods in which the pre-marketing took place, a brief description of the strategies presented and, where relevant, a list of the AIFs which were the subject of pre-marketing. The home competent authority must promptly inform the competent authorities of the Member States in which the pre-marketing took place. AIFMs will no longer be able to rely on reverse solicitation if they have carried out pre-marketing in relation to the AIF in question within the previous 18 months.

### 3.6 Can Alternative Investment Funds be marketed to retail investors?

#### RIAIFs/QIAIFs

QIAIFs may only be marketed to retail investors where they constitute qualifying investors as detailed in question 3.7 below. RIAIFs may be marketed to retail investors.

#### Non-Irish AIFs

Non-Irish AIFs which propose to market their units in Ireland to retail investors must be authorised by a supervisory authority set up in order to ensure the protection of unitholders and which, in the opinion of the Central Bank, provides an equivalent level of investor protection to that provided under Irish laws, regulations and conditions governing RIAIFs.

A non-Irish AIF which proposes to market its units in Ireland to retail investors must make an application to the Central Bank in writing, enclosing certain prescribed information.

AIFs established in:

- Guernsey and authorised as Class A schemes;
- Jersey and authorised as recognised funds; and
- the Isle of Man as authorised schemes,

will receive approval to market their units in Ireland to retail investors on completion of the information and documentation required by the Central Bank. Other AIFs must demonstrate an equivalent level of investor protection to that provided under Irish laws, regulations and conditions governing RIAIFs.

The marketing of units in Ireland to retail investors is subject to the requirements set out in questions 3.2 and 3.4 above and may not take place until the AIF has received a letter of approval from the Central Bank.

### 3.7 What qualification requirements must be met in relation to prospective investors?

#### RIAIFs

A RIAIF has no regulatory minimum subscription requirement and no investor qualification requirements.

#### QIAIFs

A QIAIF may only be sold to qualifying investors and a minimum subscription of at least EUR 100,000 applies. A qualifying investor is:

- (i) an investor who is a professional client within the meaning of MiFID;
- (ii) an investor who receives an appraisal from an EU credit institution, a MiFID firm or a UCITS management company to the effect that the investor has the appropriate expertise, experience and knowledge to adequately understand the investment in the QIAIF; or
- (iii) an investor who certifies that they are an informed investor by providing the following:
  - confirmation (in writing) that the investor has such knowledge of, and experience in, financial and business matters as would enable the investor to properly evaluate the merits and risks of the prospective investment; or
  - confirmation (in writing) that the investor's business involves, whether for its own account or the account of others, the management, acquisition or disposal of property of the same kind as the property of the QIAIF.

Qualifying investors must self-certify in writing to the QIAIF that they: (i) meet the minimum initial investment per investor and appropriate expertise/understanding tests; and (ii) are aware of the risk involved in the proposed investment and of the fact that inherent in such investment is the potential to lose all of the sum invested.

### 3.8 Are there additional restrictions on marketing to public bodies such as government pension funds?

There are no additional restrictions under Investment Funds Legislation.

### 3.9 Are there any restrictions on the participation in Alternative Investments Funds by particular types of investors (whether as sponsors or investors)?

There are none in the context of RIAIFs/QIAIFs except where participation results in a transaction being entered with the AIF by the AIFM, general partner, depositary, investment manager

or by delegates or group companies of these, in which case the transaction must be negotiated at arm's length and be in the best interests of the shareholders of the AIF.

### 3.10 Are there any restrictions on the use of intermediaries to assist in the fundraising process?

No, there are no such restrictions. However, any intermediaries used to fundraise in Ireland must be regulated where required pursuant to Irish laws. This will depend on the specific activity being carried out by the intermediary in Ireland.

## 4 Investments

### 4.1 Are there any restrictions on the types of investment activities that can be performed by Alternative Investment Funds?

The investment activities of a loan originating QIAIF (other than instruments which are held for treasury, cash management and hedging) are limited to the business of issuing loans, participating in loans, investment in debt/credit instruments, participations in lending and to operations relating thereto, including investing in equity securities of entities or groups to which the loan originating QIAIF lends. Such QIAIFs may not originate loans to natural persons, other collective investment schemes, the AIFM or depositary of the QIAIF or delegates or group companies of these, financial institutions or related companies except in the case where there is a *bona fide* treasury management purpose which is ancillary to the primary objective of the loan originating QIAIF, and persons intending to invest in equities or other traded investments or commodities.

Pursuant to the European Long-term Investment Funds Regulation, an ELTIF (which may be structured as a RIAIF or a QIAIF) may not undertake: (a) short selling of assets; (b) taking direct or indirect exposure to commodities; (c) entering into securities lending, securities borrowing, repurchase transactions, etc. if more than 10% of the assets of the ELTIF are affected; and (d) using financial derivative instruments, except where the use of such instruments solely serves the purpose of hedging the risks inherent to other investments of the ELTIF.

