

# From VCC to ICAV: Procedure and Practical Considerations

The Irish Collective Asset-management Vehicles Act 2015 (the **ICAV Act**) was signed into law on 4 March 2015. We now await a commencement order to be signed by the Irish Minister for Finance, and following the commencement order issuing the Central Bank of Ireland (Central Bank) has indicated that it will be ready to process applications for Irish Collective Asset-management Vehicle within two weeks.

The ICAV Act allows for the establishment of a new Irish corporate investment fund structure (the **ICAV**) that is tailored to the needs of the global funds industry. The ICAV sits alongside the other available fund structures in Ireland, namely the variable capital company (**VCC**), the unit trust, the common contractual fund (**CCF**) and the investment limited partnership (**ILP**). The Central Bank will act as both the incorporating and authorising body for the ICAV. It should be noted that similar to the current regime for an Irish VCC, the ICAVs may be set-up as a stand-alone structure or an umbrella structure.

In this note, we have set out some of the key advantages to entities considering converting to an ICAV structure and have detailed the process involved and steps to be taken to convert to an ICAV structure.

## Advantages to converting to an ICAV

The conversion to an ICAV would offer Irish VCCs the following advantages which are not currently available to them:

1. An ICAV will be able to elect its classification under the US “check-the-box” taxation rules. This would 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 an Irish VCC which is not able to check-the-box for US tax purposes giving 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”.

The usefulness of this feature will depend on the extent to which it is envisaged that the sub-funds of the Irish VCC might be offered or marketed or otherwise made available to US taxable investors. Conversion of the Irish VCC would not otherwise affect the regulatory treatment in the US when it comes to applying US marketing rules and other regulatory requirements.

2. The ICAV has been designed specifically for use by the international funds industry. As such, and unlike an Irish VCC, many of the provisions of Irish company law and European company law which are not relevant or appropriate to an investment fund will not apply to the ICAV. For example, it will be possible for the directors of the ICAV to dispense with the requirement to hold an annual general meeting of the shareholders of the ICAV. This feature should eliminate certain compliance risks and protect the

fund from unintended consequences of future company law amendments. It should also reduce the administrative burden and costs associated with compliance with rules and regulations which are more appropriate for trading companies. It should also be easier for changes to be made to the ICAV Act should it become necessary as it will be a standalone measure.

3. It is a requirement of the current Irish company law that an Irish VCC should invest “with the aim of spreading investment risk and giving members of the company the benefit of the results of the management of its funds”. There is to be no equivalent requirement for the ICAV which would require the restructured vehicle to invest with the aim of spreading investment risk. This should facilitate product structuring for the ICAV.

The ICAV Act provides that the sole objective of an ICAV is the “collective investment of its funds in property and giving members the benefit of the results of the management of its funds”.

It should be noted that where the Irish VCC is authorised pursuant to the UCITS Regulations and given the investment restrictions applicable to a UCITS fund this feature of the ICAV will not provide any advantage.

4. It will be possible for an ICAV to publish accounts on a sub-fund by sub-fund basis. It will not be necessary for the ICAV to produce consolidated accounts which an Irish VCC is currently obliged to do. This may reduce audit costs and reduce some of the burden involved in the production of accounts.
5. The Memorandum and Articles of Association of an Irish VCC will be replaced by the instrument of incorporation of the ICAV. At present any amendment to the Memorandum and Articles of Association of an Irish VCC may only be made with the approval of a resolution of the shareholders. This can make post authorisation amendments costly and time consuming.

The ICAV Act incorporates some of the more flexible procedures applicable to unit trusts and provides that the depositary may certify in writing that an amendment to the instrument of incorporation does not prejudice the interests of the members of the ICAV. Such certification would have the effect of permitting amendments to be made without seeking a resolution of the shareholders. Where the depositary does not certify that the change does not prejudice the interests of the members of the ICAV a resolution of the shareholders/members would be required.

In order to pass a resolution to convert an Irish VCC to an ICAV shareholders a special resolution of all the shareholders in the Irish VCC will be required. This would require an EGM to be called by the Board in order for the special resolution to be passed by the shareholders.

6. Following conversion, an Irish VCC will continue to benefit from the statutory segregation of liability provisions which are to be provided for under the ICAV Act.

## Conversion from an Irish VCC to an ICAV

The process for converting an Irish VCC into an ICAV is provided for in the ICAV Act and is relatively straightforward. The procedure is based on the procedure which has been in place for some time, and which we have successfully utilised on many occasions, for the redomiciliation to Ireland of non-Irish corporate investment schemes.

On successful submission of a conversion application to the Central Bank, an Irish VCC would be deemed to be an ICAV and would continue its existence for all purposes under the ICAV Act. The ICAV Act provides that the conversion process will not have the effect of:

- (a) creating a new legal entity as the existing corporate identity of an Irish VCC would be retained;
- (b) preventing an Irish VCC from using past performance data;
- (c) prejudicing or affecting the identity or continuity of an Irish VCC as previously established and registered for the period for which it was established and registered in Ireland;
- (d) affecting any contract made, resolution passed or any other act or thing done in relation to an Irish VCC during the period that it was established and registered in Ireland;
- (e) affecting the rights, authorities, functions and liabilities or obligations of an Irish VCC or any other person, or
- (f) rendering defective any legal proceedings by or against an Irish VCC.

