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CONTENTS

Ireland

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Overview of the Irish funds industry

Overview of the Irish regulated funds market

Ireland is regarded as a key strategic location by the world's investment funds industry. Investment funds established in Ireland are sold in 90 countries across Europe, the Americas, Asia, Africa and the Middle East. Over 1,000 fund promoters have funds domiciled and/or serviced from Ireland.

As of July 2022, there were 8,497 Irish-domiciled funds (including sub-funds) with net assets of almost €4 trillion. While the majority of these fund assets are held in Undertakings for Collective Investment in Transferable Securities ("**UCITS**"), Irish-domiciled alternative investment funds ("**AIFs**") had in excess of €890 billion in net assets as of July 2022. Ireland is also the largest hedge fund administration centre in the world.

Given the scale of the funds industry in Ireland and the global reach of its distribution network, it is not surprising that the vast majority of the investment in these regulated investment funds comes from non-Irish, predominantly institutional, investors.

Regulatory framework

The Central Bank of Ireland (the "**Central Bank**") is responsible for the authorisation and supervision of regulated financial service providers in Ireland, including regulated investment funds and investment managers. The powers delegated to the Central Bank are set out in the laws and regulations applicable to the relevant financial services sector. In addition, the Central Bank issues guidance in relation to various aspects of the authorisation and ongoing requirements applicable to financial service providers and investment fund products in Ireland.

Common fund structures

Ireland as a domicile provides a variety of potential fund structures, which can be broadly categorised as regulated by the Central Bank or unregulated.

Regulated structures

There are five main types of regulated fund structure in Ireland (as described below): (i) variable capital investment companies ("**Investment Companies**"); (ii) Irish collective asset-management vehicles ("**ICAVs**"); (iii) Unit Trusts; (iv) common contractual funds ("**CCFs**"); and (v) investment limited partnerships ("**ILPs**"). Investment Companies, ICAVs, Unit Trusts and CCFs may be established as UCITS pursuant to the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011 (as amended) or as AIFs pursuant to the EU (Alternative Investment Fund Managers) Regulations 2013 (as amended) (the "**AIFMD Regulations**"). An AIF may also be established as a regulated ILP. The Irish legislation governing ILPs was overhauled by

the enactment of the Investment Limited Partnerships (Amendment) Act 2020 (the "**ILP 2020 Act**") in late December 2020. The ILP 2020 Act modernised the law governing ILPs in Ireland. As well as modernising the ILP in line with other types of Irish investment fund structures, the amendments to the existing legislation brought the ILP in line with comparable partnership structures in other leading jurisdictions by incorporating "best in class" features for this type of vehicle.

These structures may be organised in the form of umbrella schemes with segregated liability between compartments ("**sub-funds**").

Investment Companies

An Investment Company is established as a public limited company under the Irish Companies Act 2014. They have a separate legal identity and there is no recourse to the shareholders. There is a requirement to spread risk if the fund is established as an Investment Company. It is typically the board of directors of the Investment Company that will approve any decision to borrow, grant security or enter into derivatives, although it will be important in each case to review the Investment Company's constitutional documents, including its memorandum and articles of association, prospectus and/or supplement thereto, and any management agreements to determine who has the authority to execute the necessary agreements.

ICAVs

The ICAV is an Irish corporate investment fund that was introduced to meet the needs of the global funds industry, pursuant to the Irish Collective Asset-management Vehicles Act 2015 (the "**ICAV Act**"). The ICAV is now the most commonly used structure for newly established funds in Ireland. The ICAV is a bespoke corporate structure that is specifically designed to give more administrative flexibility than an Investment Company. For example, the ICAV may:

- amend its constitutional documents without shareholder approval in respect of changes that do not prejudice the interest of shareholders and do not come within certain categories of changes specified by the Central Bank;
- where established as an umbrella fund, prepare separate financial statements for each sub-fund;
- issue debenture stock, bonds and any other securities; and
- allow directors to dispense with the holding of an AGM by giving written notice to all shareholders.

In addition and unlike Investment Companies, the ICAV may also be eligible to elect to be treated as a transparent entity for US federal income tax purposes.

UCITS and AIFs established in Ireland as Investment Companies may convert into an ICAV subject to compliance with the conversion process specified by the Central Bank. Importantly, this conversion process does not affect the legal existence of the fund or any pre-conversion rights or obligations. The ICAV Act also contains a mechanism for existing corporate collective investment schemes established in jurisdictions such as the Cayman Islands, the British Virgin Islands, Bermuda, Jersey, Guernsey and the Isle of Man, to migrate or redomicile to Ireland as an ICAV by operation of law. As the ICAV is a separate legal entity, the analysis in relation to who has authority to contract, e.g. borrow, grant security or enter into derivatives, for an ICAV is the same as for an Investment Company.