A RIAIF/QIAIF may not acquire any shares carrying voting rights which would enable it to exercise significant influence over the management of an issuing body. This requirement does not apply to investments in other investment funds or where the AIF is a venture capital, development capital or private equity AIF, provided its prospectus indicates its intention regarding the exercise of legal and management control over underlying investments.

Investment activities in RIAIFs may be impacted indirectly by concentration rules imposed by the Central Bank (e.g. 20% of net asset value ("NAV") issuer limit, 30% of NAV limit on deposits with an acceptable credit institution, 30% of NAV limit in any one open-ended fund, etc.).

In relation to QIAIFs, the Central Bank does not impose any limits on the investment objectives, the investment policies or the degree of leverage which may be employed, except (a) for money market QIAIFs and QIAIFs that invest more than 50% of NAV in another fund, the Central Bank does impose certain requirements in relation to the underlying assets, and (b) a loan originating QIAIF must limit exposure over a specific time-frame to any one issuer or group to 25% of NAV.

Finally, in relation to investment companies authorised as QIAIFs, there is a statutory requirement to spread investment risk.

### 4.2 Are there any limitations on the types of investments that can be included in an Alternative Investment Fund's portfolio, whether for diversification reasons or otherwise?

An Irish AIF structured as an ELTIF may only invest in certain eligible investments as prescribed in the European Long-term Investment Funds Regulation. Furthermore, it is subject to portfolio composition and diversification limits as set out in the European Long-term Investment Funds Regulation.

Other than the restrictions referred to in question 4.1 above and the eligible investment requirements of the ELTIF, there are no prescriptive limitations on the types of investments that can be included in an AIF's portfolio. However the liquidity profile of investments is relevant depending on whether the AIF is structured as open-ended, open-ended with limited liquidity or closed-ended.

### 4.3 Are there any local regulatory requirements which apply to investing in particular investments (e.g. derivatives or loans)?

#### Regulatory Requirements Applicable to Investing in Loans RIAIFs/QIAIFs

RIAIFs/QIAIFs may invest in loan participations and loan assignments but may not grant loans (except for loan originating QIAIFs). This is without prejudice to the right of such a RIAIF/non-loan originating QIAIF to acquire debt securities and it does not prevent such an AIF from acquiring securities which are not fully paid.

In relation to loan originating QIAIFs, the Central Bank imposes prescriptive requirements in addition to the prescriptive investment activities and persons to whom loans may be issued referred to in question 4.1 above and the issuer diversification limit referred to in question 4.2 above. Such additional requirements include (i) the appointment of an EU authorised AIFM, (ii) must be closed-ended and established for a finite period, (iii) must not be leveraged in excess of 100% of its net asset value, (iv) must have policies and procedures in respect of, *inter alia*: its risk appetite; the assessment, pricing and granting of credit; credit monitoring, renewal and refinancing; collateral management, concentration risk; valuation; and forbearance; (v) must have a comprehensive stress testing programme; and (vi) must ensure that any access to its records/staff given to any one investor for the purposes of a due diligence process has been made available on a non-discriminatory basis to all unitholders.

#### Regulatory Requirements Applicable to Investing in Derivatives RIAIFs

RIAIFs may invest in derivatives provided certain prescriptive requirements of the Central Bank are complied with, including implementing a risk management process to ensure that the use of derivatives in accordance with regulatory requirements is monitored, managed and controlled on an ongoing basis. Such regulatory requirements include, *inter alia*: (i) global exposure arising from the use of derivatives using the commitment approach must not exceed 100% of the RIAIF's net asset value; (ii) direct and indirect exposure (through derivatives) to an underlying asset must not exceed issuer regulatory limits; (iii) eligibility criteria for OTC derivative counterparties; (iv) OTC derivative counterparty exposure must not exceed 10% of the RIAIF's net assets in the case of an eligible credit institution and 5% of net assets in all other cases; and (v) sufficient liquid assets must be held to cover any commitments the RIAIF may have in respect of the use of derivatives.

### QIAIFs

There are no regulatory requirements imposed by the Central Bank on QIAIFs that invest in derivatives.

#### 4.4 Are there any restrictions on borrowing by the Alternative Investment Fund?

A RIAIF may not borrow in excess of 25% of its net assets at any time. QIAIFs are not subject to any regulatory borrowing limits.

#### 4.5 Are there any restrictions on who holds the Alternative Investment Fund's assets?

In order to act as depositary of an Irish AIF, the relevant entity must be: (i) a credit institution; (ii) a MiFID investment firm which complies with certain capital adequacy rules and is authorised to safekeep assets; or (iii) an Irish company authorised and regulated by the Central Bank under the Investment Intermediaries Act 1995 and either wholly owned by a credit institution or by a third country institution with the liabilities of the company guaranteed by such institution having a minimum share capital.

