Fund structures: *ICAVs/ Irish Collective Asset-management Vehicles*

Irish Investment fund products can be constituted in various legal forms. A range of factors can influence the choice of legal vehicle, including tax treatment, risk spreading requirements, local market requirements and market preferences.

The structuring options include an Irish Collective Asset-management Vehicle (**ICAV**), a Variable Capital Company (**VCC**), a Unit Trust, an Investment Limited Partnership (**ILP**) and a Common Contractual Fund (**CCF**). This briefing looks at the ICAV, and is part of a series on each of the above Irish fund structuring vehicles.

What is an ICAV?

The ICAV is the current vehicle of choice for promoters establishing regulated funds in Ireland, having largely replaced the VCC since its introduction in 2015. The ICAV is a corporate vehicle that is not subject to a number of requirements under general Irish and European company law that are more appropriate to trading companies but apply to investment funds established as VCCs. It has a separate legal personality with an instrument of incorporation as its constitutional document. An ICAV must be regulated either as a UCITS fund, a retail investor alternative investment fund (**RIAIF**) or qualifying investor alternative investment fund (**QIAIF**), in each case by the Central Bank of Ireland (**Central Bank**).

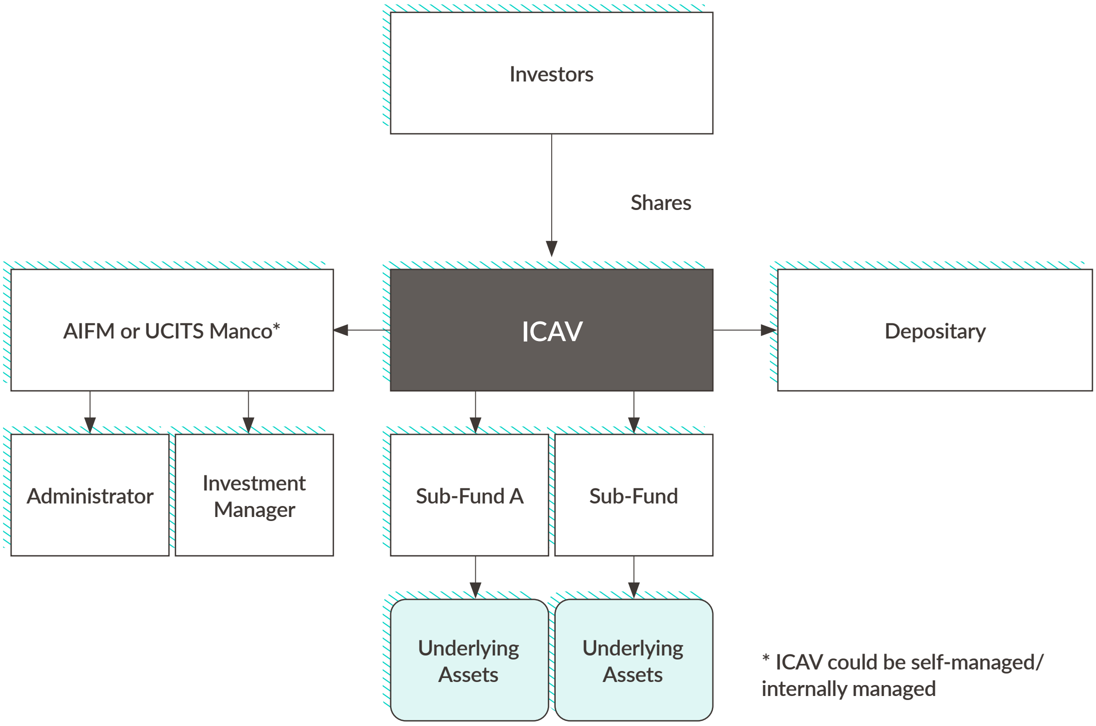
How is an ICAV created?

The Central Bank acts as the incorporating, authorising and supervisory body for the ICAV. An ICAV is created upon registration by the Central Bank following the submission of a form AR1 and draft instrument of incorporation. The form AR1 contains information about the ICAV including details of the directors, secretary and registered office.

How is an ICAV structured?

As a corporation, an ICAV is a separate legal entity, managed and controlled by its board of directors. It can enter into contracts in its own name. The ICAV's day to day management and control is carried out by a board of directors, which generally delegates many functions to service providers. The board of the ICAV may appoint a manager (as distinct from an investment manager) but is not obliged to do so. A variety of third party service providers offer this service. Alternatively a promoter may choose to appoint its own manager.