Unit Trusts

Unlike an Investment Company or an ICAV, a Unit Trust is not a separate legal entity but rather a contractual fund structure constituted by a Trust Deed between a Trustee and a management company. In a Unit Trust, the Trustee or its appointed nominee acts as legal

owner of the fund's assets. As the Unit Trust does not have a separate legal personality, it cannot contract for itself. Managerial authority is exercised by the directors of the management company, which, in the context of an AIF, may also perform the role of alternative investment fund manager ("**AIFM**"). While, in many cases, it is the directors of the management company who execute contracts, the Trust Deed and other relevant documents such as the management agreement should be carefully reviewed to confirm who has signing authority. For example, if assets are registered in the name of the Trustee, the Trustee would need to execute any security agreements required to grant security over the assets of the Unit Trust and, in some Unit Trusts, the Trust Deed may, for example, require joint execution by the Trustee and the management company.

CCFs

A CCF, similar to a Unit Trust and ILP, does not have a separate legal existence. It is a contractual arrangement established under a deed of constitution, giving investors the rights of co-owners of the assets of the CCF. As co-owners, each investor in a CCF is deemed to hold an undivided co-ownership interest in the assets of the CCF as a tenant in common with other investors. The CCF was developed initially to facilitate the pooling of pension fund assets efficiently from a tax perspective and may be treated as transparent for tax purposes, which is a key distinguishing feature from other types of Irish fund structures.

ILPs

An ILP is a partnership between one or more general partners ("**GPs**") and one or more limited partners ("**LPs**") and is constituted by a partnership agreement. As with a Unit Trust, an ILP does not have an independent legal existence. It has one or more LPs (which are similar to shareholders in an Investment Company or ICAV, or a unitholder in a Unit Trust) and a GP who can enter into contracts on behalf of the ILP, which would include any loan agreement or security document. The ILP 2020 Act introduced a number of changes to the ILP structure intended to make the ILP more broadly appealing to promoters of venture capital and private equity funds in particular. The changes included provision for: (i) the establishment of umbrella ILPs; (ii) the broadening of "safe harbour" provisions allowing LPs to take certain actions without being deemed to be taking part in the management of the ILP; (iii) the amendment of the limited partnership agreement ("**LPA**") by majority (rather than by all general and limited partners); and (iv) the streamlining of the process for the contribution and withdrawal of capital.

Unregulated structures

Limited partnerships

The limited partnership established pursuant to the Limited Partnership Act 1907 is the favoured structure for unregulated investment funds in Ireland.

A limited partnership is a partnership between one or more GPs and one or more LPs, and is constituted by a partnership agreement. To have the benefit of limited liability, the LPs are not permitted to engage in the management of the business of the partnership, or to contractually bind the partnership – these functions are carried out by the GP.

There is a general limit of 20 partners in a limited partnership, although this limit can be raised to 50 where the limited partnership is formed "for the purpose of, and whose main business consists of, the provision of investment and loan finance and ancillary facilities and services to persons engaged in industrial or commercial activities". The analysis in relation to who has authority to contract, e.g. borrow, grant security or enter into derivatives for an unregulated limited partnership, is similar to that for an ILP.

Section 110 companies

Section 110 is a reference to section 110 of the Taxes Consolidation Act 1997 (as amended), which provides for a specific tax regime for certain qualifying companies. They are most commonly incorporated as Irish designated activity companies (or "**DACs**") and are used in structured finance deals, but we also see them being used as vehicles for loan book transactions and being dropped under regulated fund structures as an investment vehicle. To qualify for the beneficial tax treatment, certain conditions must be satisfied. Where a section 110 company is borrowing under a financing transaction, it is common to include certain representations and covenants in a loan agreement to give a lender comfort that the relevant conditions are being satisfied. The section 110 is often, but not always, established as a "bankruptcy-remote" vehicle, and a common ask from section 110 borrowers is that recourse to the borrower is limited to the secured assets and that a "non-petition" clause is included. From a borrower perspective, this should be raised at term sheet stage to avoid the need for a further credit approval on this point. Developments in response to the interest limitation rules under the EU Anti-Tax Avoidance Directive may result in the restructuring of certain stand-alone section 110 structures in favour of a structure that utilises a regulated fund vehicle as part of the overall structure, and this may have implications for existing deals where security or other elements must be re-papered.

Regulation of Irish funds

Broadly speaking, regulated investment funds in Ireland can be established as either UCITS or AIFs.

UCITS

UCITS were first introduced in 1985 in the EU with the introduction of the UCITS Directive. Although UCITS are a regulated retail investment product, subject to various liquidity constraints, investment restrictions (both in terms of permitted investments and required diversification), borrowing and leverage limits, they are predominantly held by institutional investors and are firmly established as a global investment fund product (being widely distributed both inside and outside of the EU). Irish UCITS may avail of the UCITS passport regime, which allows for UCITS to be marketed publicly across the EU subject to limited registration requirements.