However, for specific types of Irish AIFs (i.e. those which have no redemption rights exercisable for at least five years from the date of initial investment and which generally do not invest in financial instruments that can be held in custody), an Irish company authorised and regulated by the Central Bank under the Investment Intermediaries Act 1995 may be appointed as the “Real Assets Depositary” (or as referred to by the Central Bank as the “Depositary of Assets other than Financial Instruments”) without having to comply with the additional requirements outlined in (iii) above provided such depositary satisfies the Central Bank in relation to its suitability and demonstrates to the Central Bank: (a) its capacity and ability to meet the safekeeping and oversight obligations under the Irish AIFM Regulations; (b) that it has effective policies and procedures to ensure the depositary oversight role is carried out; and (c) how it has the necessary systems access to effectively oversee the AIFM and any of its delegates.

In certain circumstances, it is possible for the depositary to delegate certain of its safekeeping functions to third parties provided there is an objective reason for doing so; however, delegation of the safekeeping function is subject to a number of conditions as provided for in the AIFM Regulations.

## 5 Disclosure of Information

#### 5.1 What disclosure must the Alternative Investment Fund or its manager make to prospective investors, investors, regulators or other parties, including on environmental, social and/or governance factors?

Pursuant to Article 23 of the AIFM Directive, the AIFM of a RIAIF/QIAIF must disclose certain prescribed information to prospective investors in advance of any investment and any material changes to such information on an ongoing basis. Such disclosure requirements are met by including such disclosure in the prospectus of the AIF or in certain cases by referring to where such information may be obtained in the prospectus. In addition, the Central Bank requires additional disclosure in the prospectus of a RIAIF/QIAIF, e.g. disclosure of relevant parties, fees and expenses payable out of the assets of the AIF, maximum remuneration of the AIFM and investment manager

(if any), maximum redemption fee, maximum leverage that may be generated, valuation methodologies, dealing arrangements, investment objective, policy and strategy, investment restrictions, ability to create side pockets, etc. Furthermore, there are certain circumstances where investors must be notified of certain incidents, e.g. where there has been a non-material change in investment policy or an increase in the remuneration payable to the AIFM within the maximum amount disclosed in the prospectus, etc.

Pursuant to Article 24 of the AIFM Directive, an AIFM must regularly report to the competent authorities of its home Member State certain prescribed information in the form of a template reporting template as set out in Annex IV of the Commission Delegate Regulation 231/2013, e.g. the principal markets and instruments in which it trades on behalf of the AIFs it manages. In addition, an AIFM must, for each of the EU AIFs that it manages and for each of the AIFs that it markets in the EU, periodically disclose to investors:

- (a) the percentage of the AIF's assets which are subject to special arrangements arising from their illiquid nature;
- (b) any new arrangements for managing the liquidity of the AIF; and
- (c) the current risk profile of the AIF and the risk management systems employed by the AIFM to manage those risks.

In respect of environmental, social and governance factors (“ESG”), a number of disclosure obligations have been introduced pursuant to Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector (“SFDR”) and Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (the “Taxonomy Regulation”).

The SFDR applies different requirements and implementation timeframes in respect of disclosures (i) in the prospectus of the AIF, (ii) on websites of the AIFM, and (iii) in the periodic reports of the AIF.

**AIFM Level Requirements:** The following disclosure requirements exist at manager level pursuant to the SFDR.

- (i) The AIFM must formulate a policy on the integration of sustainability risks in its investment decision-making process and disclose this policy both in the prospectus of the AIF and on its website.
- (ii) The AIFM must decide whether to (a) implement a due diligence policy with respect to the principal adverse impacts of its investment decisions on sustainability factors, or (b) provide an explanation as to why it does not consider such adverse impacts. If complying with (a), the AIFM is required to publish a statement on the due diligence policy on its website including information on the identification and prioritisation of adverse impacts, summaries of engagement policies, and adherence to responsible business codes and other internationally recognised standards. If complying with (b), the AIFM must publish on its website its reasons for not considering principal adverse impacts of investment decisions on sustainability factors, including an explanation on whether and when the firm intends to consider such impacts.
- (iii) The AIFM must update its existing remuneration policy and disclose on its website how the policy is consistent with the integration of sustainability risks.

**All AIFs:** The following disclosure requirements apply to all AIFs, irrespective of whether they have an ESG focus pursuant to SFDR.

- (i) An AIFM must decide whether to (a) assess the likely impact of sustainability risks on the return of each fund, or (b) provide an explanation for why it does not consider sustainability risks to be relevant to a particular fund. If

complying with (a), the AIF must publish in the AIF's prospectus a description of the manner in which sustainability risks are integrated into investment decisions and the results of the assessment of the likely impact of sustainability risks on the returns of the fund. Where complying with (b), the AIF must publish clear and concise reasons in its prospectus why sustainability risks are not relevant for returns of the fund.

