

# ARTHUR COX

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**BY EMAIL**

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**Re: Consultation Paper 60 – Consultation on implementation of Alternative Investment Fund Managers Directive (“AIFMD”) (“CP 60”)**

Dear Sir/Madam,

We welcome the opportunity to respond to CP 60 issued by the Central Bank on 30 October 2012.

We note that the Irish Funds Industry Association has responded to CP 60 (the “IFIA Response”). We have contributed to this response but wanted to highlight the following matters:

1. The Central Bank notes that AIFMs falling below the thresholds specified in AIFMD are subject to registration requirements only. We note the proposal that retail alternative investment funds (“RIAIFs”) and qualifying investor alternative investment funds (“QIAIFs”) under management by such AIFMs be subject to all AIFMD requirements as they are authorised investment funds. We have significant concerns with this approach and ask that it be re-considered. Two categories of AIFMs in particular are prejudiced by this.
  - 1.1 Firstly, sub-threshold AIFMs will be disadvantaged by this proposal. AIFMD seeks to regulate AIFMs and not the products themselves, which is what the Central Bank is seeking to do in this instance and thereby negating the exemption provided for in AIFMD. The reason for the exemption is not to impose undue costs and administrative burdens on small AIFMs which are not considered to contribute to the systemic risk of the financial markets. To take the approach suggested is to ignore the nature, scale and complexity of such AIFs and AIFMs. It is also to impose obligations under AIFMD which are intended to regulate managers and to impose them instead on the AIFs.

Eugene McCague, Donogh Crowley, John S Walsh, Michael Meghen, William Johnston, Nicholas G Moore, Declan Hayes, David O'Donohoe, Colm Duggan, Carl O'Sullivan, Isabel Foley, John Meade, Conor McDonnell, Patrick McGovern, Grainne Hennessy, Séamus Given, Colin Byrne, Caroline Devlin, Ciarán Bolger, Gregory Glynn, David Foley, Stephen Hegarty, Declan Drislane, Sarah Cunniff, Kathleen Garrett, Pádraig Ó Riordáin, Elizabeth Bothwell, William Day, Andrew Lenny, John Menton, Patrick O'Brien, Orla O'Connor, Brian O'Gorman, Mark Saunders, Mark Barr, John Matson, Deborah Spence, Kevin Murphy, Cormac Kissane, Raymond Hurley, Kevin Langford, Eve Mulconry, Philip Smith, Kenneth Egan, Bryan J Strahan, Conor Hurley, Alex McLean, Glenn Butt, Níav O'Higgins, Fintan Clancy, Rob Corbet, Rachel Farrell, Siobhán Hayes, Pearse Ryan, Ultan Shannon, Dr Thomas B Courtney, Orla Keane, Aaron Boyle, Rachel Hussey, Colin Kavanagh, Kevin Lynch, Garrett Monaghan, Geoff Moore, Fiona McKeever, Chris McLaughlin, Maura McLaughlin, Joanelle O'Cleirigh, Paul Robinson, Richard Willis, Tim Kinney, Deirdre Barrett, Cian Beecher, Ailish Finnerty, Louise Gallagher, Conor O'Dwyer, Jenny Fisher, Robert Cain, Brendan Cooney, Connor Manning, Gary McSharry, Keith Smith, John Donald, Dara Harrington, David Molloy, Stephen Ranalow, Roland Shaw, Jonathan Sheehan, Brendan Slattery, Gavin Woods, Simon Hannigan, Claire McGrade, Colin Monaghan, Susan O'Reilly, Niamh Quinn, Colin Rooney.

Consultants: James O'Dwyer, Daniel E O'Connor, John V O'Dwyer, John Glackin, Dr Mary Redmond, Dr Yvonne Scannell, Dr Robert Clark

1.2 Secondly, AIFMs who cannot become “Full AIFMs” for regulatory reasons, e.g., U.S. managers awaiting a delegated act under Article 37 or the switching on of the passport, will be affected by this approach. If these AIFMs have to adopt the Full AIFM provisions set out in Chapter 2, Part III rather than rely on the existing private placement regime envisaged under AIFMD, again this imposes additional requirements not envisaged by AIFMD on the product (i.e., the AIF).

If AIFMD had not been enacted at an EU level, we would question whether there would have been any reason to impose this additional level of product regulation on Irish AIFs?

