

Irish Companies Act 2014 – Investment Funds Q&A

This Q&A sets out questions relevant to investment funds and to fund management companies likely to arise in connection with the Irish Companies Act 2014 and a summary response to those questions. It is not a mechanism for assessing full compliance with legal or regulatory requirements and each fund and fund management company will need to examine its own structure and documentation to identify how the Companies Act 2014 (the Act) may apply. Please contact a member of the A&L Goodbody Asset Management & Investment Funds team for legal advice appropriate to your specific circumstances.

UCITS and AIFs established as a Part XIII Investment Company / ICAV

Q1: I am an Irish UCITS or AIF established as an investment company (a VCC) or an ICAV or I am a UCITS ManCo / AIFM managing a VCC or an ICAV. Does the Act have any impact on the VCC or the ICAV?

A1: A VCC is a public limited company (PLC). Existing PLCs are deemed to be public limited companies under the Act. Accordingly VCCs do not need to convert to a new form of company or alter their name. Nevertheless, VCCs will be impacted in that they will fall under the new, reformed, company law regime. Key changes include;

- The ultra vires rule is reformed.
- The already-established fiduciary duties of directors (8 in total) are put on a statutory footing.
- New duties are imposed on directors to ensure that the company secretary has the skills required to discharge its statutory and other duties.
- There is a streamlined offences regime and some increases in penalties.

While not a requirement, VCCs should consider taking the opportunity to update their memorandum and articles of association to take account of the Act. It is also an opportune time for VCCs to consider whether it would be of benefit to convert to the new form of Irish corporate vehicle specifically tailored for the funds industry, the Irish collective asset-management vehicle or the ICAV. An A&L Goodbody summary on the ICAV can be accessed at the following link:

http://www.algoodbody.com/expertise/irish_collective_assetmanagement_vehicle_icav

The ICAV is not subject to the Act and will not therefore be impacted by it.

Q2: I am a VCC, what kind of changes would I consider making to my memorandum and articles of association following the enactment of the Act?

A2: The memorandum and articles of association of a VCC will continue to apply, except to the extent that any provisions of the memorandum and articles of association are incompatible with mandatory provisions of the Act applicable to VCCs. Any changes will also depend on the provisions in your existing memorandum and articles of association, when they were last updated and for what purpose. The changes introduced by the Act which impact on VCCs are

limited in number and many apply “save to the extent that the company’s constitution provides otherwise”. Accordingly, there will generally be no need to make significant changes to your memorandum and articles of association to deal with these rules, but you may choose to make changes to avail of the optional flexibilities permitted by the Act and to reflect its provisions. The A&L Goodbody Asset Management & Investment Funds team can advise you on the changes to your VCC’s articles that may be desirable and those that may be necessary as a consequence of the Act.

UCITS Management Companies and Alternative Investment Fund Managers

Q3: I am an existing Irish UCITS Management Company (UCITS ManCo) or an Irish Alternative Investment Fund Manager (AIFM), do I need to change my legal structure?

A3: Yes. The Act 2014 contains structural changes for Irish private limited companies and they will need to become either a Company Limited by Shares (CLS) or a Designated Activity Company (DAC). Whether a UCITS ManCo or AIFM decides to convert to a CLS or a DAC, we do not recommend taking no action and allowing the company to be “deemed” to become a CLS after 18 months of the Act’s commencement (see A5).

Q4: Has the Central Bank of Ireland (Central Bank) issued any guidance for UCITS ManCos or AIFMs in relation to the Companies Act 2014 requirements?

A4: Yes. On 12 June 2015 the Central Bank published a Q&A update concerning the Act. The question asked was whether the Central Bank requires UCITS ManCos, AIFMs, AIF management companies, fund administrators, depositaries and investment firms which are companies to convert to DACs under the Act? The response was that the Central Bank will not require these entities to convert to DACs as it is of the view that corporate structuring is a matter for each entity. The Central Bank also made the point that, notwithstanding the corporate structure chosen, regulated financial service providers such as UCITS ManCos and AIFMs must comply with all regulatory requirements applicable to them. It is worth bearing in mind that the extent to which UCITS ManCos / AIFMs could avail of the unlimited corporate capacity provided by the CLS structure may in practical terms be limited, given their specific role in relation to investment funds and under regulation.