AIFs

AIFs are defined under the Alternative Investment Fund Managers Directive ("**AIFMD**") as "any collective investment undertaking [...] which raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors", and that does not require an authorisation under the UCITS Directive. Therefore, all non-UCITS funds may be considered AIFs. Irish AIFs are established pursuant to the AIFMD Regulations, which implement AIFMD in Ireland. AIFMD regulates both EU AIFMs that manage AIFs in the EU, and non-EU AIFMs that manage or market AIFs in the EU. The main types of AIFs in Ireland are Qualifying Investor Alternative Investment Funds ("**QIAIFs**") and Retail Investor Alternative Investment Funds ("**RIAIFs**").

QIAIFs can be marketed to professional investors and there is a minimum subscription requirement of €100,000 (which may be disapplied in respect of certain categories of investor). They can avail of the right to market across the EU using the AIFMD passport. A QIAIF can be managed by an EU or non-EU AIFM and can also be internally managed (see below). A QIAIF is not subject to any investment or borrowing limit, but it is obliged to spread risk if established as an Investment Company.

The RIAIF replaced the previous retail non-UCITS regime and has no minimum subscription requirement, but there is a restriction on it borrowing more than 25% of its net assets. As the RIAIF is a retail fund, it cannot use the AIFMD passport that is available to QIAIFs marketing to professional investors. Unlike a QIAIF, RIAIFs cannot be managed by a non-EU AIFM. AIFs are required to appoint an AIFM, which can be either an external Manager of the AIF or, where the legal form of the AIF permits, such as in the case of an Investment Company or ICAV, and the AIF chooses not to appoint an external AIFM, the AIF itself.

Real Estate Investment Trusts ("**REITs**")

REITs were first introduced in Ireland in 2013 under the Irish Finance Act with the purpose of attracting capital and thereby improving the stability of the Irish property market. Irish REITs are established as companies under the Companies Act 2014 and can gain classification as a REIT when notice is given to Irish Revenue and applicable conditions are met. While REITs are not collective investment undertakings as such, the Central Bank has indicated that REITs are *prima facie* AIFs for the purpose of AIFMD (requiring the appointment of an AIFM) unless the REIT can demonstrate otherwise. Furthermore, the Central Bank has indicated that REITs structured as unauthorised AIFs must comply with the Central Bank AIF Rulebook provisions for retail AIFs.

Regulatory and market update

Developments in relation to sustainable finance

With the aim of furthering sustainable finance and ESG integration, the European Commission (the "**Commission**") introduced a package of legislative measures in 2018 that includes three key regulations: the Taxonomy Regulation; the Disclosures Regulation; and the Low Carbon and Positive Impacts Benchmarks Regulation. The Disclosures Regulation came into effect on 10 March 2021 ("**SFDR Level 1**"), which required all financial market participants ("**FMPs**"), including AIFMs, UCITS management companies and self-managed UCITS, to consider sustainability from a number of perspectives and to: (1) publish information on their websites regarding their policies on the integration of sustainability risks in their investment decision-making process; (2) make pre-contractual disclosures on how they incorporate sustainability risks in their business; and (3) comply with pre-contractual transparency rules on sustainable investments.

The high-level principles-based requirements contained in SFDR Level 1 are supplemented by more detailed Level 2 requirements ("**SFDR RTS**"). SFDR RTS requires FMPs to comply with more detailed pre-contractual disclosures and annual reporting disclosures. FMPs must make these disclosures in the mandatory templates that are set out in the annexes to SFDR RTS for relevant products. In addition, certain Taxonomy Regulation-related disclosures will apply to those products/funds that are categorised as "Article 8" or "Article 9" under the Disclosures Regulation. This subset of Article 8 and Article 9 funds will be subject to additional disclosure requirements regarding the alignment of their investments with the Taxonomy Regulation. Further, the Taxonomy Regulation requires that so-called "Article 6" funds include a negative statement in their offering documents and annual reports that underlying investments do not take into account the EU criteria for environmentally sustainable economic activities.

To ensure there is a single rulebook for sustainability disclosures, the European Supervisory Authorities determined that the additional taxonomy-related requirements should be incorporated into SFDR RTS. These requirements become effective as of 1 January 2023.

Central Bank consultation in relation to macroprudential measures for the property fund sector

As noted above, Irish AIF structures are not typically subject to borrowing limits. However, in November 2021, the Central Bank published Consultation Paper 145 ("**CP145**"), consulting, *inter alia*, on the possible introduction of limits on the permitted level of leverage in an Irish fund investing in Irish property. Detailed submissions on the consultation paper have been received from many interested parties. The final position has now emerged and a 60% leverage limit has been set, which will include lending from the Sponsor into a property fund by way of "quasi-equity". Certain transitional or grandfathering arrangements will apply to existing structures, lessening the need for restructuring existing debt arrangements.

