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Central Bank Feedback on Exempt Unit Trusts, REITS and SPVs: Are they AIFs?

Via its March 28, 2014 Feedback Statement on CP68 [*Consultation on types of alternative investment funds under AIFMD and unit trust schemes under the Units Trusts Act 1990 (including EUTs, REITS, etc)*], the Central Bank has provided guidance as to whether EUTs, REITS and SPVs should be considered to be AIFs. That guidance is summarised below and is, we understand, to be reflected in the Central Bank's AIFMD Q&A in due course.

Exempt Unit Trusts (EUTs)

Most of the Feedback Statement is dedicated to EUTs, unit trust schemes which have traditionally been sold to a restricted investor community – pension funds and charities – which the Central Bank had until recently considered not to require regulation under the Unit Trusts Act, 1990. Although many years ago it did authorise a number of such schemes under the 1990 Act, it took the view subsequently that, because of the restricted investor base of such schemes, they did not meet a “public participation” criterion. As a result, those schemes existed outside of the Central Bank's regulatory scope, remaining as “exempt” from a Revenue Commissioners' perspective and sold only to entities which were themselves exempt undertakings. AIFMD has triggered a re-think of this position by both the Central Bank and by industry, the industry being made up of a number of quite different constituencies as the consultation process has shown.

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The issues considered by the Central Bank included whether an EUT is an AIF, whether an EUT is a unit trust for the purposes of the Unit Trusts Act, 1990 and whether EUTs which are AIFs should be treated any differently to other AIFs.

Importantly, the Central Bank analysis was, in part, influenced by the fact that under the AIFMD the marketing of AIFs to retail investors is within the Central Bank's regulatory scope irrespective of any consideration of "public participation".

In summary, the Central Bank's positions on those issues are as follows:

- (i) subject to (ii) and (iii) below, from May 1, 2014 new unit trust schemes made available to beneficiaries in Ireland should seek authorisation from the Central Bank under the Unit Trusts Act 1990 (where they are alternative investment funds under AIFMD), notwithstanding that they hold an exemption from tax obtained from the Revenue Commissioners (the basis of that exemption being that the investors in such trusts have a tax-exempt status as either pensions vehicles or charities);
- (ii) new unit trust schemes should not however seek authorisation under the Unit Trusts Act, 1990 if their eligible investors are confined to charities and/or regulated occupational pension schemes where the occupational pension scheme has multiple beneficiaries and is not a Small Self-Administered Scheme ('SSAS').

A unit trust scheme which has a tax exemption from the Revenue Commissioners, while allowing PRSAs, ARFs/AMRFs, PRBs and/or RAC schemes to invest, does not meet the requirements for this exemption and should seek authorisation in accordance with (i) above.

A unit trust scheme which is exempt from the requirement to seek an authorisation because it meets the grounds for this exemption may, nevertheless, meet the conditions for being an AIF as defined in the AIFMD. In that case, the manager (alternative investment fund manager under AIFMD) must register under the European Union (AIFM) Regulations 2013 or, if the AIFM exceeds the relevant AIFMD thresholds, seek authorisation;

- (iii) a unit trust scheme which is constitutionally (i.e. by its trust deed) confined to one ultimate beneficiary should not seek authorisation. Where there are multiple sub-trusts, the constitutional documents for the master trust and the sub-trusts must be organised so that each sub-trust can have only one beneficiary and there is no sharing of benefits between sub-trusts.

A beneficiary which is a vehicle for investment by multiple ultimate beneficiaries does not count as a single beneficiary for the purpose of calculating whether this exemption applies. Also, where an EUT could have more than one investor, but turns out only to have one, the

conditions for availing of this exemption are not met as there must be a constitutional prohibition on more than one beneficiary for this exemption to be met;

- (iv) unit trust schemes which are already in existence and which, had they come into existence after May 1, 2014, would have required authorisation under (i) above, must apply for authorisation by October 1, 2014, unless they have, in the interim, restructured to avail of one of the exemptions listed at (ii) and (iii) above;
- (v) as an exemption to (iv), unit trust schemes which are closed-ended and the AIFM of which can avail of the grandfathering arrangement set out in Regulation 60(3) of the European Union (AIFM) Regulations 2013 are recommended not to seek authorisation. For the purposes of Regulation 60(3) 'closed-ended schemes' can be read to include EUTs which have an appropriate formal plan in place in relation to their termination.

REITS and SPVs

CP 68 also invited comments in relation to other types of undertakings such as Real Estate Investment Trusts (“**REITS**”) and Special Purpose Vehicles (“**SPVs**”) as categories of undertakings which have been mentioned as possible AIF.

In reverse order, the Central Bank’s Guidance is, in summary, as follows:

Special Purpose Vehicles (Section 110 vehicles)

Reflecting what it had earlier addressed by means of its Q&A document [see ID 1065, Central Bank Q&A, Eighth Edition], the Central Bank stated that, as a transitional arrangement, entities which are either:

- (i) Registered Financial Vehicle Corporations within the meaning of Article 1(2) of the FVC Regulation (Regulation (EC) no 24/2009 of the European Central Bank); or
- (ii) Financial vehicles engaged solely in activities where economic participation is by way of debt or other corresponding instruments which do not provide ownership rights in the financial vehicle as are provided by the sale of units or shares;

do not need to seek authorisation as, or appoint, an AIFM, unless the Central Bank position changes (it will advise if that happens). The scenario referred to at (ii) above, is of great significance for Irish SPVs known as Section 110 vehicles which are most often funded by debt issuance, with only nominal equity to comply with statutory requirements.

The Central Bank has, however, left the door slightly ajar on this as, notwithstanding ID 1065 quoted above and in the Feedback Statement, it says in the Feedback Statement that “we do not

propose to issue any general conclusion on SPVs pending further consideration of the issue by ESMA”.

REITS

Although clearly a structure of some prominence – given the frequency with which the currently 2 (shortly to be 3) domestic REITS are mentioned in the press – the Central Bank feedback and guidance on REITS is found in a single paragraph near the end of the Feedback Statement and in rather circuitous language.

In essence, the Central Bank is saying that it considers REITS to be AIFs but, if a sponsor disagrees it can make its case.

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