A Guide to Irish Regulated Real Estate Funds

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A GUIDE TO IRISH REAL ESTATE FUNDS

Introduction

Ireland offers a variety of regulated real estate fund structures with differing levels of investment and borrowing restrictions and investment mechanics, minimum subscription requirements and service provider requirements and authorisation timeframes depending on the proposed portfolio composition and targeted investor profile for a particular project.

The Irish Financial Regulator is the competent authority responsible for authorising and for the ongoing supervision of all regulated Irish fund structures, including real estate funds.

Legal Structures

The legal structures within which regulated real estate vehicles can be housed include unit trusts, variable capital investment companies and common contractual funds, each of which can be open-ended, open-ended with limited liquidity, limited liquidity or, more usually, closed-ended schemes.

Non-UCITS

Given that a portfolio of real estate investments will normally be relatively or highly illiquid, the available Irish regulated fund structures are what are referred to as non-UCITS structures.

UCITS structures are not appropriate given that they may not invest directly in real estate (although UCITS can invest in REITS), must focus on liquid assets and are required to provide at least twice monthly redemption facilities. Accordingly, the appropriate structures for real estate funds are non-UCITS.

Investment and Borrowing Limits

The Financial Regulator sets the investment and borrowing limits for non-UCITS products based on the targeted investor profile - *retail investors*, *professional investors* and *qualifying investors* – with fewer investment and no borrowing limits but high minimum subscription requirements and investor net worth criteria imposed on the most flexible *qualifying investor* structure.

Whilst strict portfolio diversification requirements and limitations on borrowing/leverage are imposed on *retail investor* funds, those limits are relaxed partially for *professional investor* funds and most, but not all, investment limits are disapplied in the case of *qualifying investor* funds.

Fast Track Authorisation for QIFs

Qualifying investor funds are the most popular regulated real estate fund type with significant flexibility in terms of investment mechanics, few investment restrictions and no borrowing or leverage limits, but with a high minimum subscription requirement and investor net worth criteria.

QIFs benefit from a fast track authorisation procedure – a self certification regime which allows for a 1 day authorisation process.

Private Placement Vehicles

Non-UCITS products do not benefit from the principle of mutual recognition within the European Economic Area and cannot be publicly marketed in most other EEA Member States. They are normally private placement vehicles offered in accordance with the relevant target jurisdictions' local private placement rules.

It is, however, important to note that the public marketing of true *closed-ended* non-UCITS schemes is possible within the European Economic Area under Directive 2003/71/EC (the "Prospectus Directive" or "PD"), although our experience is that most promoters of this type of product do not seek to avail of the PD regime, particularly where they are focused on the sophisticated or institutional market place.

Liquidity Options

Regulated real estate funds can be structured as open-ended, open-ended with limited liquidity, limited liquidity or closed-ended schemes. One would expect, however, that most real estate funds would be established as limited liquidity funds or as closed-ended funds due to the long term nature of an investment in real estate and the lead time in bringing sales of real estate assets to completion.

For highly diversified funds or funds of funds, open-ended with limited liquidity may be considered.

Available Legal Structures

Non-UCITS are available in three principal legal forms - variable capital investment companies, unit trusts and tax transparent common contractual funds. [*Note that neither individuals (nor their nominees) can invest in common contractual funds without undermining their tax transparency*].

Whilst regulated investment limited partnerships are also available, to our knowledge none have been used / authorized for at least a decade and we have not accordingly considered them further given that the Financial Regulator would not be familiar with them in practice.

The choice of legal structure for a regulated fund will usually depend on a number of issues, including:

- investor familiarity;

- investor capacity to invest (e.g. Japanese investors seem to be able to invest higher proportions of their portfolios in unit trusts);

- willingness of promoter to set up Irish management company (required for unit trust and common contractual fund but not for investment company);

- portfolio diversification (investment companies are subject to a statutory risk spreading requirement whereas unit trusts are not);