Fund financing and security

Overview

Lending to Irish funds is typically structured as either a bilateral or syndicated facility, or a note issuance agreement whereby the issuer (the fund) issues a note in favour of the note holder. Lending by AIFs is restricted, although (as discussed above) it is possible to establish an AIF that is focused on loan origination, including investing in loans. While the majority of deals we see are capital call/subscription line deals, in the last number of years, we are seeing more net asset value ("**NAV**"), hybrid, umbrella and preferred equity transactions. Irish fund structures, particularly Investment Companies, ICAVs and ILPs, are also commonly used as property investment vehicles.

The lenders and governing law

At present, the majority of deals in the Irish market are being financed by international financial institutions, although one of the Irish "pillar" banks is in this market. Reflecting the international nature of the financiers, the relevant loan agreements for such transactions are commonly governed by the laws of New York or England & Wales, although there is no legal reason why they could not be governed by Irish law. The terms of the loan agreement will very much depend on the type of facility being advanced.

While many lenders in Irish fund financings hold a bank licence or have "passport" rights to lend into Ireland, it should be assessed on a case-by-case basis whether a bank licence or passporting rights are required on a particular transaction, particularly where the relevant lender(s) do not have either a banking licence or passporting rights and the transaction involves "banking business" as a matter of Irish law. Lenders should also assess with local counsel whether they need to register summary details of the loan with the Irish Central Credit Register maintained by the Central Bank.

Security package

A key consideration in every fund financing is the security package. This will vary depending on the type of financing involved. For example, on many financings, the security package will consist of a fixed charge over the fund's rights, title and interest in and to the securities and/or cash account recorded in the books and records of the Depositary (or Trustee, in the case of a Unit Trust; as such, any references hereafter to a Depositary should be read to include Trustee in the context of a Unit Trust) and an assignment of the fund's rights in the Depositary Agreement (or Trust Deed, in the case of a Unit Trust or deed of constitution in the case of a CCF). Such a security package is also commonly coupled with a control agreement, which will give the lender or its security agent control over relevant rights or assets either on a "day-one" or more commonly on a "springing lien" basis, which gives control to the security agent upon the occurrence of a future enforcement event.

A properly drafted and structured Irish law security document should also be able to obtain the benefits of being considered a "financial collateral arrangement" pursuant to the European Communities (Financial Collateral Arrangements) Regulations 2010 (as amended) in respect of a securities account. For cash accounts, relevant bank mandates should be reviewed and, where necessary, amended to be consistent with the terms of the control agreement. It is very important in this context to also verify where the account is located, whose name the account is opened in and who has signing rights on the account. The International Bank Account Number ("**IBAN**") for the account is an important piece of information to obtain in order to determine the *lex situs* of a cash account and, therefore, the appropriate governing law for the account security. In many cases, the account holder may be a Depositary or sub-custodian, and the cash account for an Irish fund may not be located in Ireland, particularly where cash is held by a sub-custodian. In this context, and to satisfy the Depositary's obligations to maintain control over the assets, consideration should be given as to whether the Depositary also needs to be party to the control arrangements. Any party with signing rights should also be a party to the control arrangements. Equally, in structures where the connection with Ireland is only that the Depositary is Irish-incorporated, it is not uncommon that one or more cash accounts may also be held by sub-custodians outside Ireland. In our experience, lenders will frequently weigh the cost of taking security in potentially multiple jurisdictions against the benefit of obtaining such security. One important consideration we have seen recently is that while, in Ireland (which has a common law system), we recognise the concept of legal and beneficial ownership of assets, this may not necessarily be the case in other jurisdictions, particularly jurisdictions that have a civil law system. By way of example, if a cash account is held in a custodian's name in Luxembourg (rather than being held in the name of the relevant fund, and including situations where the custodian holds the account on behalf of the fund), from a Luxembourg law perspective, any purported security granted by the fund under Irish law in respect of its beneficial interest in the cash account will not be enforceable under Luxembourg law, and consideration should therefore be given as to whether such security should be taken under Luxembourg law from the account holder, i.e. the custodian. As with any financing, there is no "one size fits all". In this regard, the typical security package for a capital call/subscription facility is quite different, commonly consisting of security over the right to call on investors for further contributions and security over the account into which such subscription monies are lodged, coupled with a robust power of attorney either prepared on a stand-alone basis or forming part of the relevant security document.

The fund's constitutional documents, prospectus, as well as the administrative services agreement, other fund service provider appointment documents and the Subscription Agreement, need to be carefully reviewed to verify who has the right to make the subscription call. For example, in the context of a corporate fund such as an Investment Company or ICAV, most commonly it is the directors of the fund that make the call, but sometimes the constitutional documents also give the Manager (where the corporate fund is externally managed) the power to make the call. It is not uncommon that subscriptions into an Irish entity, particularly in structured finance transactions, may consist of a subscription for shares but also a subscription for profit-participating notes, which are, in essence, a form of debt instrument. The issues that must be checked for/addressed will be similar in many respects to those for a Subscription Agreement for shares.

