

Response to CP 132 - Guidance on share class features of closed-ended QIAIFs

Overview

The Irish Funds Industry Association (“**Irish Funds**”) is the representative body for the international investment funds industry in Ireland. Our members include fund managers, fund administrators, transfer agents, depositaries, professional advisory firms and other specialist firms involved in the international fund services industry in Ireland. By enabling global investment managers to deploy capital around the world for the benefit of internationally based investors, we support saving and investing across economies.

As the Central Bank is aware, Ireland is a leading location in Europe and globally for the domiciling and administration of investment funds. The funds industry employs over 16,000 professionals across 12 counties in Ireland¹, providing services to 7,864 Irish regulated investment funds with net assets of over EUR 3 trillion².

We welcome the publication by the Central Bank of Ireland (“**Central Bank**”) of CP 132 with proposed guidance on share class features of closed-ended QIAIFs. We agree that guidance would be welcome in this area in order to provide clarity on the application of the Central Bank’s AIF Rulebook to funds in scope of the proposals and generally agree with the proposals set out. We wish to note that we are responding to this consultation solely in the context of the Central Bank’s proposals relating to closed-ended QIAIFs. There are further proposals that we would like to make in relation to the AIF Rulebook. However, since these proposals are beyond the remit of this consultation, we intend to include those proposals as part of the Central Bank’s pending consultation on the transition of the AIF Rulebook to AIF Regulations.

¹ Source: Economic Impact of the Funds Industry on the Irish Economy, Indecon, 2019.

² Source: Central Bank of Ireland, November 2020.

1 Do you have views on the Central Bank’s approach to limit the availability of these features to certain types of CE QIAIFs?

We broadly agree with the Central Bank’s proposals set out in CP132 (the “**Guidance**”) and the features described are typically relevant, and specific to, CE QIAIFs that invest in illiquid assets. However, there are some features relating to funds beyond CE QIAIFs which have been permitted in the past by the Central Bank which we would want to ensure are preserved. For example, incentive allocations via management participation are not used solely by CE QIAIFs and have been permitted by the Central Bank for certain open-ended and limited liquidity QIAIFs. Similarly, Part I Section 1, sub-paragraph v(2) of the AIF Rulebook (relating to share classes) permits a Qualifying Investor AIF to allocate assets (including, without limitation, financial derivative instruments) to individual share classes, subject to complying with certain additional requirements. It would be important to ensure that applying the draft Guidance (or certain parts thereof) in respect of closed-ended QIAIFs which invest in certain types of assets only does not lead to an interpretation that such arrangements are not available for use in open-ended/limited liquidity QIAIFs or in closed-ended funds not investing specifically in the asset types referenced in the Guidance (see further detail at point 2 below). We would accordingly welcome a clarification that while the features described are limited to CE QIAIFs, existing features currently permissible under the AIF Rulebook for open-ended and/or open-ended with limited liquidity QIAIFs shall remain in force.

Furthermore, we would want to ensure that features previously approved by the Central Bank in the context of funds employing commitment/drawdown subscriptions mechanisms and multiple closes, such as equalisation payments (including interest payments) being made by subsequent investors to initial investors, continue to be permitted. This is mentioned further in point 2 below.

2 Are there other aspects or requirements of the Central Bank AIF Rulebook that require clarification or consideration in operationalising these arrangements?

Again, we broadly welcome the proposals as appropriate from a conceptual perspective in permitting differentiated participation. We would suggest some clarification in relation to the below points:

- One point which has been raised by a number of industry participants is clarification around the scope of the Guidance. It is industry’s understanding that the Guidance applies to any CE QIAIF that invests in illiquid assets and this is evident from the wording set out on page 5 of the Guidance under “Scope”. However, in certain sections throughout the Guidance, there are references to certain strategies only: for example, in “Scope” on page 3, there is a reference to private equity, venture capital and real estate strategies. Page 5 of the Guidance under the heading “Scope” makes it clear that the scope of the Guidance is in respect of any CE QIAIF that invests in illiquid assets but there is also a reference to “private equity”. Finally, the final line of Section 7(a) of the Guidance refers to “...*(as is the case in private equity AIFs).*” Many CE QIAIFs which need to employ the features set out in the Guidance might employ other

real asset strategies such as infrastructure, private credit or sustainable investment. We think it would be helpful to remove reference to specific strategies so that it is clear that the Guidance would apply to any CE QIAIF that invests in illiquid assets (as per the “Scope” on page 5 of the Guidance).