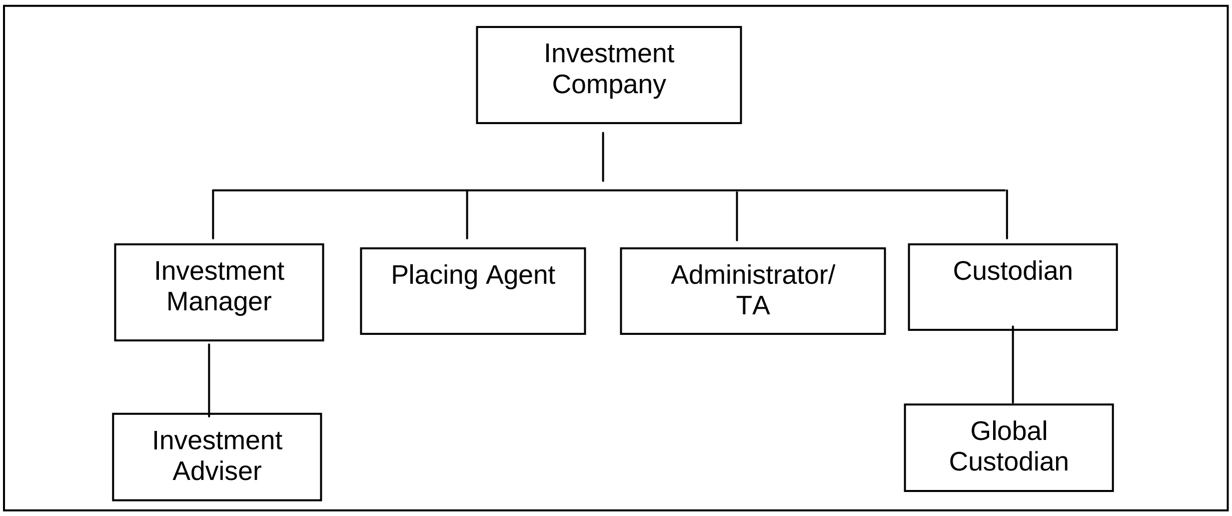
- borrowing/leverage proposals (available in all structures but legal arrangements clearer in investment companies);

- reporting requirements (all regulated funds must prepare annual audited accounts and semi-annual unaudited accounts, save that QIF investment companies no longer required to produce semi-annual unaudited accounts);

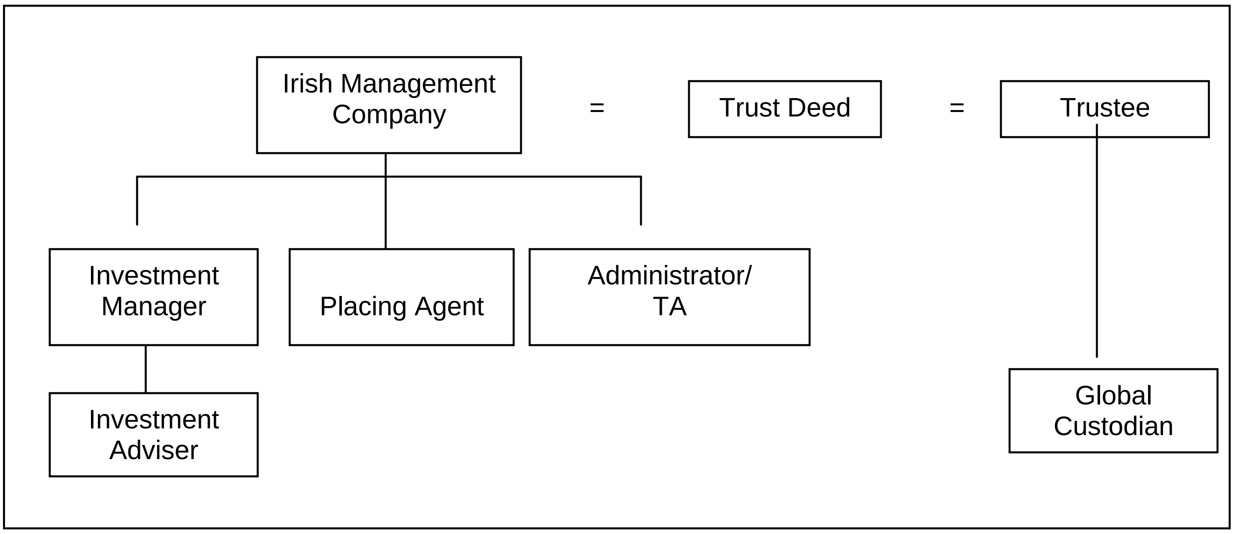
- operational flexibility (more with unit trusts than with investment companies - i.e. no AGM for unit trusts and easier to amend constitutional documentation for non-material issues).

The two main regulated fund structures are shown in diagrammatical format overleaf.

Regulated Investment Company



Regulated Unit Trust



Investment and Borrowing Restrictions

The Financial Regulator sets the investment and borrowing limits for non-UCITS products based on the targeted investor profile - *retail investors*, *professional investors* and *qualifying investors* – with few investment and no borrowing limits, but high minimum subscription requirements and investor net worth criteria, imposed on the most flexible *qualifying investor* structure.