The Administrator also plays an important role in processing subscriptions and recording and registering them. Depending on the extent of the role performed by the Administrator, consideration could be given to taking specific security over the rights of the fund in and to

the administrative services agreement, which would afford the lender "step-in" rights *vis-à-vis* the Administrator in any further enforcement. However, in practice we do not see this, and more usually a side letter addressed to the lender/agent is obtained from the Administrator in relation to the performance of their duties under the administrative services agreement; such side letters would typically, amongst other things, give the lender (or its security agent) a right to issue instructions to the Administrator following an Event of Default. Depending on the extent of the role of other fund service providers, further side letters may be required.

Over the last number of years, we have also seen a steady growth in financings involving Feeder Fund structures. From an Irish law regulatory perspective, this can require careful structuring of the security package. One of the issues that requires consideration in this regard is that an Irish regulated fund cannot give "guarantees" to support the obligations of a third party (which may include another sub-fund within the same umbrella fund structure).

Unfortunately, the term "guarantees" is not defined, and it would be prudent to take it that this term also captures "security" to support the obligations of a third party. In Feeder Fund structures where, for example, the Main Fund is the borrower and the Feeder Fund is an Irish fund that is expected to guarantee the obligations of the Main Fund, the rule against giving third-party guarantees is very relevant and the structure and security package will need to be carefully considered and tailored to ensure that this rule is not infringed.

The use of "cascading pledges" can also, depending on the structure, be a useful tool in the security package. It is also possible to apply for an exemption from the Central Bank but, even if given, this takes time to obtain. Other structuring solutions do exist, and we would always recommend local advice be sought at term sheet stage so the solutions can be "baked" into the deal. Guarantees by an Irish regulated fund of the obligations of a 100%-owned subsidiary are not captured by the prohibition.

Governing law of security package

Irish law does not strictly require that the security package be governed by Irish law. We commonly see transactions where security is taken under the laws governing the relevant financing agreement, e.g. New York or England & Wales law. However, where the relevant secured assets are in Ireland, e.g. the securities or cash account or, for a subscription call deal, the governing law of the Subscription Agreement is Irish law, we would always also take Irish law-governed security. Typically, any control agreement would be governed by the laws of the country where the account is located; however, if this is not the case, local law guidance (and preferably a legal opinion) should be obtained to ensure that the use of a different governing law will be enforceable in the relevant jurisdiction.

Security agent

As a common law jurisdiction, there is no issue as a matter of Irish law with security being granted in favour of a security agent or security trustee and, subject to the bank licensing considerations referred to previously, it is not necessary under Irish law for the security agent to be licensed in Ireland to enforce its rights. A point to note in relation to the enforcement of Irish security is that on enforcement, it is typically a receiver appointed by the lender/security agent who will be appointed over the secured assets, and realise the same on behalf of the secured parties. One advantage of this, from a lender/security agent perspective, is that the Irish security document will contractually provide that the receiver is the agent of the borrower rather than the lender/security agent, thereby insulating the lender/security agent from potential claims arising from the actions of the receiver as part of any enforcement.

Consents and stamp duty

No Irish governmental consent or stamp duty is generally required/payable in connection with the execution of security in fund financing. However, where a security assignment is being taken over the funds' rights in and to the Depositary Agreement, the Depositary Agreement should be carefully reviewed to check that the prior consent of the Depositary and/or the Central Bank is not required. In cases where the assignment is taken by way of security rather than being a true assignment, the consent of the Central Bank will not be required, as it permits funds granting such security in connection with its borrowings, and for receivers appointed by the lenders enforcing such security.

Security over the appointment documents of other fund service providers is not common, but should be assessed on a case-by-case basis, depending on the extent of the relevant role of such fund service providers in relation to the secured assets.

Security filings

Once security has been created, lenders will need to ensure that the security, if created by an Irish entity or an entity required to be registered in Ireland as a branch, whether governed by Irish law or otherwise, is registered against the correct entity in the appropriate Irish registry. For example, (1) security created by an Investment Company will be registered on the file of the Investment Company in the Irish Companies Registration Office (the "**CRO**"), and (2) security created by a Trustee or its nominee as part of a Unit Trust structure will be registered on the file of the Trustee/its nominee in the CRO.

Importantly, as ICAVs are established under the ICAV Act rather than the Companies Act, registrations for ICAVs are made on the file of the ICAV with the Central Bank rather than the CRO. Particulars of all such security in the form prescribed by the CRO (Form C1) or the Central Bank (Form CH1) must be filed within 21 days of the date of creation of the security, and in the absence of such, filing is void against a liquidator and any creditor.

Property fund financing

Irish funds are also popular vehicles for investment in Irish real estate by both Irish and non-Irish investors. In our experience, ICAVs, since their introduction in 2015, have been the most popular platforms used by investors, but some investors have also used Unit Trusts due to their familiarity with same in their home jurisdictions. While many investors establish their own fund platforms, it is also possible to establish a sub-fund as part of an existing platform set up by a service provider, a so-called "rent a fund". This can save on the establishment cost. In some deals, ILPs are also set up under the relevant Investment Company or ICAV sub-fund, for finance structuring reasons.

