The Irish Collective Asset-Management Vehicle: New opportunities

Introduction

Ireland has taken a significant step closer to paving the way for the establishment of the Irish collective asset-management vehicle (the ICAV), a new form of corporate vehicle specifically tailored for the funds industry, with the publication of the ICAV Bill on 29 July last by the Department of Finance.

The eagerly anticipated ICAV legislation is expected to be enacted and enter into force by the end of the first quarter of 2015. The Central Bank of Ireland (the Central Bank), which will act as both the authorising and regulating body for the ICAV, has indicated that it will be ready to process applications for ICAVs within two weeks of the enactment of the legislation, meaning we could see registration of the first ICAV before the end of this year.

The ICAV will sit alongside the available legal structures in Ireland for funds, being the variable capital company (VCC), the unit trust, the common contractual fund and the investment limited partnership. Notably, the ICAV Bill provides for the authorisation of ICAVs as either alternative investment funds (AIFs) under the ICAV Act (once enacted) or as undertakings for collective investment in transferable securities (UCITS) under the UCITS Regulations and so a manager's decision on the most appropriate fund structure to utilise will not be limited by their choice of legal structure.

Key benefits

In practice, the ICAV will most closely resemble the VCC. However, unlike the VCC which is governed by the Companies Acts (the collective body of legislation governing corporates in Ireland), the ICAV will benefit from being subject to a separate and distinct corporate fund regime which has been drafted specifically for use by the funds industry. As such, the ICAV will not be subject to a number of the general Irish and European company law requirements which are applicable to VCCs by virtue of their incorporation under the Companies Acts but are generally more appropriate to trading companies. The ICAV should, accordingly, represent a simpler and more cost effective choice of corporate vehicle for funds.

Additionally, and of particular interest to managers of funds targeting US investors, the ICAV will be able to elect its classification under the US 'check-the-box' taxation rules. This will allow an ICAV to be treated as a partnership for US tax purposes and so avoid certain adverse tax consequences for US taxable investors. This is in contrast to the status of the VCC which is not able to 'check-the-box' for US tax purposes. This gives rise to potential treatment as a Passive Foreign Investment Company (PFIC) for US investors which, depending on the precise status of the investor and the elections it makes, can give rise to a greater tax and administrative burden than if the fund is able to 'check-the-box'.

Establishing an ICAV

While the ICAV Bill has yet to be enacted and so is subject to further amendment, we do now have proposed high level processes for (i) registering as an ICAV, (ii) converting an existing VCC to an ICAV, (iii) migrating a fund from a prescribed jurisdiction and registering it as an ICAV by way of continuation, and (iv) merging ICAVs.

(i) Registration

As proposed under the ICAV Bill, the form of application to the Central Bank to register as an ICAV will be quite similar to the incorporation application to the Companies Registration Office for a VCC. The ICAV registration application will include the instrument of incorporation (IOI) (being the constitutional document of the ICAV) drafted in compliance with the specified requirements, none of which should be unfamiliar to fund managers of authorised VCCs.

One of the many benefits resulting from the legislature's opportunity to specifically craft a regime which draws from the experience with existing structures is that there will be no requirement to obtain prior investor approval where changes need to be made to the IOI, provided the ICAV's depositary can certify that the changes do not prejudice the interests of investors. This concept will be familiar to fund practitioners as it is borrowed from the requirements relating to changes to the trust deed of a unit trust.

The registration application will also comprise a statement of particulars providing details such as the proposed initial directors of the ICAV, the proposed secretary of the ICAV, the registered office of the ICAV and will need to be signed by the subscribers to the IOI. The Central Bank shall, once satisfied with the application received, make a registration order in respect of the ICAV and provide written notice of same to the applicant specifying the date of registration.

There is no set timing for the processing of ICAV registration applications under the ICAV Bill. It generally takes approximately ten working days to incorporate a VCC and, given the comparability of the two processes, a similar turnaround time may be anticipated for ICAV registrations. Once registered, the ICAV will be required (as is currently the case for the VCC) to apply for authorisation, either as a UCITS or an AIF, by the Central Bank in advance of commencing to trade.

(ii) Conversion

The process for converting an existing VCC into an ICAV is set out in the ICAV Bill and parallels may be drawn with the process for migrating a fund from a prescribed jurisdiction to Ireland pursuant to the relevant provisions of the Companies (Miscellaneous Provisions) Act 2009 (the Redomiciliation Legislation).

The application to convert a VCC to an ICAV is to be submitted to the Central Bank, as opposed to the Companies Registration Office which is responsible for the registration of companies redomiciling to Ireland. The application must be signed by a director and comprise the stipulated documents (which will include a director's statutory declaration and a declaration of solvency) as well as a solicitor's declaration. The statutory declaration of a director must, inter alia, include a confirmation that the conversion is permitted by and has been approved in accordance with the VCC's Memorandum & Articles of Association (M&A). Where the VCC's M&A does not already include such provision, it will be necessary to update the M&A and obtain shareholder approval in the manner prescribed under the M&A, in advance of making the application to convert, which will likely be done in tandem with the request for shareholder approval of the conversion and thus not materially impact the timing to conversion.

As with a migration under the Redomiciliation Legislation, the conversion to an ICAV is stated not to affect the identity or continuity of the VCC and so is, in effect, a conversion by way of continuation. The ICAV Bill specifies that registration as an ICAV will not impact the VCC's existing authorisation status under either Part XIII of the Companies Acts for AIFs or the UCITS Regulations and so, unlike a redomiciliation, there is no authorisation application which needs to run simultaneously to the conversion. The timing, therefore, to convert a VCC to an ICAV can be expected to be significantly shorter than to redomicile an entity to Ireland.

(iii) Migration and merger

In addition to either registering as an ICAV in the case of a new entity or converting in the case of an existing one, the ICAV Bill helpfully incorporates by reference both the Redomiciliation Legislation and the UCITS IV merger provisions which are stated to apply equally to ICAVs authorised as AIFs or UCITS. Accordingly, establishment as an ICAV should not limit access to either of these processes.

The Redomiciliation Legislation provides a mechanism for redomiciling a fund from one of the list of prescribed jurisdictions, being the Cayman Islands, BVI, Bermuda, Isle of Man, Jersey and Guernsey, to Ireland by way of continuation, thus permitting the redomiciled fund to continue its existence in Ireland whilst retaining the track record built up in its original domicile. The Asset Management & Investment Funds Unit at A&L Goodbody redomiciled the first corporate investment fund into Ireland and has advised on the redomiciliation of investment companies from several of the prescribed jurisdictions as well as advising on the effective redomiciliation of a number of unit trusts to Ireland. While the Redomiciliation Legislation was widely welcomed, its success has, to some degree, been hampered by the inability of VCCs to 'check-the-box' for US tax purposes. The ICAV provides a solution to this issue and is expected therefore, to be an attractive option for corporates redomiciling to Ireland.

Conclusion

The publication of the ICAV Bill is heralded as a significant step, not only because of the importance of providing for the establishment of a new vehicle with such key benefits, but also in light of its timing in a year during which we saw the deadline for compliance with the Alternative Investment Fund Managers Directive come and go. The publication of the ICAV Bill in such circumstances strongly signifies the government's commitment to constantly striving to enhance and develop the investment funds regime so as to reinforce Ireland's reputation as a domicile of excellence for the establishment and operation of investment funds.

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