Retail v. Professional v. Qualifying Investor Fund Criteria

A fund which has no minimum subscription requirement or has a minimum subscription which is less than Euro 125,000 per investor will be considered to be a *retail investor* fund.

Where a minimum subscription requirement of at least Euro 125,000 per investor is imposed, a fund will be considered to be a *professional investor fund* or *PIF*.

The most frequently used non-UCITS vehicle is the *qualifying investor fund* or *QIF* due to its greater flexibility in terms of investment and borrowing limits. However, a high minimum initial subscription requirement of Euro 250,000 per investor applies and investors must meet certain net worth tests.

An individual investing into a QIF must have a minimum net worth of at least Euro 1.25 million (excluding principal private residence/contents) and all other investors must own or invest on a discretionary basis at least Euro 25 million or be owned by individuals who themselves qualify as qualifying investors. Institutions may not group amounts of less than Euro 250,000 for individual investors unless pursuant to a fully discretionary investment mandate.

Qualifying investors must self certify that they meet these minimum criteria, that they are aware of the risks involved in the proposed investment and of the fact that, inherent in such investments, is the potential to lose the entire sum invested.

For funds operating on a commitment basis, compliance with the minimum subscription rules is assessed against the minimum commitment per investor. Additionally, where the fund is an umbrella scheme, the investor’s aggregate subscriptions across the entire umbrella are taken into account. Unless otherwise provided in the relevant prospectus, the amounts of subsequent subscriptions are unrestricted and certain exemptions from the PIF and QIF minimum subscription requirements and from the QIF net worth criteria apply for so called "knowledgeable employees”, mainly the Investment Manager and its team engaged in managing the relevant fund.

Real Estate and Real Estate related Assets

The Financial Regulator has historically considered *retail investor* real estate funds to be funds that invest in freehold or leasehold real estate and/or in securities issued by companies or other issuers whose main activity is investing in, dealing in, developing or redeveloping real estate (the latter being referred to as *Real Estate related Assets*). However, whilst that historical consideration is reflected in its rules for *retail investor* funds, the Financial Regulator is well aware that common law models of ownership are not applicable in many other jurisdictions and, as a result, the definition of what constitutes "real estate" in the context of retail schemes is open to negotiation with the Financial Regulator.

For *professional investor* and *qualifying investor* funds no such concepts apply but there are limits imposed in the case of a professional investor fund's investment in development land i.e. vacant properties, greenfield and brownfield sites [Note that the Financial Regulator does not consider newly acquired properties which are capable of occupation or under refurbishment to be vacant or under development].

Where a fund seeks to invest in other funds, there are specific rules dealing with the nature of the underlying funds and the maximum exposure that can be taken to any one individual fund. Again, there is more flexibility for PIFs and QIFs than for retail investor funds.

Investment Restrictions for Qualifying Investor Real Estate Funds

As a general rule there are very few investment restrictions for QIFs, there are no limits on borrowing or leverage, the Financial Regulator allows significant flexibility in terms of investment mechanics – use of SPVs, conduits, joint venture, co-investment arrangements etc – as well as permitted real estate and Real Estate related Asset exposures within a QIF.

QIFs will be subject to the following investment restrictions in respect of its investments in real estate or Real Estate related Assets:

- before real estate is acquired for the fund it must be valued. The valuation report must confirm that if the real estate was acquired for the fund it could be disposed of at that valuation within a reasonable period. The real estate must be acquired within six months from the date of the report and at a price which is within 10 per cent of the valuation price;

- there is no restriction on investment in any single piece of real estate [Note however that a QIF investment company has a statutory obligation to spread risk investment risk. It is up to the Board of Directors of the QIF investment company to determine appropriate risk spreading policies];

- there are no restrictions on the amount of cash or short term securities which can be held by the fund when the purpose of such holdings is to meet redemption requirements or where this is otherwise reasonably necessary;

- up to 100 per cent of NAV may be invested in real estate that is vacant, in the process of development or requiring development;

- exposure to any one non-wholly owned SPV, conduit or joint venture is limited to 50 per cent. of NAV;

As noted, borrowing and leverage is not subject to regulatory limit. It is a matter of prospectus disclosure only.

Investment Restrictions for Professional Investor Real Estate Funds

The Financial Regulator states that PIFs will be subject to same investment restrictions as retail investor schemes (see below) save to the extent that those restrictions are disapplied on a case-by-case basis. However, a good rule of thumb is that normally a doubling of the retail investor rules will apply.