- (ii) Where the AIFM is implementing a sustainability due diligence policy with respect to the principal adverse impacts of its investment decisions on sustainability factors, there must be a disclosure in the prospectus of the AIF and on the website of the AIFM as to whether and how each fund considers the principal adverse impacts on sustainability factors. Where a sustainability due diligence policy is not implemented, the AIFM must disclose for each fund in the prospectus of the AIF an express negative statement that it does not consider adverse impacts, and the reasons for not doing so.
- (iii) The Taxonomy Regulation further requires that, where a fund is not an Article 8 ESG fund or Article 9 ESG fund, the prospectus of the AIF and periodic disclosures must include the following statement: *"The investments underlying this financial product do not take into account the EU criteria for environmentally sustainable economic activities."*

**Article 8 ESG Funds:** The following disclosure requirements apply to Article 8 ESG funds or funds which promote ESG characteristics pursuant to the SFDR:

- (i) The AIFM must publish on its website: (i) a description of the ESG characteristics that each fund promotes; (ii) information on the methodologies used to assess, measure and monitor the ESG characteristics; (iii) information on how those ESG characteristics are met; and (iv) if an index has been designated, information on how this index is consistent with those ESG factors.
- (ii) The AIF must disclose in its prospectus: (i) information on how environmental or social characteristics are met; (ii) if an index has been designated, information on whether and how this index is consistent with those characteristics; and (iii) if an index has been designated, where the methodology used for the calculation of the index is to be found.
- (iii) The Taxonomy Regulation further requires that information on the environmental objective or objectives listed under the Taxonomy Regulation to which the underlying investment(s) contributes, and a description of how and to what extent the underlying investments qualify as "environmentally sustainable" for the purposes of the taxonomy, and also the proportion of investments that are environmentally sustainable, be disclosed in the prospectus of the AIF.

**Article 9 ESG Funds:** The following disclosure requirements apply to Article 9 ESG funds or funds which exclusively pursue a sustainable investment objective pursuant to the SFDR:

- (i) The AIFM must publish on its website: (i) a description of the sustainable investment objective; (ii) information on the methodologies used to assess, measure and monitor the impact of the sustainable investments; (iii) if no index has been designated as a reference benchmark, an explanation on how the objective is to be attained; and (iv) if an index has been designated, information on how the index is aligned with the objective and an explanation as to why and how the designated index aligned with the objective differs from a broad market index.
- (ii) Where an index has been designated as a reference benchmark, the AIF must disclose in its prospectus information on how the index is aligned with the objective and

an explanation as to why and how the designated index aligned with the objective differs from a broad market index. The disclosure must include an indication of where the methodology used for the calculation of the index is to be found. Where no index has been designated as a reference benchmark, an explanation must be provided on how the objective is to be attained.

- (iii) The Taxonomy Regulation further requires information on the environmental objective or objectives listed under the Taxonomy Regulation to which the underlying investment(s) contributes, and a description of how and to what extent the underlying investments qualify as "environmentally sustainable" for the purposes of the taxonomy, and also the proportion of investments that are environmentally sustainable, be disclosed in the prospectus of the AIF.

#### 5.2 Are there any requirements to provide details of participants (whether owners, controllers or investors) in Alternative Investment Funds or managers established in your jurisdiction (including details of investors) to any local regulator or record-keeping agency, for example for the purposes of a public (or non-public) register of beneficial owners?

Article 30 of the Fourth EU Anti-Money Laundering Directive (EU) 2015/849, as amended by the Fifth EU Anti-Money Laundering Directive (EU 2018/843), obliges EU Member States to ensure details of beneficial owners of corporate and legal entities incorporated within its jurisdiction are held on a central register. Such registers must be made publicly available.

The definition of beneficial owner is set out in Article 3 of Directive 2015/849 and means any natural person who directly or indirectly owns or controls the corporate or legal entity. This can be through having a sufficient percentage of the voting rights, ownership interest, controlling the company by other means such as through a shareholders' agreement, by the exercise of dominant influence, or via the power to appoint senior management.

Article 30 of Directive 2015/849 requires corporate and legal entities to maintain their beneficial ownership details, independent of the central register, and to provide these details to a central register when required.

In Ireland, the Companies Registration Office is responsible for maintaining a central beneficial ownership register in respect of companies such as AIFs established as variable capital companies and the Central Bank is responsible for maintaining a central beneficial ownership register in respect of the following AIF legal structures; ICAVs, Unit Trusts, Common Contractual Funds and Investment Limited Partnerships.

#### 5.3 What are the reporting requirements to investors or regulators in relation to Alternative Investment Funds or their managers, including on environmental, social and/or governance factors?

##### Annual and Half-Yearly Reports

- (a) RIAIFs/QIAIFs  
A newly established RIAIF/QIAIF must submit to the Central Bank a set of accounts (whether an interim report or an annual report) within a certain period of the launch date (i.e. within nine months for a RIAIF and 12 months for a QIAIF) and publish it within two months if it is an interim report or six months if it is an annual report. The first annual reports must be made up to a date within 18 months of incorporation/establishment and published within six months. On an ongoing basis, a RIAIF/QIAIF must publish an annual report within six months of the end of the financial

year. In addition, a QIAIF (established as a unit trust or CCF) and a RIAIF must publish, within two months of the reporting period, a half-yearly report covering the first six months of the financial year.