The loan agreement in financings for such funds is typically based on the Loan Market Association ("**LMA**") Real Estate Finance form of loan agreement. This is commonly governed by Irish law but, if necessary, could equally be governed by the laws of England (adapted as required). There are a number of key modifications that need to be made to the LMA form, in particular to reflect the role and importance of the relevant service providers in such structures, such as the management company, AIFM and the Depositary, the applicable Events of Default, regulatory compliance matters, the change-of-control provisions and the security package.

The security package will always consist of security over the relevant property and related assets and in many, but not all, cases, security over the shares/units in the fund/sub-fund. Where the fund/sub-fund has invested in real estate through an ILP, security can also be taken over the sub-fund's interest in the ILP, and security is also taken over the shares held

by the shareholder of the GP of the ILP. This is important as, in an ILP, it is the GP who contracts for the ILP and, on an enforcement, having security over those shares means that the lender can exercise control over the GP and its contracting powers.

As with all fund financing structures, it is crucial at an early stage of any property fund financing deal to ascertain who has title to the assets and who has contracting power. An additional point to note in this regard is that the Depositary of the fund investing in real estate is obliged to maintain "control" over the property and related assets, such as rental income. Previously, this was interpreted by Depositaries to mean that title to the property had to be registered in their name.

However, this potentially exposes the Depositary, as registered owner of the property, to claims, for example, in relation to environmental liability, but also to being named in court proceedings if, for example, there is a rent dispute. The practice that has emerged in this regard is that either the Depositary has title registered in the name of a nominee company it establishes or, more commonly, title is registered in the name of the fund, and the Depositary registers a caution on the relevant property title that restricts future disposals, including on any enforcement.

It is crucial in this context to obtain a control letter/deed of control from the relevant Depositary to regulate the rights and duties of the Depositary on any future enforcement by the lenders but also, for example, to regulate how the Depositary operates the fund's bank accounts to ensure compliance with the account control and waterfall provisions of the facility agreement. Commonly, the rent account in such transactions is opened in the name of the Depositary, and it is Depositary signatories who are named on the bank mandate. Certain Depositaries also interpret their duty of "control" to extend to limited partnership assets where the relevant Irish regulated fund controls the GP and is the sole LP.

Hotel financing can also be accommodated through a fund structure. Particular issues can arise in relation to this type of structure, where a separate operating company/property company ("**OpCo/PropCo**") structure is used, and advice should be sought at an early stage to optimise the structure and ensure that financing can be put in place.

Due diligence

Before deciding on the final lending and security structure, it is of critical importance that the requisite due diligence is undertaken. A good deal of management time, both on the lender and borrower side, can be saved by clearly setting out the proposed structure, the proposed security structure, including what will be required from all stakeholders, including investors, and what amendments will be required to constitutional documents.

Identifying and seeking to address issues in relation to any of the above in the course of the transaction will lead to additional costs, tension and potentially, in the worst cases, the deal not completing. In this update, we focus on some issues that lenders should bear in mind when undertaking their due diligence for subscription facilities.

Power and authority to borrow and give security

Subject to any self-imposed leverage limits, as mentioned below, most AIFs will have broad powers, in their constitutional documents, to borrow and create security. For a subscription call facility, it is preferable that the constitutional documents, when describing the assets over which security can be taken, explicitly refer, for example, to "unfunded capital commitments". But even where they do not, the lender should be satisfied that the constitutional documents refer to the fund's ability to create security over all of its "assets", as the unfunded capital commitments will constitute an asset of the fund.

Borrowing and leverage limits

As referenced above, there are a variety of available fund structures in Ireland, ranging on the regulated side from Investment Companies, ICAVs, Unit Trusts, ILPs and CCFs, to limited partnerships and section 110 vehicles on the unregulated side. The constitutional documents of each type of fund, while bearing similarities to each other in terms of regulatory content, can be quite different structurally and will always need to be carefully reviewed to establish who has the authority to borrow and provide security on behalf of the fund. Such authority should reflect the legal structure of the fund and should be set out in the relevant constitutional document. Typically, the following parties will have authority to borrow and provide security on behalf of a fund:

- **Investment Company**: The directors of the Investment Company.
- **Section 110**: The directors of the section 110 company.
- **ICAV**: The directors of the ICAV.
- **Unit Trust**: The Manager commonly has the power to borrow, and frequently also has the power to create security, although this varies and sometimes requires execution by the Trustee.
- **CCFs**: As per Unit Trust, above.
- **ILPs and limited partnerships**: The GP.

Regulated Irish funds may be established as umbrella funds with one or more sub-funds and segregated liability between sub-funds. Importantly, sub-funds do not have a separate legal personality, so the finance documents are typically entered into by: the corporate entity itself, in the case of a corporate fund such as an Investment Fund and ICAV; the Manager, in the case of Unit Trusts and CCFs; and the GP, in the case of a limited partnership.