Real estate can be acquired within six months from the date of the valuation report at a price which is within 10 per cent. of the valuation price and borrowings for a PIF are normally permitted in the 50 per cent. to 100 per cent. of net assets range.

Investment Restrictions for Retail Investor Real Estate Funds

A retail real estate fund (i.e. minimum subscription of less than Euro 125,000) will be subject to the following investment restrictions in respect of its investments in real estate or Real Estate related Assets:

- before real estate is acquired for the fund it must be valued. The valuation report must confirm that if the real estate was acquired for the fund it could be disposed of at that valuation within a reasonable period. The real estate must be acquired within six months from the date of the report and at a price which is within 5 per cent of the valuation price;

- Real Estate related Assets must be traded in or dealt on a market which is provided for in the trust deed, articles of association or partnership agreement. However, up to 15 per cent of the fund's net assets ("NAV") may consist of Real Estate related Assets which are not traded in or dealt on such a market provided that these assets are acquired under the same conditions as for real estate above;

- no more than 20 per cent of NAV may be invested in any single piece of real estate. This restriction is effective from the date of acquisition; however, real estate whose economic viability is linked to another piece of real estate is not considered as a separate piece of real estate for this purpose. The fund may derogate from this restriction for two years following the date of its launch provided it observes the principle of risk spreading;

- there are no restrictions on the amount of cash or short term securities which can be held by the fund when the purpose of such holdings is to meet redemption requirements or where this is otherwise reasonably necessary;

- no more than 25 per cent of NAV may be invested in real estate that is vacant, in the process of development or requiring development;

- no more than 25 per cent of NAV may be invested in real estate which is subject to a mortgage (this provision does not affect the ability of a fund to secure its borrowing generally on the real estate of the fund). The amount of the outstanding mortgage on any piece of real estate must not represent more than 50 per cent of the value of that piece of real estate;

- the fund may not grant any person an option to acquire any real estate included in the fund.

The general rule for a retail fund is that borrowing may be up to 25 per cent of net assets.

Retail funds are not considered flexible given the limitations on leverage, exposure to development land and single real estate properties and investment through a special purpose vehicles (“SPVs”). Please refer to “The use of SPVs” and “The Role of the Custodian” below).

The use of SPVs

There are a variety of legal and fiscal reasons why it may be beneficial for a fund to own real estate indirectly via a wholly owned subsidiary/wholly owned SPV or multiple layers of subsidiaries/SPVs (for example due to restrictions on foreign ownership, licensing of real estate management or access to tax treaties).

The Financial Regulator introduced a principles based approach for PIFs and QIFs establishing wholly owned subsidiaries/SPVs requiring that the fund/custodian be satisfied that each subsidiary/SPV (its use, its constitutive documentation, compliance with local laws, not a fund etc) will accord with the following general principles:

- each SPV must be wholly owned by, the fund or by its wholly owned subsidiary(ies);

- the shares in each SPV must be registered in the name of the custodian;

- the underlying assets must be registered in the name of the custodian or in the name of the fund or it's SPV. The custodian must be appointed as custodian to each SPV and must be in a position to demonstrate to the FR that it has sufficient controls in relation to each layer of the SPV structure;

- the prospectus must clearly disclose the intention to establish SPVs and the periodic reports must include information (i.e. name and where established) on SPVs in existence on the reporting date;

- the majority of directors appointed to the board of the SPV must be directors of the fund (subject to further discussion with the FR); and

- the assets of each SPV must be valued by the fund or its delegate.

It is important to note that the above principles are general principles and will not be rigidly applied if it is possible to demonstrate that there is a good reason for not doing so. The Financial Regulator has permitted derogations to some of these principles where, for example, imposing them had the potential to impact on the substance of a foreign subsidiary.

Retail real estate funds must seek prior approval for the establishment of subsidiaries/SPVs.

Authorisation Process

The authorisation process for Irish regulated funds has two main elements – the authorisation process for the fund itself and the authorisation process for its promoter and service providers.

Fund Authorisation Process

For retail funds and for PIFs the fund documentation (prospectus, constitutive documentation, asset management / administration / custody agreements and certain ancillary documentation) must to be submitted for prior consideration by the Financial Regulator and must go through a process of addressing Financial Regulator comments on the documentation, leading to a final set of negotiated documentation with the Financial Regulator and then filing for formal approval. This process generally takes six weeks from filing (assuming promoter approval has already obtained).