Q5: When do I need to make these changes to my UCITS ManCo / AIFM?

A5: The bulk of the Act's provisions commenced on 1 June 2015 (**Commencement**). If a UCITS ManCo or AIFM is converting to a **CLS**, the shareholder(s) of the UCITS ManCo or AIFM must pass a **special resolution** to adopt a new constitution, which must be filed with the Irish Companies Office (**CRO**) within the 18 months transition period from Commencement. If the UCITS ManCo or AIFM is converting to a **DAC**, the shareholder(s) of the UCITS ManCo or AIFM must pass an **ordinary resolution** resolving that the company be registered as a DAC within **15 months** from Commencement. If nothing is done, the UCITS ManCo or AIFM will be "deemed" to have become a CLS after the 18 month period elapses, retaining its memorandum and articles, but not its objects clause, as its constitution.

In the absence of a resolution by the shareholder(s), the directors of a UCITS ManCo / AIFM will have a duty to take action, if necessary, to prepare a new constitution and deliver it to the shareholder(s) and to the CRO. An existing UCITS ManCo or AIFM would lose its objects clause if shareholders take no action and allow a "deemed" conversion to a CLS take place. As a regulated entity, it may be desirable to retain the objects clause to demonstrate compliance with regulatory requirements applicable to UCITS ManCos and AIFMs.

Q6: What are the most notable features, practical or otherwise, of a CLS and a DAC that will be different from the existing private limited company structure of an Irish UCITS ManCo or Irish AIFM?

A6:

i) The following new features apply to both CLS and DACs:

- The already-established fiduciary duties of directors (8 in total) have been put on a statutory footing.
- Companies may notify the CRO of anyone other than directors or other officers, appointed to bind the company generally (e.g. managers) and the CRO will register the appointment. "Registered persons" are deemed to be able to bind the company, and to authorise others to do so.
- New duties are imposed on directors to ensure that the company secretary has the skills required to discharge its statutory and other duties;
- Directors and secretaries will have to sign statutory acknowledgements when consenting to act as such that they have legal duties and obligations imposed by the Act, by other statutes and at common law.
- Members will be able to pass a members' written resolution, without having to obtain the signatures of all the members. Certain procedural requirements will apply.
- There is a streamlined offences regime and some increases in penalties.

ii) The following features apply to a DAC:

- The ultra vires rule is reformed;
- A DAC must have a minimum of 2 directors. UCITS ManCos and AIFMs will continue to be subject to the requirements of the Central Bank regarding the composition of their boards of directors and to the terms of the IFIA voluntary Corporate Governance Code;

- Like existing private limited companies, a DAC will be required to have an authorised share capital;
- The name of the DAC must end in 'designated activity company' or the Irish language equivalent, or a specified abbreviation. It should be noted that this requirement will necessitate consequential changes to the company's seal, notepaper, and website details etc.

iii) The following features apply to a CLS:

- The ultra vires rule does not need to be adhered to by a CLS as there is no need for an 'objects clause'. However, UCITS ManCos and AIFMs will still need to comply with regulatory requirements applicable to them, including operating within the scope of their regulatory authorisation.
- A CLS may have a single director, however, as with DACs, UCITS ManCos and AIFMs will continue to be subject to the requirements of the Central Bank regarding the composition of their boards of directors and to the terms of the IFIA voluntary Corporate Governance Code;
- A CLS will have a single-document constitution to replace the memorandum and articles of association and no "Table A";
- A CLS does not need to have an authorised share capital, however UCITS ManCos and AIFMs must comply with statutory minimum capital requirements;
- A CLS can have a written AGM, even if it is a multi-member company;
- If converting to a CLS, there will be no need to amend the name of the UCITS ManCo or AIFM as it will still end with 'Limited' or 'LTD'.