In respect of ESG, pursuant to the SFDR, the Taxonomy Regulation and regulatory technical standards issued thereunder, AIFs will be required to publish certain disclosures in their annual reports commencing in 2022 with the level of information depending on whether the fund is an Article 8 or Article 9 ESG fund or a non-ESG fund.

- (b) AIFMs/Non-AIFM Management Companies/Administrators/Depositories

Where an AIFM, a non-AIFM management company, administrator or depository is authorised by the Central Bank, such entity must publish and file with the Central Bank (i) an annual report within four months of the end of the financial year, and (ii) half-yearly reports within two months of the half year end.

However, where an AIFM is an internally managed RIAIF/QIAIF, the annual audited accounts must be published within six months (as opposed to four months) of the year end. Furthermore, internally managed corporate QIAIFs are not required to produce half-yearly financial accounts.

### Prudential Reports

- (a) RIAIFs/QIAIFs

A RIAIF/QIAIF is obliged to file the following prudential reports with the Central Bank:

- a monthly return setting out prescriptive information relating to the AIF;
- a quarterly Survey of Collective Investment Undertakings returned within 10 working days of the end-quarter to which it refers; and
- a Funds Annual Survey of Liabilities return filed with the latter return.

A RIAIF or a QIAIF structured as a money market fund that meets the definition of a “monetary financial institution” in the Regulation of the European Central Bank (EU) No 883/2011 is also obliged to file statistical information on a monthly and quarterly basis with the European Central Bank.

- (b) AIFMs/Non-AIFM Management Companies/Administrators/Depositories

Where an AIFM, a non-AIFM management company, administrator or depository is authorised by the Central Bank, such entity must file with the Central Bank a minimum capital requirement report when filing its half-yearly and annual reports.

### Other Reports

- (a) RIAIFs/QIAIFs

A RIAIF/QIAIF may be obliged to file reports on a periodic basis with the Central Bank depending on the composition of its portfolio, e.g. where the AIF has side pocket assets, an annual report is required confirming whether or not the Central Bank’s parameters continue to be respected and the prospects and/or plans for the side pocket assets must be outlined.

- (b) Depository

A depository of a RIAIF/QIAIF must enquire into the conduct of the AIFM and the management company, investment company, ICAV or general partner in each annual accounting period and report thereon to the unitholders via a depository report included in the annual report of the AIF.

- (c) Irish AIFMs/Non-EU AIFMs Marketing in Ireland

A non-EU AIFM marketing an AIF in Ireland without a passport and an Irish-authorised AIFM are required to file reports with the Central Bank in accordance with Regulation 25 of the Irish AIFM Regulations, e.g. reports on the principal markets and instruments in which they trade on behalf of the AIFs they manage, etc.

### 5.4 Is the use of side letters restricted?

There is no express statutory or regulatory restriction on the use of side letters. However, a RIAIF/QIAIF is required, subject to certain exceptions as set out in the AIF Rulebook, to treat all unitholders in the same class equally and all unitholders in different classes fairly.

Furthermore, an AIFM is subject to certain operating conditions, including, *inter alia*, an obligation to treat all AIF unitholders fairly and to ensure that no unitholder in an AIF obtains preferential treatment unless such preferential treatment is disclosed in the relevant AIF’s constitutional document.

## 6 Taxation

### 6.1 What is the tax treatment of the principal forms of Alternative Investment Funds identified in question 2.1?

RIAIFs/QIAIFs are not subject to any taxes on their income (profits) or gains arising on their underlying investments. While dividends, interest and capital gains that an AIF receives with respect to its investments may be subject to taxes, including withholding taxes, in the countries in which the issuers of investments are located, these foreign withholding taxes may, nevertheless, be reduced or eliminated under Ireland’s network of tax treaties to the extent applicable.

### 6.2 What is the tax treatment of the principal forms of investment manager/adviser identified in question 2.3?

Compensation paid to Irish managers and advisors (such as management/advisory fees, as well as performance fees) of RIAIFs/QIAIFs is generally subject to corporation tax at the trading rate (i.e. 12.5%).

With regard to carried interest, aside from a regime introduced in 2009 for certain venture fund managers in respect of qualifying venture capital funds (which must be structured as partnerships and which are quite limited in their activities), Ireland does not have specific legislation dealing with carried interest. Nevertheless, generally speaking it should be possible to structure funds such that carried interest could be treated for Irish tax purposes as a capital gains tax receipt subject to tax at the standard rate (currently 33%) in the hands of an individual manager. It should be noted, the aforementioned venture fund managers regime (where applicable) reduces the capital gains tax rates even further to 15% (as opposed to 33%) for an individual and 12.5% (as opposed to an effective 33% rate) for a company.

### 6.3 Are there any establishment or transfer taxes levied in connection with an investor’s participation in an Alternative Investment Fund or the transfer of the investor’s interest?

There are no such establishment taxes. Furthermore, there are no transfer taxes payable in Ireland on the issue, transfer,

repurchase or redemption of units in a RIAIF/QIAIF (aside possibly from units in an IREF, see question 6.4 below). Where any subscription for or redemption of units is satisfied by the *in specie* transfer of securities, property or other types of assets, Irish stamp duty may arise on the transfer of such assets.