In the case of QIFs, however, the position is radically different. There is no prior filing with or review by the Financial Regulator. Instead, there is a self certification regime (certification has to be given by the board of the fund / management company and by the Irish legal advisers). Once those certifications can be given, the fund documentation is simply negotiated between the promoter, the legal advisers and the other service providers and then executed and filed with the Financial Regulator. Once the documentation is filed by 3 p.m. on the day prior to the date for which authorisation is sought, the fund will be authorised on the requested date without a prior review. A ‘spot check’ post authorisation review may then take place.

If any specific derogations from the Financial Regulator’s requirements for qualifying investor funds are being sought for the particular product these have to be cleared in advance. In other words this is very much *a fast track process* but again assumes that promoter approval has been obtained.

Promoter and Service Providers Authorisation Process

For all Irish regulated funds, the principal service providers to the fund must be approved in advance. This requirement applies to each of the promoter, the management company (if any), the directors, the investment manager and the Irish administrator and custodian.

Promoter : The Financial Regulator regards the promoter of a fund as being the driving force behind the product. Promoters of an Irish regulated fund must submit an application seeking the Financial Regulator’s approval to promote the fund which application must include, inter alia, details of shareholders, latest audited accounts and details of overseas regulatory status. The Financial Regulator must be satisfied as to the promoter’s expertise, integrity and adequacy of financial resources (the promoter must have minimum shareholder’s funds of €635,000).

The Financial Regulator will carry out a due diligence process including contacting the promoter's regulator in its home jurisdiction, asking the service providers to confirm their due diligence checks, etc. in order to ensure that the promoter is sufficiently reputable and experienced.

The Financial Regulator has indicated that it will consider applications from unregulated entities wishing to act as promoters of regulated Irish real estate fund vehicles, where the applicant can demonstrate appropriate expertise and subject to a review by the Financial Regulator of the applicant's fitness and probity.

Management Company (Unit Trust/CCF only) : Where an Irish management company is established (required for unit trusts and common contractual funds), the Financial Regulator must be satisfied as to the competence and probity of its management, that it has sufficient financial resources at its disposal to enable it to conduct its business effectively and meet its liabilities, that it will be in a position to comply with any conditions imposed by the Financial Regulator and that the effective control over its affairs and of the trustee or custodian will be exercised independently of one another. A minimum of two directors of the management company must be Irish resident.

A management company must have a minimum paid-up share capital equivalent to €125,000 or one-quarter of its proceeding years fixed overheads, whichever is the greater. The minimum capital requirement must be held as eligible assets in a form that is easily accessible and must be free from any liens or charges. A management company that is a member of a group must maintain its minimum capital requirements outside of the group and must be in a position to demonstrate its ongoing compliance with this requirement.

Adequate information on the expertise and the reputation of the proposed directors and managers of the management company must be provided, the name of the company secretary and of the shareholders must be furnished with audited accounts, overseas regulatory status identified (if any) and appointments to the office of director of the management company must be approved by the Financial Regulator. The management company is also required to consult the Financial Regulator before engaging in significant new activities and is not permitted to manage funds not regulated by the Financial Regulator. Approval from the Financial Regulator is required in respect of any proposed change in ownership or in significant shareholdings (10 per cent or more in the management company).

Directors : The Directors of the fund/management company are required to meet certain standards of competence and probity which requires them to submit a detailed questionnaire to the Financial Regulator seeking prior approval for that appointment.

Investment Manager : Irish regulated funds must have an investment manager responsible for discretionary portfolio management. Such entities must be regulated entities in their home jurisdiction under MiFID or equivalent (i.e. regulated by the US SEC, Hong Kong SFC etc). If incorporated in Ireland, they are likely to have to be regulated under Irish MiFID Regulations (however, see discussion on MiFID below).

The Financial Regulator may accept unregulated entities, where the applicant can demonstrate appropriate expertise, fitness and probity.

Administrator/Trustee/Custodian : It is a requirement for all Irish investment funds that they have an Irish based Administrator and an Irish based Custodian/Trustee. The Administrator is responsible, in summary, for the calculation of NAV, the maintenance of the accounting books and records, the maintenance of the share register etc. and the Custodian/Trustee is responsible for safekeeping of the assets and for certain fiduciary/trustee type functions.

Before submitting a promoter approval documentation, one needs to have agreed with an Irish Administrator/Custodian/Trustee that they will act for a product. They will therefore want to see in detail what the product is, how it is structured, what it is investing in, how and when it will be valued, where it is investing and what liquidity it is providing etc.

