

Matheson Investment Funds Update: Central Bank of Ireland Responds to Industry Brexit Queries

On 24 January 2019, the Irish funds industry representative association, Irish Funds, made a submission to the Central Bank of Ireland (“**Central Bank**”) outlining a number of matters to be addressed at a domestic regulatory level in advance of the withdrawal of the United Kingdom (“**UK**”) from the European Union (“**EU**”). The Central Bank has now replied to industry and we have set out below a number of the more substantial issues raised in the Irish Funds’ submission and the Central Bank’s response to each of those issues.

Clarifications by the Central Bank

Continuance of Existing Appointments of UK Investment Managers

Irish Funds asked whether existing appointments of UK investment managers would be permitted to continue on the basis of their previous automatic clearance of the investment manager by the Central Bank. Industry also enquired whether, in relation to new investment manager appointments, the Central Bank intends to expand its list of comparative regulatory regimes to include the UK.

The Central Bank advised that, once the UK leaves the EU, existing appointments of UK investment managers by Irish fund management companies will be permitted to continue. For new appointments, UK investment managers will be considered non-EU investment managers and they will be subject to a full review. The application process will no longer be by email but will involve a complete application submitted via Orion, the Central Bank’s online filing system.

Irish UCITS Management Company Managing a UK UCITS

Irish Funds queried what would be required of an Irish UCITS management company currently managing a UK UCITS.

The Central Bank responded that this is a matter for the Irish UCITS Management Company to consider and the UK Temporary Permissions Regime allows time for that consideration. It states that an Irish UCITS management company cannot manage an AIF on a cross-border basis.

OTC Counterparty Exposures

Irish Funds requested that the Central Bank update their current requirements regarding UCITS eligible counterparties to include UK entities authorised under the post-Brexit equivalent of the Markets in Financial Instruments Directive (“**MiFID**”) in the categories of eligible counterparties.

The Central Bank has now confirmed to industry the Central Bank's intention to maintain the status quo. The Central Bank has confirmed that it expects to issue a statement shortly confirming that it is considering whether UK entities previously authorised under MiFID will continue to be eligible OTC counterparties post-Brexit, and that UK entities previously authorised under MiFID will continue to be eligible OTC counterparties post-Brexit pending the outcome of the Central Bank's review.

Liquidating Funds

Irish Funds requested confirmation that a UCITS or alternative investment fund ("AIF") with a UK management company or alternative investment fund manager ("AIFM"), which is in liquidation or which will be liquidated once the final disbursements of assets has been completed, would not have to change management company or AIFM.

The Central Bank has stated that it would need specific details from the funds in question for consideration, that is, confirmation that they have terminated and the timeframe for seeking revocation of authorisation.

Fund Revocations

Industry enquired whether the revocation process could be more efficient, noting that some revocation applications are as a result of Brexit-related rationalisations where a UK AIFM or UCITS management company wants to ensure funds under management are revoked prior to Brexit day.

The Central Bank noted that the revocation process is being reviewed and forms are in the process of being updated. It emphasised that the revocation of a fund cannot be finalised until all requirements have been met, including the payment of any outstanding industry levy.

UCITS Mergers

Irish Funds enquired whether it was acceptable to proceed with a UCITS merger where merger documents have been approved and the necessary shareholder circular issued before 29 March 2019, even if the merger itself happens after that date.

The Central Bank has stated that any Brexit-related merger must be completed by 29 March 2019.

Passporting Applications

Irish Funds observed that, where an entity is approved by 29 March 2019 but has not yet completed passporting applications, this could give rise to serious investor protection issues.

The Central Bank stated that it is not in a position to process passport applications until a firm is authorised as other national competent authorities will not accept the notification.

Matters Already Addressed by the Central Bank

A number of matters raised in the Irish Funds' submission had already been addressed at the time of preparation of the Central Bank's response. These included:

- The signing of memoranda of understanding ("MoUs") between the European Securities and Markets Authority ("ESMA") and the UK Financial Conduct Authority ("FCA"), as advised in the Central Bank's **Markets Update** dated 4 February 2019.

- On 4 February 2019, the Central Bank published a **notice of intention** in relation to the location requirement for directors and designated persons of Irish fund management companies. The notice sets out that should the UK become a third country, the Central Bank will consider whether it is a jurisdiction to be determined as meeting its Effective Supervision Requirement. For the period while this is under consideration, the Central Bank does not propose adopting a default position which would treat the UK as not satisfying the Effective Supervision Requirement.
- In relation to Irish QIAIFs managed by UK AIFMs, the Central Bank published an updated **AIFMD Q&A** on 4 February 2019, clarifying that a QIAIF will be permitted to designate a UK AIFM as its AIFM. The Central Bank has also written to QIAIFs with UK AIFMs seeking confirmation regarding their plans post 29 March 2019 and setting out deadlines for submitting post-authorisation amendments and change of service provider applications.
- On 19 January 2019, the Central Bank issued an updated **Investment Firms Q&A** clarifying that the IOSCO multilateral MoU is a co-operation arrangement that satisfies the requirements set out in the Irish regulations implementing the Markets in Financial Instruments Regulation relating to availing of the safe harbour exemption.
- The Central Bank has communicated directly with feeder funds that invest into UK UCITS regarding their post-Brexit plans.

Matters Still under Consideration

The Central Bank also advised in its response that a number of matters remain under consideration, as set out below.

- The provision of a form of **fast-track review procedure** for amendments to UCITS / RIAIF prospectuses which are solely Brexit-related, such as updates to the list of recognised exchanges.
- **Investment in UK Funds:** Irish Funds noted in their submission to the Central Bank that post-Brexit, a UK UCITS would fall into a category of AIF in respect of which an Irish UCITS would be required to make an individual and detailed submission to the Central Bank in advance of an investment. This would leave Irish UCITS in a difficult position in respect of investment in funds which are, to all intents and purposes, other UCITS and also leaves open a question as to whether an Irish UCITS which is already invested in such funds would then have to seek retrospective permission or permission if it seeks to make a further investment in these funds. A similar issue would arise for Irish AIFs currently investing in UK UCITS. Industry has requested that the Central Bank amend both its UCITS guidance and AIF Rulebook to include former UK UCITS in the categories of eligible fund types, which are taken as being acceptable without having to be shown to comply in all material respects with the UCITS rules (in the case of Irish UCITS investing in such underlying UK UCITS), on the basis that the day before Brexit they will have been not just complying in all material respects with the UCITS rules but actually complying with the UCITS rules.
- The Central Bank will address on a case-by-case basis the issues arising where managers are not approved by 29 March 2019, or are approved but have not affected passporting applications / COSP filings.

We will continue, through our industry engagements, to seek further clarifications from the Central Bank to assist our clients in preparing for Brexit and implementing their contingency plans.

Please get in touch with your usual Asset Management and Investment Funds Department contact or any of the contacts listed in this publication should you require further information in relation to the material referred to in this briefing note.

Full details of the Asset Management and Investment Funds Department, 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.

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