- We also note that the capital accounting methodology is recognised in connection with these concepts. However, the proposals relate to share classes and refer exclusively to share classes throughout. We would suggest clarifying the wording to ensure that both unitised and non-unitised structures are expressly provided for under the guidance. Investment Limited Partnerships (“**ILPs**”) will have “partners” rather than “shareholders” or “unitholders” and typically use capital accounts, as opposed to share classes. We therefore suggest amending the text throughout to refer to “share classes or capital accounts” and to refer to “investors” more generally, which will cover shareholders, unitholders and partners. In a similar vein, we would also suggest replacing references to the “prospectus” with “offering document” in order to also cover other types of offering documents such as private placement memoranda.
- We welcome recognition of the practice of multiple closings under “stage investing”. However, as noted above, structures such as ILPs will rarely use share classes and so it would be unusual to have to issue a new class at each subsequent closing for a limited partnership. Furthermore, market practice in partnership structures would typically involve an equalisation mechanism and charging an interest rate charge to new limited partners that invest at subsequent closings in order to reimburse limited partners that were admitted at earlier closings. This process means that the position of each investor is equalised as if they were all admitted at the first closing, thus making each investor whole again. This is currently permitted by the Central Bank for funds that employ commitment/drawdown mechanisms and which have multiple closings so we would want to ensure that while the flexibility to have new classes/interests issued through stage investing is welcomed, CE QIAIFs will still have the ability to equalise investors under the more traditional method.

3 Are the safeguards proposed sufficient? Are there other features which may be desirable or of benefit from an investor protection perspective?

We are supportive of the proposed framework and the safeguards for investors contained therein, as they reflect the safeguards which industry discussed with the Central Bank during the detailed consultation on proposed amendments to the AIF Rulebook to reflect private fund features. Therefore, we believe the safeguards set out in the Guidance, together with the other applicable provisions of the AIF Rulebook and the AIFMD framework are sufficient to ensure an appropriate level of investor protection for professional investors.

We note that in particular, the Central Bank has specified a number of conditions around differentiated participation, including:

- Express provision for differentiated participation in the constitutional documents and disclosure to investors prior to investment
- Express provision for differentiated participation in the offering document
- Ensuring that the investor's interest is always proportionate to the amount they have paid in
- Appropriate recordkeeping on a per-investor basis to identify commitments paid and commitments outstanding in respect of each investor
- Use of a capital accounting methodology consistent with the requirements of Commission Delegated Regulation (EU) 231/2013

We note that in respect of excuse / exclude provisions:

- These must be pre-determined and documented
- A formal legal opinion must be furnished by an investor seeking to invoke such a provision
- There must be consideration and documentation by the board of the exercising of such a provision by an investor

We would also note the additional investor protection provided in this regard under Article 23(1)(j) of the AIFMD:

“A description of how the AIFM ensures a fair treatment of investors and, whenever an investor obtains preferential treatment or the right to obtain preferential treatment, a description of that preferential treatment, the type of investors who obtain such preferential treatment and, where relevant, their legal or economic links with the AIF or AIFM;”

In relation to stage investing, we note that again the terms of such investing must be clearly documented, and the commitments paid and commitments outstanding for each investor are accounted for using a capital accounting methodology. Fair treatment of investors must also be ensured and each investor, regardless of when the investor invested, will be made whole again under the process, as if all investors invested at the same time.

With respect to management participation, again the conditions relating to this must be disclosed in the prospectus, while priority is given to investors over management in terms of capital and return allocation, which is appropriate.

We therefore think that the protections set out are extensive and we are supportive of them as consistent with the AIFMD and market practice.

Clarifications outside the scope of the Guidance

As mentioned above, there are some further issues in relation to certain aspects of the AIF Rulebook which we would welcome raising with you. However, since these proposals are beyond the remit of this consultation, we intend to include those proposals outside the scope of the response to CP132 and instead, raise them as part of the Central Bank's pending consultation on the transition of the AIF Rulebook to AIF Regulations.