Independent Valuers : Irish regulated real estate funds must appoint a qualified independent valuer or valuers (normally chartered surveyors or other qualified entities) who will value the fund's properties at market value at least twice per year (and more frequently if market conditions warrant it). One of these two valuations must be a physical valuation; the second can be a desktop valuation. The fund's offering document will generally disclose the basis for the appointment of independent valuer(s) – the identity of independent valuer(s) may be disclosed in the fund's annual financial statements.

Real Estate Managers: The investment manager may appoint a local real estate management company to manage ongoing maintenance, secure tenants, manage rent collection etc. As non-discretionary agents of the investment manager, the fund's offering document will generally disclose the basis for the appointment of any appointed real estate manager and disclose it's identity in the fund's annual financial statements.

Liquidity Options

Regulated real estate funds can be structured as open-ended, open-ended with limited liquidity, limited liquidity or closed-ended schemes. One would expect, however, that most real estate funds would be established as limited liquidity funds or as closed-ended funds due to the long term nature of an investment in real estate and the lead time in bringing sales of real estate assets to completion.

For highly diversified funds or funds of funds, open-ended with limited liquidity may be considered.

Open-Ended / Open-Ended with Limited Liquidity

In summary, an open-ended scheme is one which provides redemption facilities for investors (at their request) on at least a quarterly basis. Open-ended with limited liquidity is one which provides redemption facilities at least annually.

Limited Liquidity

A limited liquidity fund is one which provides that, at some stage during the life of the fund, there will be an option for investors to request redemption.

Closed-Ended

Closed-ended funds are funds which do not provide any capacity for investors to request redemption during the life of the fund.

Closed-ended funds are required to have a finite closed-ended period provided for in the constitutional documentation. Retail schemes can have an initial closed-ended period of up to 5 years (can be raised to 10 years where there is realistic provision for liquidity in the units (bear in mind this refers to realistic provisions for liquidity so listing is unlikely to be sufficient where there is no secondary market).

There is also a provision to increase the initial closed-ended period up to 15 years for retail schemes where they provide for specific opportunities for redemption after 10 years.

Qualifying investor funds schemes can have an initial duration of up to 15 years and professional schemes up to 10 years, extending this to 15 years where they have made realistic provision for liquidity.

At the end of the closed-ended period, the fund is required to either:

- wind-up and apply for revocation of authorisation;

- redeem all outstanding units and apply for revocation of authorisation;

- convert into an open-ended scheme; or

- obtain investor approval (generally 75% of more of unitholders in favour) to extend the closed period for a further period.

Closed-ended Funds: Prospectus Directive

Closed-ended funds are subject to the Prospectus Directive unless that they can avail of an exemption (professional investor and qualifying investor schemes should generally be able to avail of an exemption provided that they do not list).

The PD (and the legislation implementing it in Ireland) applies to the drawing up and the publication of prospectuses when securities are offered to the public and/or admitted to trading on a regulated market in the EU and imposes disclosure requirements over and above those mandated by the Financial Regulator. The additional burden of compliance with the PD comes with the added benefit that a PD compliant prospectus is a harmonised document which can be used throughout the EU without further amendment.

The nature of any fund offer should be carefully assessed to see if it is one of the types of offers covered by the PD. If an offer is caught by the PD it may still be exempted from the obligation to produce a prospectus in certain circumstances including the following:

- where the offer is made to ‘qualified’ investors meeting certain criteria;

- where the offer is made to fewer than 100 natural or legal persons other than qualified investors;

- where the offer is made to investors who acquire the securities for a total consideration of at least €50,000 per investor or the denomination per unit is at least €50,000;

- where the total consideration of the offer is less than €100,000 calculated over a period of 12 months;

- where shares representing less than 10% of the number of shares of the same class are already admitted to trading on the same regulated market.

Any subsequent resale of securities to which these exemptions apply is however regarded as a separate offer and may require a prospectus unless an exemption applies.

Funds which do not provide any redemption facility (at the request of the investor) during the life of the Fund are subject to the PD (unless they can benefit from any of the exemptions listed above). This means that the PD does not apply to funds which provide even a quite limited opportunity for redemption at the request of investors.

It also needs to be borne in mind that listed closed-ended schemes may be subject to quite a number of other European Directives including the Transparency Directive, which imposes reporting obligations on a fund to disclose changes in the composition of its shareholders and the Takeover Bids Directive, which requires (among other things) that a shareholder must launch a bid for the shares of a fund if that shareholder’s holdings exceeds 30% of the issued shares of a relevant fund.

Operational Issues

As indicated above, whilst real estate funds represent only a small proportion of Irish funds those that have been established have primarily been established as QIFs.

