EXPERT COMMENTARY

Amendments to Ireland's limited partnership regime establish it as a leading jurisdiction for private market funds to raise and deploy capital, write Dillon Eustace partners Shane Geraghty and Derbhil O'Riordan

The Irish Investment Limited Partnership: An overhaul worth waiting for

Ireland's reputation as one of the world's leading domiciles for regulated alternative investment funds is hard won and well-earned. Irish funds are distributed and sold throughout Europe, the Americas, Asia and the Pacific, the Middle East and Africa and over 40 percent of global hedge fund assets are serviced in Ireland. In the retail space, Ireland has also been a market leading jurisdiction for UCITS products for many years and it continues to excel in being a European hub for exchange-traded funds and money market funds.

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As more and more fund managers set up their European fund structures in Ireland, one area where the jurisdiction struggled by comparison to others was in its offering of partnership type investment structures. Ireland's investment limited partnership regime was introduced in 1994 with the Investment Limited Partnerships Act but was not considered fit for purpose for a variety of reasons, including operational and regulatory limitations.

A significant growth in private markets globally, including in private equity, real estate and infrastructure, spurred Irish industry to update its 1994 regime in order to capitalise on this growth. Significant industry, regulatory and governmental interaction culminated, in December 2020, in amendments to Ireland's investment limited partnership regime, which finally establish Ireland as a leading jurisdiction for private market funds looking to raise and deploy capital in the EU and beyond.

The Investment Limited Partnerships Act, 1994 as amended governs the establishment and operation of regulated investment limited partnerships in Ireland. The ILP Act modernises the law governing investment limited partnerships in Ireland to offer a regulated, common law, pass-portable limited partnership vehicle for implementing private equity, venture capital, private debt and real assets investment strategies in Europe. Some of the key features of the ILP Act include:

An attractive hub: the regime changes will be of considerable interest to private markets asset managers globally

Formation of ILPs

The formation of ILPs is subject to the approval of the Central Bank of Ireland and ILPs are regulated by the Central Bank in accordance with the provisions of the Central Bank's AIF Rulebook. An ILP can only be considered formed when a certificate of authorisation has been issued by the Central Bank in accordance with the requirements of the ILP Act.

Regulation of ILPs as alternative investment funds

All ILPs are required to be authorised and regulated by the Central Bank. ILPs are regulated in accordance with the requirements of the Central Bank's AIF Rulebook and are categorised as either Retail Alternative Investment Funds or Qualifying Investor Alternative Investment Funds. For RIAIF ILPs, the main offering documents are required to be submitted to the Central Bank for prior review and comment. However, QIAIF ILPs can avail of a fast-track procedure under which the constitutional documents, main offering documents and material contracts are simply filed the day before approval is required. RIAIFs and QIAIFs are capable of being open-ended, limited liquidity or closed-ended in terms their liquidity profile.

Ability to establish umbrella type ILPs

The ILP Act also introduces the concept of umbrella type ILPs whereby multiple segregated liability compartments or "sub-funds" can be established. This provides asset managers with real options around economies of scale and significant structuring flexibility. Importantly, it allows different strategies and investor types to be accommodated within one overall architecture while at the same time preserving segregation of liability (ie, the assets of one sub-fund will not be available to discharge the liability of other sub-funds within the same umbrella). The umbrella structure concept is well established and recognised by asset managers, however, the ability to use an umbrella structure in an ILP is a unique feature that provides considerable operational efficiencies and potential economies of scale.

Limited liability of limited partners

Similar to other jurisdictions, the liability of limited partners is limited to the amount they contribute or agree to contribute to the ILP unless they perform certain activities related to the management and operation of the ILP.