2. Chapter 4 of the AIF Handbook expands upon the existing management company requirements set out in Non-UCITS Notice NU 5 to a significant degree. Significant additional operating conditions and organisational requirements, drawn from the UCITS IV management company / AIF Handbook Chapter 3 requirements are proposed for those AIF management companies which are not themselves AIFMs. Given that the AIFM of the AIF(s) managed by the AIF management company will itself be subject to the extensive corporate governance, organisational, operating and risk requirements set out in Chapter 3 of the AIF Handbook, it is unnecessarily onerous and duplicative to impose the additional operating conditions and organisation requirements on this category of AIF management companies. Ultimately, this will result in increased costs for investors in the AIFs without any obvious benefit accruing to them. It should be sufficient that the AIFM in the structure is subject to requirements of this nature.
3. We note that the Central Bank is not proposing to change the existing limit of 50% on a QIAIF investing in a single unregulated investment fund. We would urge the Central Bank to consider the detailed arguments in the IFIA Response against retaining this position. We recognise that the Central Bank has a policy concern to ensure that Irish funds are not capable of being used as regulated “wrappers” for unregulated funds. However, we believe that maintaining the current regime would go too far. We strongly urge at the very least that the 85% threshold provided for in AIFMD be adopted, and that alternative safeguards be considered in the interests of investor protection. For example, we note the very long-established and accepted practice by which the Irish Stock Exchange (“ISE”) requires control agreements to be put in place for offshore master-feeder structures which intend to list on the ISE. Such control agreements allow the listed feeder funds to contractually assume certain control over the operation of the respective master funds. We submit that this could be a balanced compromise position between properly implementing the AIFMD provisions, while still improving control and investor protection at the level of the feeder QIAIF.
4. The Central Bank has removed its requirement regarding the maximum initial duration of the closed-ended QIAIF which is welcomed. The reference to “a specified future date” in Section 3, Article i 1 (page 183) should be amended for clarity. As currently drafted, the sentence could be interpreted as requiring the constitutional documents to specify the closed-ended term of the AIF.
5. CP 60 and the AIF Handbook introduce some additional flexibility in terms of the ability to have differing treatment of share classes and other concepts that are unrelated to the transposition of AIFMD. We note the statement by the Central Bank at the industry briefing on 20 November 2012 that such changes would not be implemented until July 2013. We believe that this will be a significant bar to further product development over the first six months of 2013. To the extent that these new provisions are not contingent on the additional protections which will be introduced under AIFMD, we strongly recommend that a process be put in place by the Central Bank to allow AIFs to avail of these enhancements early in 2013.
6. We would also welcome the inclusion in the AIF Handbook of clear provisions dealing with the transition to the new AIF and AIFM regime.

- 6.1 Many managers will wish to avail, at the earliest possible opportunity, of the AIFMD passport with the marketing and branding benefits that this will bring. Accordingly, these managers will wish to avail to seek authorisation under the provisions of AIFMD with immediate effect so that they can be fully authorised and commence marketing activities with effect from 22 July 2013. Article 8(5) of the Directive provides that “competent authorities of the home member state of the AIF shall inform the applicant in writing within 3 months of the submission of a complete application, whether or not the authorisation has been granted”. At the industry briefing held on 20 November 2012, it was stated that the AIF Handbook would only take effect from 22 July 2013. We believe that it is important that Ireland is “AIFMD-ready” at the earliest possible point in time by being able to have both AIFMs and AIFs approved on 22 July 2013. Accordingly, we would like to ensure that the timeframes applied facilitate the issue of AIFM authorisation on, or as close to, 22 July 2013 as possible with certainly being given as to what date applications for authorisation will be accepted by the Central Bank. We would have thought that this date will need to be at least 3 months in advance of 22 July 2013.
- 6.2 As the Central Bank has noted, there will be a very significant amount of work to be completed by existing AIFMs (both in relation to their own structures and to require amendments to any AIF under management) before they will be in a position to comply in full with the new regime. Given the sheer volume of changes to be processed in order to comply with these requirements, we believe that the Central Bank should allow existing AIFMs and AIFs as much time as is possible within the framework of AIFMD to comply with the new regime. Article 61 of AIFMD (Transitional Provisions) provides that existing AIFMs performing activities under AIFMD prior to 22 July 2013 shall take all necessary measures to comply with national law stemming from AIFMD and submit an application for authorisation under AIFMD within one year of that date. We believe that the intent of this transitional clause is to allow all existing AIFMs and AIFs until 22 July 2014 to complete their application for authorisation and comply in full with the provisions of AIFMD. This approach is consistent with the approach taken by the Financial Services Authority in the United Kingdom in Consultation Paper CP 12/32 on Implementation of the Alternative Investment Fund Managers Directive.

Yours sincerely,

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ARTHUR COX