General Features

In that context, the Irish Financial Regulator is familiar, with and has permitted:

- partly paid units/shares and drawdown mechanics whereby investors make a commitment at the outset which is then drawn down over time as investment opportunities arise. This possibility applies equally to PIF and QIF funds so that investors can meet the regulatory minimum subscription requirement by making a commitment of €125,000 or €250,000, as applicable, and in the case of a QIF, subject to the investor meeting the other qualified investor criteria;

- use of the rules of the Royal Institution of Chartered Surveyors (RICS) for valuation purposes;

- investment by way of loans (on a secured or unsecured basis) to wholly owned subsidiaries; investment by way of part equity / part loan (for example investment in a limited partnership in part by capital contribution and part by subordinated non-interest bearing loan);

- flexible investment parameters;

- use of carried interest/waterfall mechanisms;

- joint venture arrangements, co-investment arrangements;

- investor committees.

One point to note is that care needs to be taken in structuring partly paid / commitment arrangements in closed-ended investment companies as there are particular rules relating to both allotment of partly paid shares and rules which only allow redemption of fully paid shares.

Minimum Viable Size

All Irish regulated real estate funds must disclose a minimum viable size in their prospectuses which must be reached within a specified period after their launch. No real estate may be purchased or contracted until this minimum amount has been reached. In the event that the minimum viable size if not reached within the specified period, the fund must return any subscriptions received to the unit holders and apply to the Financial Regulator for revocation of its authorisation.

Valuation Frequency

All Irish regulated real estate funds must value their portfolios at market value twice yearly (and more frequently if market conditions warrant it). One of these two valuations must be a physical valuation; the second can be a desktop valuation.

Eight Year Deemed Disposal Rule

A further important point to note in the context of a fund for Irish investors is that, in the case of regulated funds, Irish tax law applies a deemed disposal for Irish tax purposes for Irish investors after eight years from date of investment. In other words, Irish investors are taxed on the basis of a deemed realisation of their investment after eight years from the date of investment even if no actual liquidity has been provided. See taxation section below for more detail.

The Role of the Custodian

Under the Irish regulatory regime, a custodian / trustee of an Irish regulated fund is responsible for the custody of all of the assets of the fund. Normally, this means that the assets of a fund must be registered in the name of the custodian / trustee or held within its custody network.

However, custodians / trustees generally do not wish to be registered as owners of real estate as that may open them to risks including liability for remedying contaminated land/ polluted waters, nuisance caused by migrating contaminants, environmental damage industrial waste, breaches of planning laws, injury/ loss suffered by members of the public entering a real estate under custody, etc.

The Financial Regulator has amended its custody rules to permit the assets of a real estate fund to be held in the name of the fund itself or in the name of an SPV provided that either a restriction or caution is placed on the title to the real estate. If this is not possible, the fund must undertake that it will not invest in real estate unless the custodian / trustee is satisfied that the real estate cannot be disposed of without its prior consent or that arrangements equivalent to registration of a restriction / caution on title are in place.

This places a significant onus on the trustee / custodian to confirm that the arrangements in place are in accordance with the requirements of the Financial Regulator and in practice means that the trustee / custodian should be involved at an early stage of the purchase of real estate so that the existence of a public register of real estate ownership interests can be verified and, if necessary, the agreement of the vendors to public registration of the interest of the trustee / custodian can be obtained before negotiation of a transaction reaches an advanced stage.

The purpose of ensuring that restrictions on transfer are entered on a public registry of real estate is to ensure that potential purchasers are put on notice that the trustee / custodian has an interest in the relevant real estate. The absence of a public registry in a particular jurisdiction will make it difficult for the custodian to demonstrate to the Financial Regulator that it can exercise control over real estate in that jurisdiction due to the fact that it may be possible for a purchaser of such real estate, without notice of the trustee's /custodian's interest may be able to enforce their title to the real estate.

The custodian / trustee will also receive all rental income received by a real estate fund but will not accept responsibility for such income until it has passed into the real estate fund's custody account.

It is worth noting that most real estate funds are established as companies due to the fact that a unit trust is not a separate legal entity and does not have the capacity to hold assets, which obliges trustees to register real estate in its own name unless the promoter of the fund and trustee agree to establish an SPV and register the real estate in the name of an SPV. The conditions for setting up an SPV are set out further above.

Taxation of Irish Regulated Collective Investment Funds

All Irish regulated funds whether they are constituted as corporate entities or unit trusts are subject to the same taxation regime so long as they are designated as Investment Undertakings under Section 739B of the Taxes Consolidation Act 1997 (as amended) (the "TCA").

