

## COVID-19: Governance, contingency planning and risk



Focus on  
**COVID-19**  
Coronavirus

Our Assessment Management and Investment Funds team look at practical and other issues for regulated investment funds and regulated financial service providers (RFSPs) established in Ireland during the period of uncertainty brought about by the COVID-19 pandemic.

### Governance

#### COVID-19 discussions

From a governance perspective, in such unprecedented times, it is a good decision to have board engagement to discuss implications of COVID-19 for individual funds. This will allow directors to inquire about matters such as:

- is the performance of the fund being affected?
- is an adjustment to the investment strategy required?
- is the fund operating within its risk limits and can it continue to do so?
- what is the fund's potential liquidity needs in the context of redemption flows?
- are the business continuity policies of delegates operational, effective and have been or will be tested?
- will COVID-19 restrictions materially or otherwise affect the ability of any service providers to provide services?

This engagement could be by email or some may prefer a board meeting to be convened to discuss.

#### Can we hold directors' board meetings by audio or video conference?

It may not be possible for boards to meet in person because of public health travel restrictions or local restrictions on gatherings. The rules for a

regulated investment fund or RFSP on electronic meetings of directors are usually set out in their constitution. These rules may address how many directors are required to form a quorum, whether directors not physically present can be counted in a quorum and whether they can participate in passing resolutions.

A typical quorum for a board meeting is 2 directors, but it can be higher so this should be checked. Depending on what the constitution says, a fund could:

- structure its board meeting with 2 Irish directors present in person while the rest join by audio or video conference. This is an option where the quorum is no more than 2 directors
- pass written resolutions of directors. It should be borne in mind that written resolutions must generally be signed by all directors so there must be unanimous agreement among directors on the proposals
- have a board meeting where all directors participate by audio or video conference. If the constitution does not permit directors who are not present in person to form a quorum or pass resolutions the discussions at that meeting could be ratified at a future meeting that does satisfy the technical requirements.

When directors participating in the board meeting of a regulated investment fund established in Ireland are not present in Ireland at the time of the meeting, the principles of the

effective place of central management and control of that fund for tax residency purposes should be considered. This is an issue for the jurisdictions outside Ireland in which directors are located. If one or more board meetings for a fund are held by audio or video conference with no directors physically present because of state mandated travel or gathering restrictions, common sense suggests that this is an exceptional circumstance and should not give rise to scrutiny as to whether it caused the place of central management or tax residency of the fund to be somewhere else other than Ireland.

#### **What happens if a PCF becomes unable to perform his or her functions due to COVID-19 disruption?**

The Central Bank of Ireland's (the CBI's) Fitness & Probity Guidance does permit a person to perform a PCF role without being approved in advance as a PCF in truly exceptional circumstances. Under the Guidance, the CBI needs to agree to the appointment of the temporary officer in writing in advance of that person assuming the responsibility. If the CBI agrees in writing that a person may perform a PCF in a temporary capacity, the RSFP must be satisfied on reasonable grounds that the person complies with the Fitness & Probity standards, and has agreed to abide by the Fitness & Probity standards. If the function enables the person to exercise a significant influence on the conduct of the affairs of an RFSP, even for a relatively short period, it is likely that the CBI will require the firm to progress with the full PCF application process.

#### **What about AGMs?**

Funds and RFSPs should identify the date of their next AGM, if any.

Fund management companies and other RFSPs which are private limited companies may dispense with AGMs.

An ICAV may also dispense with AGMs.

A PLC cannot dispense with the requirement to hold an AGM. The rules for holding the AGM in the PLC constitution will need to be examined. If it is likely that the AGM will need to be held

while the COVID-19 period of disruption persists and shareholders have historically attended the AGM, the PLC may want to consider practical implications, such as encouraging the use of proxy services for this AGM. Contingency planning will be needed in the event shareholders do turn up in person. The AGM notice could be used to communicate relevant COVID-19 restrictions such as local restrictions on gatherings.