**6.4 What is the local tax treatment of (a) resident, (b) non-resident, and (c) pension fund investors (or any other common investor type) in Alternative Investment Funds?**

RIAIFs/QIAIFs are not subject to any taxes on their income (profits) or gains arising on their underlying investments.

**RIAIFs/QIAIFs (other than CCFs & ILPs)**

*Non-Residents*

There are no Irish withholding taxes in respect of a distribution of payments by such AIFs to investors or in relation to any encashment, redemption, cancellation or transfer of units in respect of investors who are neither Irish-resident nor ordinarily resident in Ireland, provided the AIF has satisfied and availed of certain equivalent measures or the investors have provided the AIF with the appropriate relevant declaration of non-Irish residence.

*Irish Residents*

Exempt Investors (which includes pension funds) – Again, no Irish withholding taxes apply in respect of a distribution of payments by the AIF to such investors (which would include approved pension schemes, charities, other investment funds, etc.) or any encashment, redemption, cancellation or transfer of units in respect of investors that have provided the AIF with the appropriate relevant declaration.

Non-Exempt Investors – If an investor is an Irish resident and not an exempt Irish investor, tax at the rate of 41% (25% where the unitholder is a company and an appropriate declaration is in place) is required to be deducted by the AIF on distributions (where payments are made annually or at more frequent intervals). Similarly, tax at the rate of 41% (25% where the unitholder is a company and an appropriate declaration is in place) will have to be deducted by the AIF on any other distribution or gain arising to the investor on an encashment, redemption, etc. of units by an investor who is Irish-resident or an ordinary resident in Ireland. While this tax will be a tax liability of the AIF, it is effectively incurred by investors out of their investment proceeds.

**RIAIFs/QIAIFs (established as CCFs or ILPs)**

For Irish tax purposes, a CCF and an ILP (authorised on or after 13 February 2013) are treated as “tax transparent”. This means that the income and gains arising or accruing to the AIF are treated as arising or accruing to its unitholders/partners either (i) in the case of a CCF, in proportion to the value of the units beneficially owned by them, or (ii) in the case of an ILP, in accordance with the apportionment terms of the partnership agreement. The income and gains are treated as if it did not pass through the hands of the CCF or ILP. Consequently, for tax purposes, the profits that arise to this type of AIF are treated as being profits that arise to the unitholders/partners themselves. Currently, natural persons cannot invest in a CCF without negatively affecting its Irish tax transparent status. This may change in the future.

**Irish Real Estate Funds**

Ireland has recently introduced a new withholding tax regime in respect of certain Irish property-related distributions and redemptions made by Irish real estate funds (“IREFs”) to

certain unit holders. An IREF is a non-UCITS authorised fund where (i) 25% or more of the market value of its assets is derived from certain types of Irish real estate related assets (“IREF Assets”), or (ii) it would be reasonable to consider that the fund’s main purpose (or one of its main purposes) was to acquire IREF Assets or carry on an IREF business (that is, activities involving IREF assets the profit or gains of which would, but for the general tax exemptions applied to funds, be within the scope of Irish taxation). Where a fund is an umbrella fund, the new rules will be applied at the sub-fund level. In summary, subject to certain exceptions, a 20% withholding tax will be imposed on distributions and redemptions made out of IREF profits, which are essentially the accounting profits of the IREF with certain exclusions (e.g. distributions/dividends made by unquoted companies which derive the greater part of their value from Irish relevant assets).

The Finance Act 2019 introduced certain anti-tax avoidance measures in respect of excessive debt financing of IREFs and expenses not wholly and exclusively incurred for the purposes of the IREF business (both of which could be used to reduce the profits of the IREF and thus the amount of withholding tax suffered on a distribution). It is important to note that the anti-avoidance provisions do not apply to genuine third-party debt.

**6.5 Is it necessary or advisable to obtain a tax ruling from the tax or regulatory authorities prior to establishing an Alternative Investment Fund?**

No. Once a RIAIF/QIAIF has received its authorisation from the Central Bank and for so long as such authorisation remains in place, the taxation treatment detailed above applies.

**6.6 What steps have been or are being taken to implement the US Foreign Account and Tax Compliance Act 2010 (FATCA) and other similar information reporting regimes such as the OECD’s Common Reporting Standard?**

*Foreign Account Tax Compliance Act (“FATCA”)* – The Irish and US Governments signed a Model 1 intergovernmental agreement (“Irish IGA”) on 21 December 2012 and provisions were included in the Irish Finance Act 2013 for the implementation of the Irish IGA and also to permit regulations to be made by the Irish Revenue Commissioners with regard to registration and reporting requirements arising from the Irish IGA. Subsequently, the Irish Revenue Commissioners (in conjunction with the Department of Finance) issued Regulations S.I. No 292 of 2014 which were effective from 1 July 2014. Supporting Guidance Notes have also been issued by the Irish Revenue Commissioners and are updated on an *ad hoc* basis. RIAIFs/QIAIFs that are Irish Reporting Financial Institutions for FATCA purposes will have certain registration, due diligence and reporting requirements. Compliant RIAIFs/QIAIFs will not be subject to, nor will they have to operate, FATCA withholding taxes.

