

## The UCITS Management Company Passport

### Introduction

A number of significant reforms to the UCITS regulatory regime were implemented in July 2011, designed to modernise and enhance the UCITS framework, increase efficiencies for industry participants and reduce operating costs. These reforms were introduced by what is known as the UCITS IV directive, which also consolidated into one piece of legislation all of the previous UCITS legislative measures (with the exception of the 2007 Eligible Assets Directive.)<sup>1</sup>

A key development under UCITS IV was the introduction of a passport for UCITS management companies permitting UCITS funds to be managed on a cross-border basis. The availability of the UCITS management company passport means that a management company located in one member state is permitted to manage UCITS established in other member states.

### Management Company Passport

Prior to the introduction of the UCITS IV reforms, whilst a UCITS which had been established and domiciled in one member state could sell and market its shares throughout the EU (subject to the relevant notification procedure and local marketing requirements), management companies had not enjoyed parallel cross-border freedoms, as the management company of a UCITS was required to be domiciled in the same member state as the UCITS which it managed. The UCITS Directive now permits UCITS funds to be managed on a true cross-border basis, meaning that a management company located in one member state is permitted not only to manage UCITS established in that same member state, but also to manage UCITS located in other member states.

Such cross-border management involves interaction and engagement between member state regulators. From a supervisory perspective, where a management company wishes to provide cross-border services to UCITS domiciled in another member state, it is required to follow two sets of rules: first, the rules of the management company's home member state as regards organisational requirements, rules of conduct and prudential requirements and second, the rules of the UCITS' home member state in relation to the constitution and functioning of the UCITS. Both sets of rules are the subject of harmonised provisions within the UCITS Directive.

The passporting provisions mean that an application for authorisation of a UCITS is no longer subject to the requirement that its management company must have its registered office in the UCITS home member state or that the management company pursue any activities in the UCITS home member state. Accordingly, a UCITS may be authorised with a foreign management company having no previous dealings with, or presence in, the UCITS' home member state provided that the management company is authorised as a management company by the regulator of its home member state (the "Management Company Regulator") and that it complies with the passporting procedures set out in the UCITS Directive.

### Application for the Passport

The application for the passport occurs by way of a notification to the Management Company Regulator by the management company of its intention to manage a foreign UCITS and the submission of certain prescribed documentation, including a programme of the activities it envisages undertaking as manager of the UCITS. Once a complete file is received, the Management Company Regulator will then forward this information to the home state regulator of the UCITS (the "UCITS Regulator") within one month, together with a number of additional documents as required in accordance with the UCITS Directive, including an attestation by the Management Company Regulator of the authorisation status of the management company, a description of the arrangements to deal with investor complaints and a written agreement with the UCITS' depositary in respect of information sharing. The agreement with the depositary is required to document and regulate the flow of

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1. The consolidated UCITS provisions as set out in Directive 2009/65/EC and later amended by Directive 2014/91/EU are referred to in this briefing note as the UCITS Directive.

information between the management company and the depositary, ensuring that both parties have the requisite information to discharge their respective duties.

The UCITS Regulator may request additional information from the Management Company Regulator regarding the documentation submitted, but only insofar as it is necessary to ensure compliance with the rules for which it is responsible for supervising. In terms of the UCITS Regulator refusing the application of the management company, it can only do so in defined circumstances as set out in the legislation and it must first consult with the Management Company Regulator.

### **Tax Implications**

A key concern with respect to the management company passport is how the application of national tax regimes might affect its operation. In preparation for the implementation of the passport, the Irish Government introduced legislation to address uncertainty around the question of tax treatment of funds managed by a management company which is located in a jurisdiction different to that of the fund's domicile – ie, if a fund domiciled in the UK is managed by an entity in Ireland, would the Irish tax authorities consider that all of the fund's activities actually take place in Ireland, with the potential consequence that the fund could be taxed twice? The dedicated Irish measures clarify that UCITS funds which are established in other member states, but which are managed by Irish resident management companies, will not have a taxable presence in Ireland by reason only of having an Irish management company.

### **Establishing a Management Company in Ireland**

UCITS management companies are regulated under the Irish regulations implementing the UCITS Directive and the rules and guidance issued by the Central Bank of Ireland (the "**Central Bank**"). At the core of any application for a management company to manage UCITS is the requirement for a business plan. This is essentially a governance document or a regulatory compliance plan, setting out how the company will be run on a day-to-day basis. A key requirement of the business plan is the necessity to demonstrate that the mind and management of the applicant company is in Ireland. The board of directors of the management company must ensure that it is actually operated and carries out its business on the basis of the model set out in the business plan.

Once authorised, a management company to a UCITS may engage in investment management and provision of administrative functions to the fund (including accounting services, customer inquiries, valuation and pricing, regulatory compliance monitoring, maintenance of the unitholder register, distribution of income, unit issues and redemptions and contract settlements). In addition, the management company may be authorised to provide discretionary investment management services, and, as ancillary services, investment advisory and custody services.

Irish UCITS management companies generally delegate their day-to-day functions to third parties and have no employees, but they do hold periodic board meetings in Ireland and are tax resident in Ireland. The directors of a UCITS management company, who are usually non-executive directors, are subject to the Central Bank's "fitness and probity" regime which also applies to directors of UCITS and non-UCITS funds. Other office holders in a management company who are subject to the "fitness and probity" regime include the chairman and any person below board level who has been designated management functions.

### **Ireland as a Domicile for Management Companies**

As a well established centre of funds excellence with a premier base of technical expertise, Ireland is a leading choice of domicile for UCITS management companies. Clarification of the tax position as outlined above adds to Ireland's attractiveness as a hub for management companies managing UCITS across EU borders.

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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