Q7: Do I need to change the memorandum and articles of association of a UCITS ManCo / AIFM?

A7:

- The special resolution required to convert to a CLS, passed in accordance with the existing memorandum and articles of association of the company will state that the UCITS ManCo / AIFM is to be registered as a CLS in accordance with the Act. The same resolution must also provide for the alteration of the memorandum and articles of association so that it is a single document constitution which states that: "The Company is a company limited by shares to which parts 1 to 15 of the Companies Act 2014 apply".
- The ordinary resolution required to convert to a DAC, which can be passed in writing, will simply state that the UCITS ManCo / AIFM is to be registered as a DAC in accordance with the Act. The same resolution must also provide for the alteration of the memorandum and articles of association so that it is a single document constitution comprising two parts, a memorandum of association and articles of association, and states in its (a) memorandum of association that: "The Company is a Designated Activity Company to which part 16 of the Companies Act 2014 applies"; and (b) memorandum and articles of association that the word 'limited' will be replaced by 'designated activity company' wherever it appears in the name of the UCITS ManCo or AIFM.
 - The A&L Goodbody Asset Management & Investment Funds team can advise you what other changes should be made to the documents of a UCITS ManCo or AIFM to bring them in line with the Act and to update statutory references.
 - A&L Goodbody has prepared standard short form and long form DAC and CLS constitutions and conversion packs for

existing Irish private limited companies. The A&L Goodbody Asset Management & Investment Funds team can advise on how these can be adapted for use by each UCITS ManCo and AIFM.

Q8: What is the minimum action a UCITS ManCo / AIFM needs to take to satisfy the new requirements?

A8: In order to convert to a CLS, a UCITS ManCo or AIFM which is an Irish private limited company can pass a special resolution within the 18 month transition period after Commencement and submit its new constitution and the resolution together with duly completed forms N1 and G1 to the CRO.

In order to convert to a DAC, a UCITS ManCo or AIFM which is an Irish private limited company can pass an ordinary resolution within the 15 month transition period after Commencement and submit its new memorandum and articles of association and the resolution together with a duly completed form N2 and currently, form G2 to the CRO. In the case of CRO filing upon conversion to a CLS and a DAC, currently a list of original subscribers as submitted to the CRO on incorporation must also be submitted. All DACs must have the words "designated activity company" at the end of their name. The words "designated activity company" may be abbreviated to "d.a.c." or "dac" (including either such abbreviation in capitalised form) in any usage after the company's registration by any person including the DAC. UCITS ManCos and AIFMs should update company stationery, any name plates, company seals, bank accounts, websites, advertisements and provide relevant third party notifications when conversion occurs to reflect the new name.

We can assist AIFMs and UCITS ManCos to co-ordinate the passing of the necessary resolution at the next scheduled AGM of the relevant company.

It is a requirement of the Central Bank that an AIFM / a UCITS ManCo obtains prior approval for any change of name which would be relevant in the case of conversion to a DAC.

Q9: If I am a UCITS ManCo or AIFM and convert to a CLS or DAC, do I need to amend the material contracts of any fund to which I am a party and/or the prospectus for a fund which I manage? Should I update my Business Plan / Programme of Activity?

A9: As there will be no change in name upon conversion to a CLS, there would be no need to update documents to reflect a name change. For both a CLS and DAC, the description of the legal status of the company may change slightly and references to "the Companies Acts" may become outdated. Upon conversion to a DAC, the name of the UCITS ManCo or AIFM will change from "XYZ Limited" to "XYZ DAC" (or see alternatives in A8 above). The prospectus and material contracts could be updated to reflect these minor changes or the new name of a DAC but it is not a requirement of the Act. One approach would be to update the prospectus and/or material contracts at the next opportunity following conversion.