ICAV/ Irish Collective Asset-management Vehicle



* ICAV could be self-managed/ internally managed

Regulatory regimes

An ICAV may be authorised as a UCITS (in which case it must be open-ended). UCITS are subject to the UCITS regime (which includes the Central Bank of Ireland's UCITS Regulations) and the provisions of the ICAV Act 2015.

An ICAV may be authorised as an Alternative Investment Fund (**AIF**) in one of two categories:

- A RIAIF which may be marketed to retail investors.
- A QIAIF which may be marketed to Qualifying Investors.

Both RIAIFs and QIAIFs are subject to the AIFMD regime (which includes the Central Bank of Ireland's AIF Rulebook) and the provisions of the ICAV Act 2015.

Liquidity

ICAVs may be open ended or, if authorised as RIAIFs or QIAIFs, may have limited liquidity or be closed-ended.

Umbrella/ Single fund/ Segregated Liability between sub-funds

ICAVs may be single funds or umbrella funds. ICAVs established as umbrella funds have segregated liability between sub-funds.

What do investors hold?

ICAVs issue shares to investors. The shares do not represent a legal or beneficial interest in the ICAV's assets, those assets being legally held by the Depositary and beneficially by the ICAV itself. Its share capital does not have a par value but is equal to the net asset value of the ICAV at any time.

Main advantages

- The ICAV is an 'eligible entity' for US tax purposes and can file a 'check the box' election to be treated as a partnership (or a disregarded entity if a single shareholder) for US federal income tax purposes. As a result, ICAV master-feeder structures may be established to cater for different tax reporting requirements of certain categories of investors including US taxable persons, non-US investors and US tax exempt investors.
- ICAVs can be established with a single

portfolio cell or with multiple portfolio cells (called sub-funds), each following different investment policies and each having segregated liability status under Irish law so that the assets and liabilities of each sub-fund are ring-fenced.

- An ICAV can produce separate audited accounts at sub-fund level, which is of great benefit where it is preferable not to refer to the accounts and details of other sub-funds of the ICAV that may have different strategies and terms.
- A sub-fund of the ICAV may invest in one or more other sub-funds of the same ICAV, subject to certain rules preventing double-charging of management fees.
- The instrument of incorporation, being the constitution of an ICAV, may be amended without requiring investor approval where the depositary certifies that the interests of investors are not prejudiced by the amendment.
- The ICAV legislation provides straightforward procedures for the re-domiciliation by way of continuation of non-Irish corporate funds into Ireland as ICAVs, with migration into Ireland by way of continuation as an ICAV possible from the Cayman Islands, British Virgin Islands, Bermuda, Jersey and Guernsey. Under this process the existing corporate entity is retained and as such the migration should not be a taxable event for investors. Continuity of contractual arrangements and performance track record is also maintained
- The ICAV is not subject to the principle of risk spreading which facilitates single asset deals.
- An ICAV that is not a UCITS may hold property directly as an asset class.
- Many jurisdictions recognise a corporate fund structure, such as an ICAV, more readily than a contractual vehicle.
- Using a corporate fund structure, such as an ICAV, may facilitate better access to double taxation treaties.
- With its own legal personality and board of directors, an ICAV can act as the management entity without the need to set up or engage a separate management company. The obligations imposed on such entities are becoming increasingly onerous.
- Broadly, a regulated fund constituted as an ICAV is exempt from tax on its income and gains on underlying investments and instead operates an exit tax on certain chargeable events (e.g. distributions to, or disposals of shares by, its non-exempt Irish resident investors). Non-Irish tax resident investors and Irish exempt resident investors are outside the scope of the exit tax regime. To the extent the ICAV, or a sub-fund of an umbrella ICAV, is invested 25% or more in Irish real estate, consideration needs to be given to the potential application of IREF withholding tax and exemptions therefrom.
- Two of the directors of an ICAV must be Irish resident.

Points to note

The Investment Limited Partnerships (Amendment) Bill 2020 is expected to be enacted soon. It will substantially overhaul the Investment Limited Partnership Act 1994. It includes some amendments to the ICAV Act 2015. These are not significant in nature. They include:

- Supplementary provisions regarding ordinary and special resolutions (as well as written resolutions)
- A clarificatory amendment regarding the principal object clause of a UCITS ICAV
- Matters relating to the corporate powers of an ICAV
- Matters relating to powers of attorney of an ICAV
- Matters relating to intra-group transactions of an ICAV
- Further provisions relating to the use of a corporate seal by an ICAV
- Confirmation that the registration of an investment company as an ICAV does not affect the priority of charges created by that investment company

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