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By Donnacha O'Connor (pictured), Partner at Dillon Eustace – ***Ireland has a well-established reputation as a leading funds centre, being home to 6,470 regulated investment funds as of December 2016 according to the Central Bank of Ireland, and as a leading fund servicing centre.***

Irish domiciled funds include ETFs, money market funds, real estate and infrastructure funds, loan and other credit funds, hedge funds, private equity, hybrid and everything in between. These funds are marketed not only within Europe but globally. Ireland's success in this area is attributable to a number of factors including its EU membership, the range of regulated funds that it offers, a zero direct tax environment for funds and low corporation tax for fund service providers.

Choosing a fund domicile is a critical decision. There can be significant differentials between jurisdictions as regards things like local regulatory requirements, tax, the range of available products, running costs and the local service provider market. The choice of jurisdiction and fund type can often enhance or stifle the marketing of the product and once a decision is made on a domicile, it can often be difficult to undo. There has tended to be a herd mentality as regards certain jurisdictions. In an era of a changing regulatory and tax environment and with changing investor trends, conventional wisdom may need to be challenged.

The impact of the Alternative Investment Fund Managers Directive on the marketing of funds in Europe is now creating a very significant impetus towards domiciling funds within the EU single market in order to maximise the manager's ability to market in

Europe. The ease by which a fund can be relocated to an EU jurisdiction, should the manager wish to do so at a later date, is another consideration that should be taken into account at the outset.

It is very difficult to find a single jurisdiction that is all things to all people and jurisdictions have their individual strengths and weaknesses. Delaware and Cayman remain home to the majority of hedge funds globally, however, it would generally be understood that the Delaware fund is essentially a domestic product. Cayman would certainly have a broader appeal globally. Delaware and the Channel Islands have traditionally been home to the majority of private equity funds, with Luxembourg and Ireland also representing a significant portion of the European market. Whatever the strategy and structure, to have a product that is broadly marketable internationally, particularly in Europe, a manager has to consider a product that will get access to the EU internal market through one of the marketing passports available under the UCITS Directive or the Alternative Investment Fund Managers Directive. The marketing of fund products in Europe outside of those marketing passports is still possible but it is constrained in some jurisdictions, impossible in others and the end of private placement of funds in Europe is probably not too far down the road. In Italy, for example, there is no facility for marketing non-EU domiciled funds locally. In Germany and the Nordics, the ability to market a non-EU product is subject to significant requirements, local approvals and a lengthy lead-in time. An EU domiciled fund, be it an Alternative Investment Fund (™AIF∫) with an Alternative Investment Fund Manager authorised under the Alternative Investment Fund Managers Directive, or a UCITS established under the UCITS Directive, effectively removes all of those marketing difficulties and opens up the European investor market to the manager.

Managers have a number of options to gain access to one of these marketing passports. It is possible to domicile an AIF or UCITS in Ireland and other EU Member States. Dealing with regulatory constraints and the ongoing running costs of such funds can discourage start-up managers from initially domiciling in Europe. It is possible to mitigate those factors but if a manager nonetheless chooses to establish a fund outside of Europe, it is important to consider what happens in the future if investors begin to look for an EU regulated version of the manager's non-EU fund. It is possible to establish an AIF in Ireland to invest in a non-European fund in order to get access to the AIFMD marketing passport. It is worth bearing in mind that a European domiciled AIF cannot have exposure in excess of 85% of its net asset value to a single non-European AIF. A UCITS has only a limited ability to invest in non-European funds and only then if they are deemed to be equivalent to a UCITS. A UCITS can only invest on a master-feeder basis into another UCITS.

Re-domiciling a non-European fund to certain European jurisdictions as a UCITS or AIF is also an option. This operation generally requires shareholder approval and significant operational change, so it is not something undertaken lightly. If the manager chooses to go down this route it is generally for long term strategic marketing reasons rather than as a response to a single investor demand. The ideal scenario is that the re-domiciliation can be undertaken by way of migration or continuation rather than having to undertake a share for share or asset for share swap. A migration involves the fund moving its corporate seat but the fund itself remains in place and there is no asset or share transfer.

There are two principal reasons why this is optimal: the first is that a re-domiciliation by way of a share for share or asset for share swap is likely to be considered a disposal for tax purposes in the hands of many investors. When considering whether to relocate a fund, the manager's objectives often include avoiding this "mark-to-market" event for the fund's investors. In the case of a re-domiciliation by way of migration this mark-to-market event can generally be avoided.

Secondly there is the question of whether the manager can continue to market the original fund's track record. In the case of a re-domiciliation by way of a share for share or asset for share swap, the manager may find it difficult to continue to do so. If it can be presented to investors at all, it would generally need to be presented in a way that makes it clear what portion of the performance history related to the original fund and what assumptions underlie that performance (for example, a different expense ratio, possibly an investment strategy subject to different constraints and so on).

There can be times where unforeseen, and probably unforeseeable, events can lead managers to have to move a fund to another jurisdiction. For example, Brexit will cause UK UCITS to cease to be categorised as UCITS upon the UK leaving the European Union and they will instead be categorised for regulatory purposes as non-EU AIFs. For a manager with ambitions to market such funds within the EU after Brexit, the retail investor market may well be inaccessible because the fund will no longer have access to the UCITS marketing passport.

As things stand right now, the UCITS Directive allows UK UCITS to merge with UCITS in another Member State in a manner that the UK, France and certain other EU jurisdictions would generally currently consider to be a tax neutral event, but this option to merge can be expected to cease to be available to UK UCITS once Brexit occurs.

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