*Intergovernmental Agreements* – Aside from the Irish IGA, Ireland has not entered into any other IGAs.

*Common Reporting Standards (“CRS”)* – As Ireland was one of the early adopter countries, the legislation to implement the CRS in Ireland was introduced in the Finance Act 2014 by inserting Section 891F of the Taxes Consolidation Act 1997, and Regulations (Statutory Instrument 583 of 2015) came into effect on 31 December 2015. The legislation to implement the Revised EU Directive on Administrative Cooperation in the

Field of Taxation (DAC2 – which essentially imports the CRS into EU legislation) in Ireland was introduced in the Finance Act 2015 by inserting Section 891G of the Taxes Consolidation Act 1997. Section 891F will not apply where Section 891G applies. RIAIFs/QIAIFs that are Irish Reporting Financial Institutions for CRS purposes will have certain registration, due diligence and reporting requirements.

**6.7 What steps are being taken to implement the OECD's Action Plan on Base Erosion and Profit-Shifting (BEPS), in particular Actions 2 (hybrids) (for example ATAD I and II), 6 (prevention of treaty abuse) (for example, the MLI), and 7 (permanent establishments), insofar as they affect Alternative Investment Funds' operations?**

Since the initiation of the BEPS project, the Irish Government has been very active in the area, having launched a consultation in May 2014 and published a detailed paper in the same year, where they explored the potential impacts of the project.

In recent years, it has implemented various domestic tax legislation in line with BEPS and the related EU Anti-Tax Avoidance Directives (as detailed below). They continue to liaise with various interested parties (including the Irish Fund's industry) in relation to the various ongoing "Actions" provided for under BEPS and, indeed, the EU Anti-Tax Avoidance Directives (see below).

**EU Anti-Tax Avoidance Directives**

The implementation into Irish tax law of Council Directive (EU) 2016/1164 (commonly referred to as the Anti-Tax Avoidance Directive or ATAD), as subsequently amended by Council Directive (EU) 2017/952 (ATAD 2), addresses a number of the BEPS Actions.

*Anti-Hybrid Rules* – As part of the implementation of ATAD and ATAD 2, anti-hybrid rules have been recently introduced into Irish tax legislation. Broadly speaking, these rules are intended to prevent arrangements that exploit differences in the tax treatment of a financial instrument or an entity under the tax laws of two or more jurisdictions to generate a tax advantage. The new legislation is effective for relevant payments made or arising on or after 1 January 2020 (although the provisions on reverse hybrid mismatches for which implementation can be postponed to 31 December 2021, have not yet been transposed into Irish legislation).

It is important to note that these rules generally only apply to particular cross-border arrangements between associated enterprises and to certain "structured arrangements". Given that AIFs are not subject to any Irish taxes on their income or gains, it is expected that the Irish anti-hybrid rules should have little impact for AIFs.

*Interest Limitation Rules* – Also as part of the requirements of ATAD, Ireland is currently in the process of developing interest limitation rules which are expected to be implemented into Irish tax legislation from 1 January 2022. As required by ATAD, these rules are designed to limit the ability to deduct borrowing costs when calculating taxable profits. It operates by limiting the allowable tax deduction for 'exceeding borrowing costs' (in broad terms, net interest costs) in a tax period to 30% of Earnings before Interest, Tax, Depreciation and Amortisation (EBITDA).

Nevertheless, Member States may exclude financial undertakings (which in an Irish context would include AIFs) with respect of the aforementioned interest limitation rules and, on that basis, AIFs are not expected to fall within scope.

**Multilateral Instrument (Actions 15, 6, 7 and other actions of BEPS)**

Ireland signed up to the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("MLI") which was subsequently ratified by Ireland through the Finance Act 2018 and Ireland formally deposited its Instrument of Ratification with the OECD on 29 January 2019.

In respect of Action 7 (permanent establishments), Ireland has confirmed that it will adopt Option B under Article 13 of the MLI, such that only some of the permanent establishment exceptions listed in Article 5 of the OECD Model Tax Convention must meet the test of being preparatory or auxiliary in character. In line with this, Ireland has also adopted the anti-fragmentation rules in the MLI which are designed to prevent the fragmentation of operations and/or splitting of contracts in order to avail of the permanent establishment exceptions.

The MLI came into force in Ireland on 1 May 2019. The treaties that will be modified by the MLI will be those treaties to which Ireland is a party, and where Ireland's treaty partner has already ratified the MLI.

As a general rule, it will begin to have effect for Ireland's tax treaties (i) with respect to taxes withheld at source, from 1 January 2020, and (ii) with respect to all other taxes levied by Ireland, for taxes levied with respect to taxable periods beginning on or after 1 November 2019.