Irish Direct Tax & Withholding Tax

Investment Undertakings ("funds") are not subject to Irish taxation on any income or gains they may realise from their investments. In addition, no withholding tax would arise on dividend or interest payments (from mezzanine debt) made by Irish companies to the Investment Undertaking.

In addition, there are no Irish withholding taxes in respect of a distribution of payments by funds to unitholders or any encashment, redemption, cancellation or transfer of units in respect of unitholders who are neither Irish resident nor ordinarily resident in Ireland and who have provided the fund with the appropriate relevant declaration of non-Irish residence or indeed in respect of certain categories of exempt Irish investors (e.g. approved pension schemes, charities, other investment undertakings, etc) who have also made the appropriate declaration to the fund.

When, however, a distribution is made by the fund to Irish resident unitholders (or an ordinarily Irish resident unitholder) who do not fall within any of the exempt Irish investor categories, or such a unitholder disposes of units and realises a gain, tax must be deducted by the fund at a rate of [23]% on distributions (where payments are made annually or at more frequent intervals) or [26]% on any other distribution or gain arising to the unitholder.

Taxation of Irish residents

Irish individual investors pay no further tax on distributions made to them. Irish corporates would pay additional tax (up to a rate of [25]% - assuming the investment in the regulated fund represents a passive investment for the corporate) above the [23]% already deducted (to the extent tax at 26% has been deducted then no further tax is payable by the Irish corporate).

Taxation of non-Irish residents

There would be no withholding tax on distributions made to non-residents (provided they complete a non-Irish tax resident declaration).

8 Year Rule

Ireland introduced in 2006 legislation to counteract Irish investors being able to roll-up (indefinitely) their share of the underlying income and gains of an Investment Undertaking for more than 8 years. Therefore, every time an Irish investor invests in an Investment Undertaking, an 8 year clock starts running in relation that particular investment in the fund and if that if that investment is not returned before the 8th anniversary of making (or acquiring) that investment (being shares/units) in the fund, then certain Irish investors will be taxed as if they had made a redemption or disposal (at market value) of their investment (being shares/units) in the fund and consequently will be taxed on any deemed gain at 26%. This 8 year rule does not apply to non-Irish resident investors.

Please note that if the real estate fund makes a “drawdown” from investors to make Investment A and then a further drawdown (at a later date) to make Investment B, two separate 8 year clocks run from the date of each drawdown and so if the fund is confident that each drawdown will be returned to investors within 8 years then this will not be an issue in practice.

Stamp Duty

No stamp duty is payable in Ireland on the issue, transfer, repurchase or redemption of units in a fund. Furthermore, no stamp duty is payable by the fund on the conveyance or transfer of stock or marketable securities provided that the stock or marketable securities in question have not been issued by a company registered in Ireland and provided that the conveyance or transfer does not relate to any immovable real estate situated in Ireland or any right over or interest in such real estate or to any stocks or marketable securities of a company (other than a company which is a fund) which is registered in Ireland. Where Irish securities or land is involved, Irish stamp duty will apply.

Where any subscription for or redemption of units is satisfied by the in specie transfer of securities, real estate or other types of assets, consideration should be given to whether Irish stamp duty may arise on the transfer of such assets.

VAT

There are wide ranging VAT exemptions with regard to the provision of services to funds (e.g. administration, transfer agency, investment management, custodial, etc) and to the extent that a fund suffers Irish VAT on certain services it receives (e.g. audit and legal fees) the fund may recover this VAT based on its recovery rate. The recovery rate will be based on either (i) the extent that securities of the fund are invested outside the EU or (ii) the extent that the investors in the fund are located outside the EU. The Irish Tax Authorities prefer to base the fund’s VAT recovery position by reference to where the securities of the fund are invested, rather than where the investors in the fund are located. Nevertheless, whichever basis is used, it must be applied consistently from one period to the next.

Compliance requirements

Funds have an obligation to register with the Irish Tax Authorities to obtain a tax reference number as each fund must file bi-annual tax returns with the Irish Tax Authorities. These tax returns should be accompanied by the payment of appropriate tax (if applicable) for the period in question. On the basis that there are no Irish resident or ordinarily resident unitholders (or such unitholders are exempt Irish investors) the appropriate tax should be nil.

Certain services received from abroad (e.g. the service of non-Irish lawyers or accountants) will require a fund to register and self account for VAT in Ireland. However, depending on the fund's VAT recovery rate, the fund may be able to recover some or all of this Irish VAT (although in respect of EU investments, no VAT recovery would be available).

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