In each case, the relevant entity is acting for and on behalf of the relevant sub-fund, and this should be reflected in the finance documents. Segregation of liability means that the assets of one sub-fund cannot be used to satisfy another sub-fund's liabilities. This is achieved by statute in the case of Investment Companies and ICAVs, and by contract in the case of Unit Trusts, CCFs and limited partnerships.

While statute implies the concept of segregated liability between sub-funds in an umbrella in every contract entered into by Investment Companies, ICAVs and ILPs, it is customary practice to include segregated liability language in any finance document to which the Irish fund is a party, irrespective of the legal form of the fund. Segregated liability is not important for unregulated fund structures, i.e. limited partnerships and section 110 companies, but as previously mentioned the concepts of limited recourse and non-petition will be key concerns for section 110 companies.

The constitutional documents – due diligence

Irish funds may be open-ended, open-ended with limited liquidity, or closed-ended. In the context of a capital call facility (in the case of closed-ended funds or limited liquidity funds with a capital commitment structure), it is crucial to understand: (i) the subscription process, including who can make calls on investors; (ii) who determines the price at which units or shares are issued and by what means; (iii) when capital calls can be made on investors; (iv) what an investor can be asked to fund; (v) the implications of an investor not funding a capital call; and (vi) what account subscription proceeds are paid to.

The subscription process, who can make calls?

The agreement between the fund and the investor in relation to subscriptions is typically enshrined in a Subscription Agreement. This tends to be a relatively short document, but must be read in conjunction with the constitutional documents and the fund service

provider documents. Most commonly it is the fund, through its directors, GP or Manager (as applicable), who will be authorised to make the calls on investors, although this is sometimes a role that is delegated by the directors, GP or Manager (as applicable) to either the Investment Manager or the Administrator. For entities such as a Unit Trust or a CCF, which are constituted by deed between the Manager and the Trustee/Depositary, it is usually the Manager who is authorised to make calls.

How and who determines the price at which units or shares are issued?

For Irish regulated funds, it is not just the fund itself acting through its directors, GP or Manager (as applicable) that has a role. Other service providers, such as the Administrator of the fund, also play a crucial role. The Administrator in an Irish regulated fund assumes, for example, the role of calculating the NAV of the fund and its units/shares. This calculation is crucial in determining the number of units/shares that will be issued to the investor in return for their subscription/capital call proceeds.

Once the proceeds are received, the Administrator will then issue all of the relevant shares/units to each relevant investor. In Irish regulated funds, the constitutional documents commonly provide that physical unit/share certificates are not issued but rather the unitholder/shareholder register is evidence of ownership. Due to the important role played by the Administrator, it is common that an Administrator side/control letter is obtained as part of the security package.

When can calls be made on investors?

Calls are typically made on a Dealing Day, which will be a defined term in the constitutional documents. It is important to check that this definition accommodates calls being made by the lender, if they need to, on a future enforcement. The definition of Investment Period is also relevant in this regard. Many constitutional documents only permit calls to be made during the Investment Period, subject to limited exceptions; for example, where the call is made to satisfy sums due for an acquisition that has contracted but did not complete prior to the expiry of the Investment Period.

As noted above, one of the key first steps in making a call is for the Administrator to determine the NAV and how many units/shares will be issued. The constitutional documents must be carefully reviewed to determine what events are specified, the occurrence of which gives the directors the right to suspend calculation of the NAV. The concept of suspension is an important safeguard for the fund to deal with; for example, *force majeure* market events that prevent the fund from valuing a substantial portion of the assets of the fund, or generally where it is deemed in the best interests of the investors in the fund.

However, in practice, while the NAV is suspended, calls may not be able to be made. This risk can be mitigated by having all shares potentially issuable to an investor being issued on a partly paid basis on day one, but the ability to use this mechanism needs to be assessed on a case-by-case basis. A suspension of the NAV where enforcement is necessary is not ideal! A carefully drafted investor consent letter, or drafting included in the Subscription Agreement, in which the investors expressly agree to fund a capital call during a suspension of the NAV, can give lenders additional comfort on this issue.

What can an investor be asked to fund?

As you would expect, investor calls are primarily made to fund the acquisition of investments. Preferably, the constitutional documents should also explicitly permit calls to be made to repay sums due to the lenders. Importantly, most Irish funds will operate on the basis that *pro rata* calls are made on investors. This may not be explicit in the constitutional documents, and sometimes may be reflected in an investor side letter.

What are the implications of an investor not funding a subscription call?

The constitutional documents and/or the Subscription Agreement will usually provide for a period of time in which the investor must remit the call proceeds. If they are not received in that period, the documents will commonly provide that the fund may then issue a default notice and, if the default is not remedied within any applicable remedy period, the fund will have the right to charge default interest and ultimately to realise the defaulting investor's shares/units to meet the call. From a lender perspective, the constitutional documents need to be checked to determine whether they contain "overcall" provisions. Such provisions permit the fund to call on the other investors to fund another investor's defaulted call, subject of course to the investors' maximum commitment not being exceeded.

