

Technical Guidance Ltd response to CP 68

Question for consideration: Do you believe that our brief summary on the organisation of EUTs as set out above is correct?

No, in the following respects:

- the technical reason EUTs are not subject to the Unit Trust Act 1990 is not that the investors are 'gross' investors, but that the EUT is not a 'unit trust scheme' because it is deemed to be NOT: *'made for the purpose, or having the effect, of providing facilities for the participation by the public, as beneficiaries under a trust, in profits or income arising from the acquisition, holding, management or disposal of securities or any other property whatsoever'*.
- Individuals who invested in a life assurance pension policy, which in turn invested in an EUT are NOT unit holders in the EUT; the unit holder is the life assurance company. The individual in this case legally owns the policy; the life assurance company legally owns the EUT units, as the internal allocation by the life company of EUT units to an internal unit linked fund is purely a notional exercise for the purpose of determining the value of individual policies.

Question: Do you agree with our analysis that an EUT is an AIF?

Yes.

The 'one investor' EUT sub fund argument is dubious in a case where the 'one investor' in fact represents the accumulated investments of a number of individuals.

Take for example, a typical scenario of a few years back where the promoter of the EUT (or an associated entity) identifies a particular property investment, sources borrowing, and then possibly through an associated entity, promotes that investment as a package to a wide range of individual investors. (some even advertised such EUT property funds in National Newspapers, at the time.)

Some individuals may only be able to access that investment through a life company policy, e.g. such as a retirement annuity, a PRSA, or a Buy Out Bond. Therefore these individuals invest in a particular life company pension policy which in turns invests in the EUT property fund; the only investor or maybe the sole investor in that fund is the life company, but in reality that sole investor represents the accumulated savings of a number of individuals who are directly exposed to the investment gains and losses of the EUT fund. The life company, although the 'investor' in the EUT fund, is merely acting as a conduit to pass the investment profits and losses to a group of individuals who choose to invest in that offering.

The single investor argument may also hides the situation where for administrative reasons an EUT may place each investor into an EUT sub fund of their own, but these sub funds may then be

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aggregated within the EUT into another larger sub fund, e.g. sub funds A, B and C , held by sole investors, invest in an aggregated sub fund D by holding units in that sub fund.

Do you agree that an EUT is subject to the UT Act?

Yes.

As outlined above, EUTs are not currently not subject to the Unit Trust Act 1990 because investors in EUTs are 'gross' investors (this is purely a fiscal treatment in S 735(7)(a) TCA 1997), but because the EUT was deemed NOT to be a 'unit trust scheme' under the Unit Trust Act 1990.

This may have been a reasonable assumption in 1990 when EUTs were predominantly the preserve of large defined benefit occupational pension schemes, particularly for property investment. Some investment management houses also operated such structures for the bulking of charity monies for investment purposes. So at that time, it was valid to say that investors in EUTs were not the 'public'.

However in the early to mid 2000's period, retail intermediaries (or associated trustee companies) started to establish EUTs, often as a means of offering geared pension property investment to individual pension investors such as :

- trustees of one member Small Self Administered Pension Schemes;
- ARF holders, who beneficially own the funds and assets in the ARF; ARFs were introduced in 1999.
- PRSA holders; who beneficially own the funds and assets in the PRSA; PRSAs were introduced in 2003.
- Buy Out Bond holders; who legally own the policy
- retirement annuity holders, who legally own the policy.

So EUTs were opened up to *individual* pension investors who either had direct 'gross' status themselves and hence could invest directly in the EUT themselves, e.g. ARF and PRSA holders, or could obtain that gross status by investing in the EUT through a pension policy which they legally owned.

Further wider access to EUTs also opened up at this time with the introduction in 2001 of 'gross roll up' for life assurance company non pension savings and investment business, i.e. investment returns rolled up within the life company tax free with realised policy gains being subject to exit tax on encashment/maturity.

Life companies therefore could invest ordinary non pension investor funds in an EUT on the basis that the life company was a 'gross' investor, and hence met the criteria of gross status under S731(5)(a) TCA 1997 to invest in the EUT.

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Therefore many property based EUTs would have both pension and non pension individual investors funds channelled into the EUT by life assurance companies.

EUT based property investments were often advertised in newspapers and promoted by the EUT provider (or associated company) to other retail intermediaries and their clients. Life companies also promoted such investments widely.

In many cases it was hard to distinguish between the retail intermediary who controlled the EUT and the EUT itself; in effect it was seamless.

It's very difficult to see how such 'retail' EUTs could still be said to be NOT an arrangement '*made for the purpose, or having the effect, of providing facilities for the participation by the public, as beneficiaries under a trust, in profits or income arising from the acquisition, holding, management or disposal of securities or any other property whatsoever.*'

Clearly such retail EUTs 'have the effect of' providing for the participation by the public as investors in the fund.

An argument could be made to allow the existing EUT exemption from the UT Act 1990 to continue to apply to 'wholesale' EUTs where the sole investors are registered charities and the trustees of large¹ occupational pension schemes, but capture 'retail' EUTs which provide investment facilities directly or indirectly to individuals within the UT Act 1990.

¹ e.g. with 100 or more members, or some other threshold could be defined.