Similarly for the Business Plan / Programme of Activity, one could take the view that the change of name (in the case of a DAC) and legal structure is not a material change requiring immediate update to the Business Plan or Programme of Activity and filing with the Central Bank. However it may be a good opportunity to update the Business Plan or Programme of Activity and file them with the Central Bank, particularly if

there are other general updates which can be undertaken at the same time.

If any material contracts or other fund documents are to be updated to reflect the change of name (in the case of a DAC) and conversion of the UCITS ManCo / AIFM to a CLS or DAC, this should be filed with the Central Bank in accordance with the Central Bank's usual procedures for fund documentation updates.

Q10: What is a form N1 and a form N2?

A10: A form N1 is the form for converting from an Irish private limited company to a CLS. A form N2 is the form for converting from an Irish private limited company to a DAC.

Q11: Is there a CRO fee for converting to a CLS or a DAC?

A11: There is currently no CRO fee to make the filing for conversion of a private limited company to a CLS or a DAC.

Q12: Are there any Irish Stock Exchange requirements to consider for a UCITS ManCo or AIFM?

A12: If you are a UCITS ManCo or AIFM converting to a DAC and are managing an investment company, unit trust, common contractual fund or ICAV which has its shares or units admitted to listing on the Irish Stock Exchange (ISE), then you should contact A&L Listing Limited or your listing sponsor to advise the ISE of any change of name of the UCITS ManCo or AIFM.

A&L Listing has however advised that no announcement solely for the change of name of a UCITS ManCo or AIFM to a DAC will be necessary.

Q13: Are there any Irish tax consequences upon becoming a CLS or a DAC?

A13: There are no Irish tax consequences for a UCITS ManCo or AIFM upon becoming a CLS or a DAC. In the case of conversion to a DAC, the Irish Revenue should be notified of the name change.

Q14: What if I am a UCITS ManCo or AIFM managing a Unit Trust or a Common Contractual Fund?

A14: The Act has no direct impact on unit trusts or common contractual funds (CCF). If the headed paper of the UCITS ManCo or AIFM converting to a DAC is the headed paper of the unit trust or CCF, then this will need to be updated to reflect the change of name to a DAC.

General Queries

Q15: Do I need to change my Board of Directors?

A15: There are no provisions in the Act requiring a VCC, UCITS ManCo or AIFM to make changes to their boards of directors.

Q16: I am a director of a VCC/UCITS ManCo/AIFM. How am I impacted by the Act?

A16: The Act will introduce, for the first time in Irish law, a concise statement of the principal fiduciary duties of the directors of an Irish company. Such duties will be owed not just by directors, but also by "shadow" or "de facto" directors.

The Act introduces a new obligation on all directors to include a statement in their annual directors' report that (1) so far as each director is aware there is no relevant audit information of which the auditors are unaware and (2) he or she has taken all the steps that he or she ought to have taken as a director to make themselves aware of any relevant audit information and to establish that the auditors are aware of that information.

There is a new “streamlined” offences regime setting out penalties and liabilities for breach of the Act. Some of these penalties for non-compliance by directors with company law represent an increase on the penalties for equivalent breaches under the old regime and some new penalties are introduced.

The Act introduces a requirement to include a compliance statement in the directors’ report in the annual financial statements for UCITS ManCos or AIFMs that have a balance sheet of over €12.5m and a turnover in excess of €25m in the year to which the directors’ report relates. There is also a requirement for directors of large private companies (balance sheet total in excess of €25m and turnover in excess of €50m) to establish an audit committee or explain in the directors’ report why one has not been established. Neither requirement applies to VCCs.

Q17: If I have a wholly-owned subsidiary or section 110 company in my investment fund structure, do I need to change its structure in accordance with the Act?

A17: Where the investment fund’s wholly-owned subsidiary / section 110 company is an Irish private limited company then it will need to convert to a DAC or CLS.

Q18: Where can I find out more details?

A18: Please contact a member of the A&L Goodbody Asset Management & Investment Funds team for further advice.

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