A&L Goodbody

A&L Goodbody
International Financial Services Centre
25-28 North Wall Quay, Dublin 1
D01 H104
T: +353 1 649 2000
DX: 29 Dublin | www.algoodbody.com

Dublin
Belfast
London
New York
San Francisco
Palo Alto

Date | 22 December 2020
Our ref | 01405600
Your ref |

Funds Policy
Central Bank of Ireland
fundspolicy@centralbank.ie

Consultation Paper 132: Guidance on share class features of closed-ended QIAIFs
A&L Goodbody feedback response

Overview

Thank you for the opportunity to engage with the Central Bank of Ireland (**CBI**) through this consultation paper 132 (**CP 132**) with proposed guidance (**CP 132 draft guidance**) on share class features of closed-ended QIAIFs (**CE QIAIFs**). We note and endorse the response to CP132 being submitted on behalf of industry by Irish Funds.

We saw merit in providing general observations by way of this additional response which is generally aligned with the response being submitted by Irish Funds, with some additional focus being placed on certain points set out below.

General Observations

The commentary which precedes the draft guidance (i.e. the CP 132 draft guidance in the text box) gives rise to a number of comments, as detailed in the response submitted by Irish Funds and as summarised below. We would query whether any of this text should be included with the guidance when published. We note that the CP 132 draft guidance set out in CP 132 does not repeat a number of the points made in the commentary which precedes the CP 132 draft guidance. We would agree with this approach for the reasons set out below under the heading "Commentary on text before Guidance".

Commentary on text before Guidance

The commentary before the guidance in the text box could lead to a narrow application of the proposed guidance. We would also agree with the point made in the submission from Irish Funds that it should be made clear that the guidance does not prevent QIAIFs other than CE QIAIFs availing and continuing to avail of certain of the features described in the guidance, including for example incentive allocation arrangements providing for management participation in open-ended QIAIFs, which the CBI has previously approved.

In our view, the features described in the draft proposed guidance should not be limited to:

- **CE QIAIFs**. Where appropriate, open-ended with limited liquidity QIAIFs should also be able to apply the features described in the guidance

- **private equity, venture capital, real estate strategies or infrastructure**. The features described in the guidance should also be available to QIAIFs investing in other types of strategies and asset classes

- CE QIAIFs which **generally do not invest in assets that must be held in custody**. Relevant QIAIFs wholly or partly investing in assets which must be held in custody should also be able to avail of these features; and

- CE QIAIFs **investing in issuers or non-listed companies in order potentially to acquire control over them**. Relevant QIAIFs which wholly or partly acquire **minority stakes** in issuers or non-listed companies, or are restricted from acquiring control of issuers or non-listed companies in which such QIAIFs invest should be able to avail of these features.

Share class features should use or include an all-encompassing term such as "categories of interests" instead of or in addition to "share classes", as this terminology would include unitised and non-unitised interests.

Share class features – the **management share class participation rules** should not be so prescriptive as to restrict the operation of standard waterfall mechanics which would prioritise return on capital and preferential returns of investors in a QIAIF but may then provide for returns of management participants which are not subordinate to all returns of other investors in a QIAIF. Clawback provisions frequently form part of these arrangements, and application of the guidance should allow clawback mechanisms to operate. These features could form part of disclosure under 7 d. i. of the CP 132 draft guidance.

CP 132 draft guidance

- Adding reference to "certain open-ended with limited liquidity QIAIFs" and removing the limitation to QIAIFs pursuing private equity type strategies or investing in illiquid assets would provide clarity that appropriately structured QIAIFs other than CE QIAIFs can utilise features described in the CP 132 draft guidance within the parameters of the guidance. i.e. "This Guidance applies only to closed-ended Qualifying Investor AIFs and certain open-ended with limited liquidity QIAIFs (relevant QIAIFs) ~~which~~ including those that generally use private equity type strategies or invest in illiquid assets."

- Reference to share classes updated to "categories of interests". There is also an opportunity to update other terminology such as "unitholder" to incorporate terminology which is also appropriate to investment limited partnerships.

- **Excuse and exclude** provisions:

  - There are some circumstances where there could be an alternative to a legal opinion that would be equally satisfactory to the CBI and the investor / QIAIF, or where requiring a legal opinion may give rise to undue costs or impracticalities that may make an investment in the QIAIF unattractive to a prospective investor. This may be particularly the case for excuse. Examples may include avoiding investment in competitors, investments that involve controversies or investments that trigger conflicts of interest such as group companies or linked entity investments. Disapplication of the requirement for the investor to provide a legal opinion would be subject to compliance with all other provisions of 7 b. of the CP 132 draft guidance. This would avoid unnecessary cost to an investor or the QIAIF in a situation where it is in the best interests of the investor or the QIAIF that the investor in question be excused or excluded. It may also be seen as facilitating an increase in the capital base of the QIAIF by assisting to avoid a situation where an investor may otherwise decide not to invest at all because of the cost, difficulty and perceived non-benefit in the investor or the QIAIF being required to obtain legal opinions in all such circumstances. We suggest the addition of the words after "a formal legal opinion" in 7 b ii "a formal legal opinion or other evidence where a legal opinion is not practical or obtainable must be provided…."

- it is difficult to see on what grounds the board of the CE QIAIF or AIFM can accept or disagree with a formal legal opinion where that is in fact obtained, or how the directors could enforce participation in a QIAIF when the investor has provided a legal opinion that it cannot do so. Would the directors need to source a legal opinion to the contrary? We suggest that 7 b iii is deleted or confined to the board formally documenting the reasons given in the legal opinion or other appropriate evidence.

Yours faithfully

A&L Goodbody

A&L Goodbody

M-53000863-1