## Procedural Steps to be taken:

Prior to making an application to convert to an ICAV structure the memorandum and articles of association of the Irish VCC should be reviewed. The ICAV Act provides that a conversion to an ICAV structure is only permitted where the memorandum and articles of association of the Irish VCC permit. Where the memorandum and articles of association of the Irish VCC do not provide for the reconstruction, amalgamation, merger or division of the Irish VCC, a special resolution will be required to be obtained at an extraordinary general meeting of the Irish VCC to make the necessary amendments to the articles of association.

It should be noted that a special resolution of the shareholders in the Irish VCC would be required to approve the conversion of the Irish VCC to an ICAV.

In order to convert to an ICAV an Irish VCC will be obliged to undertake a number of procedural steps. We have outlined below a list of the documents which must form part of the conversion application which is made to the Central Bank.

The following documents must be filed with the Central Bank on making the application to convert to an ICAV structure:

- a copy of the Irish VCC's certificate of incorporation together with a certified copy of the Irish VCC's memorandum and articles of association;
- the proposed instrument of incorporation of the Irish VCC on conversion to an ICAV;
- a list setting out particulars in relation to the registered office, directors and secretary of the Irish VCC's;
- A statutory declaration of a director of the Irish VCC, made not more than 28 days before the date on which the application is made, to the effect that:

- the Irish VCC is, as of the date of the declaration, established and registered in Ireland, no petition or other similar proceeding to wind up or liquidate the migrating body has been notified to it and remains outstanding in any place, and no order has been notified to the Irish VCC or resolution adopted to wind up or liquidate the migrating body in any place;
- the appointment of a receiver, liquidator or other similar person has not been notified to the Irish VCC and, at the date of the declaration, no such person is acting in that capacity in any place with respect to the Irish VCC or its property or any part of its property;
- the Irish VCC is not, at the date of the declaration, operating or carrying on business under any scheme, order, compromise or other similar arrangement entered into or made by the migrating body with creditors in any place;
- at the date of the declaration the Irish VCC has served notice of the proposed registration on the creditors of the migrating body,
- any consent or approval to the proposed registration in Ireland required by any contract entered into or undertaking given by the migrating body has been obtained or waived, and
- the registration is permitted by and has been approved in accordance with the memorandum and articles of the Memorandum and Articles of Association of the Irish VCC.

- a declaration of solvency, similar to the form of declaration made on a migration, and stating that the director making the declaration has made a full inquiry into the affairs of the Irish VCC and has formed the opinion that the Irish VCC is able to pay its debts as they fall due, and accompanied by a report of an independent auditor;
- a schedule of any charges or security interests created or granted by the Irish VCC that would, if such charges or security interests had been created or granted by an ICAV, have been registerable;
- notification of the proposed name of the Irish VCC if different from its existing name (other than where the only change is to delete the words "public limited company" or "plc" from the existing name, to be replaced by "Irish Collective Asset-management Vehicle" or "ICAV"); and
- a statutory declaration of a director or solicitor confirming that the above requirements have been met.

The Central Bank is required as soon as practicable after receipt of the application to publish details of it in the Irish Official Gazette. Where the Central Bank is satisfied that the conversion application complies with the requirements of the ICAV Act, the Central Bank is required to issue a registration order in respect of the re-registration of the Irish VCC as an ICAV and to enter into a register details of charges and securities interests of the ICAV. The Central Bank has stated that it will issue a Registration Order for a new ICAV within two weeks from the date of receipt by the Central Bank of a complete application for registration. The Irish VCC, though now in the form of an ICAV, shall continue its existence for all purposes under the ICAV Act.

The Irish VCC is obliged thereafter to apply to be de-registered in the Companies Registration Office with effect from the date of its registration as an ICAV. An announcement should also be made to the Irish Stock Exchange in respect of the change.

## What is the effect of conversion?

From the date of registration, the Irish VCC is deemed to be an ICAV formed and registered under the ICAV Act and the provisions of the ICAV Act will apply to it.

As the conversion to an ICAV is stated not to affect the identity or continuity of the entity, it is, effectively, a conversion by way of continuation. The ICAV Act specifies that registration as an ICAV will not impact the Irish VCC's existing authorisation status under the UCITS Regulations or AIFM Regulations.

As noted above, the past performance track records of the Irish VCC and its sub-funds can continue to be used in the key investor information documents and marketing materials following the successful conversion to an ICAV.

As there will be no change in legal entity, the conversion should not be a chargeable event for tax purposes for existing shareholders and should not require any re-registration of the assets of the Irish VCC.

## Conclusion

The introduction of the ICAV provides an additional option for those contemplating existing ranges of Irish investment fund vehicles. The introduction of the ICAV will not affect existing Irish Investment Companies that do not wish to convert to an ICAV structure.

Due to the significant benefits offered by the ICAV structure it may be prudent to consider the potential to convert an Irish VCC to an ICAV structure.

## KEY CONTACTS



**Brian McDermott**  
*Partner and Head of Asset  
Management & Investment Funds*  
+353 1 649 2307  
bmcdermott@algoodbody.com



**Michael Barr**  
*Partner*  
+353 1 649 2327  
mbarr@algoodbody.com



**Stephen Carson**  
*Partner*  
+44 20 7382 0820  
scarson@algoodbody.com



**Mary McKenna**  
*Partner*  
+353 1 649 2344  
mmckenna@algoodbody.com



**Nollaig Greene**  
*Knowledge Lawyer*  
+353 1 649 2359  
ngreene@algoodbody.com

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