

AIF Rulebook Consultation
Markets Policy Division
Central Bank of Ireland
Block D
Iveagh Court
Harcourt Road
Dublin 2

24 February 2016

Dear Sir/Madam,

Re: Consultation Paper (CP99) – Central Bank Consultation on amendments to the AIF Rulebook

Dillon Eustace welcomes the opportunity to comment on this Consultation Paper regarding amendments to the AIF Rulebook ('CP 99' or the 'Consultation Paper'). At the outset, we should state that, for the most part, Dillon Eustace welcomes the changes proposed in the Consultation Paper insofar as they propose to rectify errors in drafting of the AIF Rulebook, to avoid unintended interpretations of the current text of the AIF Rulebook and to reflect changes in legislation or industry practice. Our comments on the Consultation Paper are set out below. For avoidance of doubt, to the extent that we have no comment on a proposal set out in CP99, we have not referred to it below.

Section I – Proposed policy changes

7. Remove all references to bearer shares in the AIF Rulebook

We note the proposed deletion to paragraph 1(l)(iv) on page 122 of the AIF Rulebook (November 2015) and agree that this makes sense in light of the provisions of the Companies Act 2014. However, in order to allow those AIFs which currently have bearer shares in issues time to cancel / divest themselves of such shares, any such amendment should be drafted in such a way as to provide for the transition period of 18 months (from 1 June 2015) as set out in the Companies Act 2014 under Section 1019 (7).

In addition, we would submit that upon such deletion, the amended section would no longer be necessary and would suggest, therefore, subject to the above consideration, deleting paragraph (iv) entirely along with the associated section of the QIAIF Application Form (section 2.12.5).

8. Require AIFMs and AIF Management Companies to produce a second set of half-yearly accounts

We note that the merits or otherwise of this approach have been debated at length under the Consultation Paper 77 on the UCITS Rulebook and we do not propose rehashing these arguments again in this instance. However, suffice to say that we consider that the increased costs and compliance burden which will result from AIFMs and AIF management companies being required to produce a second set of half-yearly accounts outweigh the perceived benefit of more complete and timely information being provided to the Central Bank as the consolidated information is already provided in the full annual financial statements.

Section II – Proposed technical issues

1. Clarify which rules apply to Qualifying Investor AIF with non-EU AIFMs

We welcome the inclusion of the obligations applicable to QIAIFs which have designated non-EU AIFM authorised after July 2013 for which the proposed drafting makes sense as it reflects what is currently set out in the latest Q&A of the Central Bank dated 4 November 2015 under ID1031 which provides that all QIAIFs set up on or after 22 July, 2013 will be subject to the rules applicable to AIFs with registered AIFMs and that certainty and consolidation of the requirement in this regard is sensible.

However, what is not clear is whether this proposed amendment to the AIF Rulebook will also apply to those QIAIFs which were established prior to 22 July, 2013. As you will be aware, the above mentioned ID1031 currently provides that QIAIFs authorised before 22 July, 2013 which designate a non-EU AIFM, will be allowed to avail of the relevant transition period allowed for these funds (i.e. until the European Commission turns on the non-EU AIFM passport) provided that at all times the QIAIF can show that its management company and AIFM arrangements when considered in their entirety at least meet the standard which would have applied under the non-UCITS regime which applied in Ireland immediately prior to 22 July, 2013. Our reading of ID1031 is that those QIAIFs set up pre-22 July 2013 and designated a non-EU AIFM need only comply with the NON-UCITS Series of Notices and, for example, do not need to appoint a depositary in the same manner which a similar QIAIF authorised post 22 July 2013 would. Therefore, if this was the intention we would submit that this proposed technical change would in fact be a policy change by the Central Bank and if this is the case we would ask that an appropriate lead in time of at least 12 months be given to those QIAIFs authorised pre-22 July 2013 which have designated a Non-EU AIFM in order to allow time for those stakeholders to comply with this revised requirement from the Central Bank. The application of this transition period could be clarified in the revised AIF Rulebook or in an updated ID1031 in the Q&A.

Section III- Additional Clarifications Requested;

While the following comments and requests for amendment or clarification do not directly relate to any of the matters listed specifically in the Consultation Paper, as they relate to provisions set out in the AIF Rulebook we think this is an appropriate and opportune time to raise these issues:

1 The Need to appoint an authorised AIFM within two years of the authorisation of a QIAIF

We refer to the current requirement contained in the Central Bank's AIF Rulebook at Chapter 2 (ref-section 2.i.1) and its Q&A at ID 1057 that a QIAIF authorised on or after 22 July 2013 must have an authorised AIFM within in two years from the QIAIF's date of launch or, where there are multiple closings, the date of first closing.

We are of the view that this is a rule that should be changed for the following reasons:

Out of step with the domestic and European legislation providing for registered AIFMs

Under the Alternative Investment Fund Managers Directive (2011/61- EU) ("AIFMD") regime as implemented in Irish law by virtue of the European Union (Alternative Investment Fund Managers) Regulations 2013 ("Irish AIFM Regulations"), the concept of a registered AIFM –being internally managed or externally managed – is clearly provided for and allows such registered AIFMs to manage portfolios below certain threshold levels/with certain particular features under a less onerous regime by comparison to that which applied to a fully authorised AIFM. However, registered AIFMs – internally managed or externally managed – are unable to utilise any of the AIFMD passports but have an opt-in right so that if they do wish to use the passports they can opt in but have to switch to authorised AIFM status.