As noted above, this needs to be carefully considered in the context of any potential conflict with any "*pro rata*" call provisions in the constitutional documents, any side letter, or the commercial practice of the particular fund. The constitutional documents should also be checked to determine whether the investor has any right of set-off, defences, counterclaim, etc., in respect of unpaid calls against amounts that may be owed by the fund to the investor. If possible, it should be made explicitly clear that the investor must fund even if the fund is insolvent, and that they will meet calls by the lender upon enforcement. If a borrower is asked to give an undertaking to a lender in the finance documents that all sums due to an investor are subordinated to sums due to the lender, the borrower should check that its fund documents and contractual arrangements with its investors are consistent with this. If such subordination provisions are not included, an amendment may be required to the constitutional documents or the fund may need to obtain a side letter from the investors. We also see appropriate wording being built into notices of creation of security and the investor agreeing to the wording by signing an acknowledgment of the notice.

What account are subscription proceeds paid to?

A key part of the security package for a capital call facility is security over the Subscription Proceeds Account. There can be some variation between funds as regards how and in whose name their bank accounts are established. For example, it may be in the fund's name, which is the most straightforward position from a lender's perspective, but may also be in the AIFM's or the Depositary's name. The bank account mandates should also be checked to see who has signing rights, and it should be checked with the Administrator/Depositary whether the proceeds move through any other accounts *en route* to the Subscription Proceeds Account and whether there are any automatic sweep mechanics on the account. Appropriate control arrangements should also be considered, to include the above-referenced service providers, where necessary.

The Subscription Agreement, investor side letters and notice of security

As mentioned above, the typical Subscription Agreement is quite short but is nevertheless a crucial document. As part of the security package, security is taken over the fund's rights therein by way of security assignment. The Subscription Agreement and any side letters need to be checked to ensure there are no prohibitions or restrictions on such assignment. For subscriptions into a section 110 company, investors commonly invest by subscribing for profit-participating notes rather than by subscription for shares, but a security assignment can still be taken over the section 110's rights therein.

Upon execution of the security, an equitable assignment is created as a matter of Irish law. From a priority perspective, however, it is better to convert this to a legal assignment. There can be some reluctance on the part of the fund to have notices of assignments sent to investors and relevant acknowledgments obtained, particularly where there is a large

number of investors. In this regard, some lenders will agree that notices are not served until a future Event of Default. One possible compromise between these two positions is that the relevant notice of creation of security is communicated in the next investor communication. Most commonly, we see notices served on investors at closing of the facility.

Securitisation Regulations

The European Securitisation Regulations (2017/2402) came into force in Ireland on 1 January 2019. If a section 110 company is in the deal structure, it is important that an analysis is carried out at the beginning of the deal as regards whether the financing could be considered to be a securitisation and if the Regulations are applicable. An important part of the analysis in relation to applicability of the Regulations will be determining whether the lender is relying, partly relying, or not relying on the underlying cash flows or assets of the section 110 company. The analysis may therefore reach different conclusions for subscription line facilities, NAV, other asset-based facilities or hybrid facilities.

The year ahead

The Irish financial services sector has continued to provide market-leading solutions for its international client base, which is reflected in significant increases in total assets in the Irish funds sector as well as the continued increase in the number of asset managers establishing management companies in Ireland.

Irish Funds, the industry body for the Irish funds sector, forecasts the level of international assets in Irish-domiciled funds to top €5 trillion by 2025, with the number of people directly employed in the industry, across asset management, Depositaries, Administrators, professional advisers, transfer agents, and other specialist firms, set to increase by 25% to over 20,000 in the same period.

Ireland is an open and international economy. In the fund finance space, lenders are currently dominated by the major players from the US and UK and continental Europe. Bank of Ireland has developed a visible and growing market presence over the last number of years and it is to be hoped that it will be joined by other domestic banks and direct lenders in the near future. The cautious optimism that predominates amongst our clients seems to be echoed on an international level; for example, in Cadwalader's recent lender survey with some well-placed words of caution, as expressed in Jeff Johnson's excellent article "A discussion on Bank Regulatory Capital and other Factors Impacting the Fund Finance Market".

We are excited for what 2023 will bring and look forward to working on innovative and market-leading transactions with you.

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Kevin Lynch is the Head of the Arthur Cox Banking & Finance Group. Kevin has extensive experience in banking and finance transactions with an emphasis on domestic and cross-border finance transactions and financial services. Kevin acts for a wide range of financial institutions, funds (both Irish and non-Irish domiciled), corporates and corporate service providers (including AIFMs and Depositaries), advising on funds lending transactions including subscription call, hybrid and NAV facilities. Kevin's practice also includes asset/property finance, acquisition finance and structured finance.

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