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Brexit – Implications for Irish Investment Funds

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As the UK's closest trading neighbour our economic interests in Ireland have always been closely aligned with those of the UK. It is therefore with regret and disappointment that we receive the results of the referendum of 23 June 2016. The decision of the UK electorate to leave the European Union brings uncertainty and turbulence to the market. That turbulence, in turn, impacts those involved in the establishment and ongoing management of investment funds.

Walkers acts for a number of leading UK-based funds managers who have established investment funds in Ireland.

Since the result of the referendum we have been approached by a number of those UK managers over concerns on the potential impact of Brexit for their Irish regulated investments funds and for UK domiciled funds selling outside of the UK. These issues are considered below.

The immediate impact of Brexit for UK based managers with Irish investment funds

The first point to note is that the vote of the public on 23 June 2016 is (technically) not legally binding and the exact time for the UK's departure will not be known until the British government notifies the European Council of its intention to leave the European Union under Article 50 of the Lisbon Treaty.

The UK's Financial Conduct Authority (FCA) confirmed in a press release issued on 24 June that the UK remains a full member of the EU. As most financial services legislation derives from EU law, UK investment firms remain subject to and must abide by these rules, until such time as the mechanics of how an exit will be effected are finalised. This is likely to take at least 2 years to conclude (being the timing for final departure following the delivery of an Article 50 notice).

Until this is agreed, UK asset and fund managers will remain authorised and eligible to establish Irish collective investment schemes and to be appointed as investment manager to such funds.

Likewise, Irish collective investment schemes continue to be able to register for sale in the UK under both the UCITS and AIFMD passporting regimes.

While it is difficult to say what the precise impact of a Brexit will be in the absence of a clearly defined Brexit strategy by the British government, managers should consider the points below.

Self-managed Irish funds

Most funds in Ireland are established as self-managed UCITS or QIAIFs. All such structures will remain subject to, and fully compliant with, EU regulations and therefore will remain eligible to avail of the pan-EU passport, even post Brexit. Where a delegate investment manager from the UK is appointed to such funds, those managers will need to confirm the basis of their appointment. The MiFID passport will no longer be available to them.

It should be noted that the vast majority of UK based delegate investment managers are approved by the Central Bank under an equivalency test as opposed to via the MiFID passport and the equivalency route is unlikely to be affected by a Brexit. This will however, need to be confirmed with the Central Bank once the method by which the UK will exit has been agreed.

Irish funds with external managers/AIFMs based in the UK

Some funds have opted to designate an external manager/AIFM. If the manager or AIFM is based in the UK, they will no longer be eligible to avail of the AIFM/UCITS passport into Ireland. They will also be considered to be a non-EU AIFM/manager and could therefore cause the Irish fund to lose its passporting rights across the EU.

A number of options are available to address this problem, for instance the fund could opt to become self-managed rather than appoint a UK based AIFM/manager. This would make the fund fully compliant with EU law and allow it to avail of the UCITS and/or AIFMD passport. Alternatively the UK manager could consider moving to or establishing a subsidiary in Ireland or appointing a third party AIFM based in the EU.

Walkers regulatory team can advise, in this context, on migrations of AIFMs and MiFID authorised managers from the UK to Ireland.

Marketing Irish funds in the UK

The ability of Irish funds to continue to sell into the UK could also be affected, as they currently register for sale via either the AIFMD or UCITS passports, which will no longer be available. While this passport would cease to exist in the UK, it is likely that they will be permitted to gain access under a modified private placement arrangement, not dissimilar to the way in which non-EU funds currently access the UK market.

As European regulated funds, Irish funds will most likely also be able to access retail as well as professional investor capital, subject to confirmation by the FCA of its proposed new post-Brexit registration process.

The impact of Brexit on UK-based collective investment schemes

Any UK domiciled funds will loose the benefit of the UCITS and AIFMD passports. In our experience, UK managers do not generally use these structures to access capital outside of the UK and therefore we suspect that they will not be impacted by any decision by the UK to exit the EU. If a UK domiciled fund is used to access capital outside of the UK and is impacted, UK based managers have the option of establishing an Irish fund vehicle as set out above, to access European capital. Alternatively, if eligible, they could look to register in each EU member state under their private placement regimes.

Business as usual until Article 50 is triggered

The full impact of Brexit cannot be considered until the UK government agrees how it will affect its exit with the EU. UK managers are already using Irish fund vehicles to access European capital and they can continue to do so under the current regime. So while the result of the Brexit referendum came as a surprise, for the moment it is "business as usual" with very little immediate impact until the British government triggers Article 50 and commences negotiations on a UK exit with the remaining 27 member states of the EU.

Walkers investment funds team

As an international law firm, with an office in London, Walkers is in direct contact with the Central Bank, the Department of Finance and Irish Funds industry association and will continue to monitor developments in this area. Ireland will remain an EU member state and fully compliant with EU legislation. Irish funds continue to offer a tax efficient route for both EU and non-EU managers to access European capital.

This advisory is part of a series of client advisories on the potential impact of Brexit prepared for clients of Walkers' office in Ireland. The full series may be found in the Brexit section of our website.