The Irish Revenue Commissioners have confirmed that they will publish guidance to facilitate the interpretation and application of the treaties as modified by the MLI on an ongoing basis.

The full impact that the MLI may have on QIAIF/RIAIFs going forward remains to be seen.

**Mandatory Disclosure Rules (Action 12 of BEPS)**

Council Directive (EU) 2018/822 (amending Directive 2011/16/EU), commonly referred to as "DAC6", was enacted in response to Action 12 of BEPS and became effective on 25 June 2018. Relevant Irish tax legislation has since been introduced to implement this Directive in Ireland.

DAC6 creates an obligation for persons referred to as "intermediaries" to make a return to the relevant tax authorities of information regarding certain cross-border arrangements with particular characteristics, referred to as "hallmarks" (most of which focus on aggressive tax planning arrangements). In certain circumstances, instead of an intermediary, the obligation to report may pass to the relevant taxpayer of a reportable cross-border arrangement.

Revenue have issued detailed guidance and this is updated on an *ad hoc* basis.

**Country-by-Country Reporting (Action 13 of BEPS)**

Ireland introduced Country-by-Country Reporting legislation in the Finance Act 2015, followed by accompanying regulations published on 23 December 2015. The legislation applies for accounting periods commencing on or after 1 January 2016.

Asset managers and AIFs should monitor the potential impact of BEPS/ATAD on their structures.

**6.8 Are there any tax-advantaged asset classes or structures available? How widely are they deployed?**

Whether a tax advantage exists for a particular asset class or structure depends on numerous factors, some of which will be non-Irish factors and so in order to obtain the optimum structure for a particular asset type, counsel advice should be sought on a case-by-case basis. That said, there are a few strategies/structures available in Ireland that may assist in obtaining an optimum result.

### 6.9 Are there any other material tax issues for investors, managers, advisers or AIFs?

Management fees are generally subject to VAT at the current rate of 23%. However, under the harmonised VAT legislation, an exemption applies to the management of investment funds as defined by the EU Member States which, in Ireland, includes all authorised investment funds. Therefore, the VAT exemptions are wide-ranging with regard to the provision of services to funds (for example, fund administration, transfer agency, investment management, etc.).

RIAIFs/QIAIFs must adhere to the relevant rules on due diligence and information reporting under the CRS and FATCA, for instance (assuming they are Irish Reporting Financial Institutions). Furthermore, RIAIFs/QIAIFs will also need to monitor the OECD BEPS project and its possible effects on their investment structures (see question 6.7 above).

A tax concern which may arise is whether Irish AIFs managed by a non-Irish AIFMs lose their Irish tax residency due to the AIFM being established abroad and are thus taxed according to the laws of the seat of the AIFM. This, however, depends on the content of the laws of the jurisdiction of the AIFM. On the other hand, Irish tax law has provided that a non-Irish AIFM will not be liable to tax in Ireland by reason only of having an Irish AIF.

### 6.10 Are there any meaningful tax changes anticipated in the coming 12 months other than as set out at question 6.6 above?

See question 6.7 above with regard to ATAD and also continual monitoring of BEPS and BEPS-related legislation is a necessity.

## 7 Trends and Reforms

### 7.1 What have been the main trends in the Alternative Investment Funds space in the last 12 months?

The main investment trends have been in real estate, private equity, loan origination, private debt and real economy assets. With the enactment of the Investment Limited Partnership

(Amendment) Act 2020 in December 2020, the ILP is expected to become the fund structure of choice in Ireland for many international investment managers, particularly those in the private equity and real assets sectors. This updated legislation, together with recent guidance published by the Central Bank relating to closed-ended AIFs, ensures that the regulatory environment in Ireland caters for typical features of limited partnerships, including:

- closed-ended/finite life;
- capital accounting;
- commitments, capital contributions and drawdowns;
- excuse and exclude provisions;
- defaulting investor provisions;
- distribution waterfalls and carried interest arrangements;
- co-investment;
- parallel/alternative vehicles;
- subsidiaries; and
- advisory committees.

### 7.2 What reforms (if any) in the Alternative Investment Funds space are proposed?

On 10 June 2020, the European Commission submitted a report to the European Parliament and the Council on the scope and the application of the AIFM Directive. The report concluded that while the AIFM Directive has contributed to the creation of the EU AIF market, provided a high-level protection to investors and facilitated monitoring of risks to financial stability, there are a number of areas where the legal framework could be improved. With this in mind, the European Commission launched a public consultation in October 2020 on the AIFM Directive seeking the views of stakeholders on how to achieve a more effective and efficient functioning of the EU AIF market as part of the overall financial system. The deadline for responses closed on 29 January 2021. A legislative proposal amending the AIFM Directive is expected in the third quarter of 2021.



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legal advisor to Irish domiciled funds for over 20 years as confirmed by Monterey. The Dillon Eustace financial services team is recognised internationally by legal directories *IFLR 1000*, *The Legal 500* and *Chambers* as a top-tier firm in asset management and investment funds.

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