It would be a technical breach of the Companies Act for the PLC to hold a late AGM. The chance of action by the CBI or Office of Director of Corporate Enforcement is remote where a delay is owing to COVID-19. A PLC could explore the possibility of having an audio conference AGM so shareholders have opportunity to ask questions, even if this is not catered for in its constitution; followed by a formal AGM when COVID-19 restrictions have passed. This would demonstrate good governance if an AGM cannot be held on time.

### **Contingency planning**

#### **Business continuity planning**

Regulated investment funds and RFSPs established in Ireland are obliged to comply with conduct of business rules as a condition of their authorisation and regulation. An AIFM is required to establish, maintain and implement an adequate business continuity policy aimed at preserving essential data and functions and maintaining services and activities. A UCITS management company is also required to have a BCP.

These policies should now be reviewed. During this continued period of uncertainty, plans for COVID-19 need to be flexible while complying with regulatory requirements.

#### **Electronic signatures**

Regulated investment funds and RFSPs may want to explore the possibility of using electronic signatures. This may be particularly useful when it comes to signing audited financial statements. April is usually a busy time for this as many funds have a 31 December year-end.

## Risk

### Market disruption

COVID-19 is causing wide-ranging market and economic disruption. Regulated investment funds should assess the operational, investment and legal risk this may pose. This will include questioning if there will be a material effect on the ability of delegates or service providers to provide services. The contracts for such appointments often have force majeure clauses which may be relevant in the unlikely event that the provision of services cannot continue as a consequence of COVID-19 disruption.

### Liquidity risk

Even without the current regulatory focus on liquidity risk for investment funds, COVID-19 has the potential to be a unique stress test. Potential redemption flows and associated liquidity needs should be examined.

### Risk management policies

Regulated investment funds and their management companies are required as a matter of regulation to have substantial risk management policies and procedures in place. These policies should be considered in light of COVID-19 to assess compliance with any applicable regulatory requirements.

### Suspension of dealing

If the market and economic disruption continues to the extent that, for example, some stock markets close and it is not possible to value assets, then investment funds may have to look at the possibility of suspending dealing. A regulated investment fund established in Ireland will have a constitutional document and a prospectus outlines the circumstances in which dealing can be suspended. The constitution and prospectus also outline notifications which should be made in the event of a suspension and the manner of those notifications. Typically the CBI and investors will need to be notified. Regulated investment funds listed on a stock exchange will need to make an announcement. Regulated investment funds registered for sale in other jurisdictions will need to identify and comply with the requirements of the relevant jurisdictions about suspension of dealing.

### Disclosure risk

It is unlikely that existing offering documents such as prospectuses, UCITS KIID or PRIIPs KID will need to be updated for COVID-19 risks. It is worth noting that, under AIFMD, before an investor invests in an AIF, the AIFM should disclose a description of the types of assets in which the AIF may invest, the techniques it may employ and all associated risks and any material changes to those risks. If a new product is launched, consideration should be given whether to include specific risk factors for COVID-19.

### Regulatory communications

#### Has the CBI of Ireland issued any guidance or otherwise contacted RFSPs about COVID-19?

The CBI issued a general [press release](#) on COVID-19.

It has also contacted some RFSPs directly asking that business continuity arrangements are reviewed and expects that those RFSPs are fully satisfied with them. Any significant matters should be reported to the CBI .

On 16 March, Irish Funds contacted members to share the response from the CBI to questions asked about the CBI 's own business continuity planning and the CBI 's view on in-person board meetings. The CBI confirmed it has no rules regarding in-person voting for contractual or other arrangements.

The CBI confirmed it has business continuity plans to ensure that it can continue to work effectively to deliver on its important public interest mandate during this period, in what is an evolving situation. This includes following the advice of the health authorities closely.

#### What about ESMA?

ESMA issued recommendations to financial market participants in light of the impact of COVID-19. It covers business continuity planning, disclosure to the market of significant information, reporting on any financial impact in annual accounts and the continued application of risk management rules. ESMA also issued a decision temporarily requiring the holders of net short positions in shares traded on an EU regulated market to report positions of 0.1% and above. You can read about ESMA's recommendation and decision [here](#).

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