Nowhere in the AIFMD, the Commission Delegated Regulation (EU No. 231/ 2013) ("**Level 2 Regulations**") or the Irish AIFM Regulations is there an obligation imposed on a registered AIFM to convert to authorised AIFM status simply due to the passage of time. Rather, Irish QIAIFs which either have or are registered AIFMs are required by the Central Bank – under Irish funds law it seems - to convert into/appoint an authorised AIFM once a period of two years elapses after the QIAIF's first closing.

Key concern for Irish Private Equity Funds

The size or nature of the portfolio is not relevant under these requirements and, as such, it does not make sense to us why such rule is imposed, in particular, in the context of Irish QIAIF private equity funds which, as you know are often times of a such as size that they either are or have registered AIFMs and, but for this rule, would not be required to appoint an authorised AIFM.

If you take it that at a European level and via domestic legislation it has been decided to provide for a registered AIFM concept without the imposition of a time limit it is very difficult to see why the Central Bank as regulator of Irish funds has decided only to give a two year period (or to impose any time limit at all) to registered AIFMs of QIAIFs and internally managed registered AIFMs. For example, if you consider an Irish QIAIF which is launched with a 10 year closed-end period and raises money over an initial 18 month period, with its first closing after 12 months. It will begin to invest the money committed from the first closing for an investment period of a number of years, followed by a period of managing the assets and then a divestment period followed by return of capital and eventually wind up. All the investors are qualifying investors and all their commitments are made by the second closing. Those commitments are made on the basis of the prospectus which indicates that the QIAIF is an internally managed AIFM and whose fee arrangements and expenses are all predicated on the basis of the QIAIF being a registered AIFM.

What then is the logic in the Central Bank requiring that that internally managed registered AIFM (the QIAIF itself) convert to authorised AIFM status once the stated period has elapsed? That is not the basis upon which the investors made their commitment to invest. What benefit does that bring to the investors bearing in mind that that is not what they invested in? It seems to us that this rule is not consistent with what was intended by the European Commission for small private equity managers. It also fails to recognise the quite significant differences between, for example, a large open-ended hedge fund and a small closed-ended private equity fund and it also seems to run contrary to the efforts being made to develop the private equity fund industry here.

2. Cross-investment by a VCC QIAIF where the investee sub-fund itself invests in other sub-funds of the same umbrella

Regulatory Guidance

Our understanding is there a general Central Bank prohibition exists on a sub-fund (A) of an umbrella investing in another sub-fund (B) of the same umbrella where B in turn invested in a third sub-fund (C) of the same umbrella. This was true in relation to the Non UCITS Notices (and was not dis-applied for Qualifying Investor Funds (QIFs)) (paragraph 9 of Notice NU 15). In addition, the previous Central Bank Guidance Note 1/01 (March 2010), provided that QIFs set up as units trusts or CCFs (but not investment companies) could derogate from that rule (Guidance Note 1/01 page 10; 'Cross investment within umbrella schemes').

This same prohibition has been carried across by the Central Bank with respect to Retail AIFs in the AIF Rulebook November 2015 (page 47 Section 1(x) paragraph 6). However, no such equivalent prohibition is contained in AIF rulebook with respect to QIAIFs (ref- Chapter 2).

Companies Legislation

Section 1399(2) of Part 24 (which applies to QIAIFs structured as variable capital investment companies) of Companies Act 2014 permits cross-holdings in accordance with conditions imposed by the Central Bank in the following manner:

"Notwithstanding subsection (1), an umbrella fund may, for the account of any of its sub-funds, and in accordance with conditions imposed by the Central Bank pursuant to section 1396, acquire by subscription or transfer for consideration, shares of any class or classes, howsoever described, representing other sub-funds of the same umbrella fund provided that the acquisition is for a purpose otherwise than that provided for in section 1386(1)(b)(ii)"

Subsection (1) of the same section of the Companies Act 2014 which provides as follows (where the only exception to that is the foregoing):

"Shares of an investment company which have been purchased by the company shall be cancelled and the amount of the company's issued share capital shall be reduced by the amount of the consideration paid by the company for the purchase of the shares"

As such our assumption is that in practice Section 1399(1) of the Companies Act 2014 has been interpreted by the Central Bank as meaning that there cannot be another layer of investment for investment companies in its own shares and presumably for this reason the Central Bank previously allowed unit trusts and common contractual funds (CCFs) derogate from the regulatory restriction but not investment companies. That leads us to think that the prohibition may still apply to investment companies following the conversion of those investment companies from QIFs to QIAIFs notwithstanding that the QIAIF Rulebook is silent.

We would be grateful if you could please clarify the Central Bank's position in this regard.

Please do let us know if you wish to discuss further.

Yours sincerely,

Kind regards

Dillon Eustace

Dillon Eustace