Limited partners performing certain functions

Typically, if an LP takes part in the management of the limited partnership structure, the LP runs the risk of losing limited liability in relation to any losses which arise as a result of such activities. The ILP Act provides a non-exhaustive list of activities that an LP can perform in relation to the ILP which will not be considered to be participating in the management of the ILP and consequently will not compromise their limited liability status. The provisions of the ILP Act relating to LP participation in these activities are in line with accepted industry standards, ie, service on any board or committee of the ILP; investigating, reviewing or being advised as to the accounts or

business affairs of the ILP or exercising any right conferred by the ILP Act; or approving changes to the limited partnership agreement.

Amendments to the LPA

In order to provide greater flexibility and simplify the process of amending the LPA of an ILP, the amendments to the legislation remove the requirement for all LPs to approve an amendment to the LPA and amendments will now be permitted by a majority of the general partners and a majority of LPs. In order to be consistent with other available fund structures in Ireland, the ILP Act also allows for certain amendments to proceed without LP approval where the depositary of the ILP certifies that the changes to the LPA do not prejudice the interests of LPs. The ILP Act allows for the LPA to set down the specific provisions with respect to what a "majority of limited partners" is considered to mean. Accordingly, asset managers have flexibility in determining the appropriate methodology to use.

Partner defaults and failure to perform

Critical to the operation of an ILP are the provisions of the LPA which address the issues relating to failures by LPs to perform their obligations under the LPA. The range of options available to the GP in the event of a default by an LP in respect of their obligations will be set out in the LPA. The ILP Act allows for the following consequences for an LP that fails to perform the obligations applicable to them under the LPA:

- reducing, eliminating or forfeiting of partnership interests;
- subordinating the partnership interest in the ILP of the defaulting partner to the interests of non-defaulting partners;
- effecting a sale or forfeiture of the defaulting partner's partnership interest.

Importantly, the consequences for defaulting investors will not be unenforceable solely on the basis that they may be penal in nature.

Return of contributions

LPs are permitted to receive out of the capital of the ILP a payment representing the return of any part of their contribution to the ILP subject to the requirements of the LPA. In order to ensure that such payments are capable of being recalled if necessary, the LPA will have provisions addressing the issue of repayment of distributions by limited partners in specific circumstances.

Migration of limited partnerships from other jurisdictions

It is possible for limited partnerships established in other jurisdictions to migrate to Ireland. The application for migration by a migrating partnership is made to the Central Bank and follows much of the standard process for the establishment and authorisation of an ILP.

Beneficial ownership requirements: ILPs and common contractual funds

The ILP Act requires the GP of an ILP to establish and maintain a register of beneficial ownership of the ILP and to submit that information to the Central Bank for inclusion on the Central Bank's central register of beneficial ownership of certain financial vehicles.

A "beneficial owner" in relation to an ILP means: any individual who (a) ultimately is entitled to or controls, whether the entitlement or control is direct or indirect, more than a 25 percent share of the capital or profits of the partnership or more than 25 percent of the voting rights in the partnership, or (b) otherwise controls the partnership.

Regulation of GPs to ILPs

In November 2020, the Central Bank issued a revised version of its Q&A on AIFMD in which it confirmed that the GP of an Irish ILP will not need a separate regulatory authorisation.

However, as expected, it has also confirmed that the directors of the GP of an Irish ILP will be required to comply with its fitness and probity regime, a well-trodden and predicable pre-authorisation process for individuals carrying out regulated tasks in Ireland.

Ireland: A future private markets leader

The changes brought forward by the ILP Act provide Ireland with another "best in class" fund structure which will be of considerable interest to private markets asset managers globally. The industry is excited at the prospect of Ireland becoming a hub for future private markets-type funds.

The clarity provided by the Central Bank in relation to issues such as: (i) the issue of interests at a price other than net asset value; (ii) excuse and exclude provisions; (iii) stage investing; and (iv) management participation in specific share classes (ie, carried interest/waterfall mechanisms) has further enhanced Ireland's offerings and attractiveness in this area, which it is anticipated will allow Ireland the ability to compete with other jurisdictions. ■

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