

A nighttime photograph of a city street, likely in Dublin, Ireland. The scene is illuminated by streetlights and building lights, creating a vibrant atmosphere. A tall, cylindrical tower with a white and blue patterned facade stands prominently on the right side of the frame. The street is filled with light trails from cars and a bus, indicating movement. Pedestrians are visible on the sidewalk, and trees line the street. The overall mood is modern and urban.

Matheson

**Pension Pooling and Asset
Pooling in Ireland**
Establishing an Irish Common
Contractual Fund

About Matheson

Matheson's primary focus is on serving the Irish legal needs of internationally focused companies and financial institutions doing business in and from Ireland. Our clients include the majority of the Fortune 100 companies. We also advise 7 of the top 10 global technology brands and over half of the world's 50 largest banks. We are headquartered in Dublin and also have offices in Cork, London, New York, San Francisco and Palo Alto. More than 740 people work across our six offices, including 97 partners and tax principals and over 520 legal, tax and digital services professionals.

Our strength in depth is spread across more than 30 distinct practice groups within the firm, including Asset Management and Investment Funds, Aviation and Asset Finance, Finance and Capital Markets, Commercial Litigation and Dispute Resolution, Corporate, Healthcare, Insolvency and Corporate Restructuring, Insurance, Intellectual Property, International Business and Tax. We work collaboratively across all areas, reinforcing a client first ethos among our people, and our broad and interconnected spread of industry and sectoral expertise allows us to provide the full range of legal advice and services to our clients.

Our dedication to client service and excellence has become our hallmark as a firm, and is acknowledged by both our clients themselves and the world's leading legal directories and publications.

The Asset Management and Investment Funds Department

Matheson is the number one ranked funds law practice in Ireland, acting for 31% of Irish domiciled investment funds by assets under management as at 30 June 2020. Led by 13 partners, the practice comprises 70 asset management and investment fund lawyers and professionals in total. The group's expertise in UCITS and alternative investment funds is reflected in its tier one ranking by Chambers Europe, the European Legal 500 and the IFLR1000, and the team is specifically recognised for its abilities with respect to complex mandates.

We are consistently involved in influencing developments in the asset management and investment funds industry in Ireland and Europe. Our partners and associates hold key industry appointments on various committees and taskforces of the Irish funds industry association (Irish Funds). We also hold an appointment to the Irish Prime Minister's International Financial Services Centre Funds Working Group and, at European level, a Matheson partner sits on the UCITS working group, the ETF Task Force, the ESG Standing Committee and the Benchmarks working group of the European Fund and Asset Management Association.

With our asset management legal and regulatory advisers working alongside Matheson taxation, structured finance and commercial litigation departments, we offer a comprehensive service for clients. We are one of the few law firms in Ireland with a specialist derivatives practice, which enables us to provide combined asset management, tax and derivatives advice of the highest calibre to our clients.

Matheson's Tax Department is significantly the largest tax practice group amongst Irish law firms. In contrast to the tax departments of other Irish law firms, it operates primarily as a "front-end" service and more than half of its work is on transactions or advisory matters where it has the sole or lead role. The tax department has also developed significant expertise with respect to taxation matters as they impact investment funds and management companies in Ireland and regularly works with the Asset Management Department in this regard.

Establishing an Exchange Traded Fund in Ireland

This brochure provides information in relation to Irish common contractual funds ("CCFs") generally, the structures available for use, the relevant tax treatment and the steps necessary to launch a CCF. It also outlines the advantages of Ireland as a fund domicile.



Contents

1	Introduction to Common Contractual Funds	4
2	Structuring a Common Contractual Fund in Ireland	6
3	Tax advantages of an Irish Common Contractual Fund	9
4	Key Steps to Establishing a Common Contractual Fund	10

1 Introduction to Common Contractual Funds

The Irish CCF is a tax transparent cross-border investment vehicle designed to assist multinationals, their finance professionals and local pension plans to achieve economies of scale and enhanced governance.

The pooling of pension fund assets, life assurance assets or general asset pooling from various jurisdictions into one entity enables a number of cost savings to be achieved through economies of scale. It allows pension funds or life assurance funds in local subsidiaries to diversify their risk by using a larger number of investment managers than would be possible if they were operating on a standalone basis. By pooling pension plans, a multinational can leverage the value of investment talent, limit the extent to which it is required to duplicate structures in each country of operation, reduce the potential liability and workload of local plan trustees and investment managers, permit greater negotiating power in respect of administration, custody and brokerage fees and increase access to securities lending structures. It can also enhance access to market leading investment management schemes, including schemes with higher minimum subscription amounts and it facilitates better governance, enhanced risk management and reporting in respect of plan assets. There will also be advantages for employees through the cost savings outlined above and the application of a consistent investment policy across different jurisdictions.

A pooled investment vehicle will only be viable if it does not materially increase the tax costs incurred by the local pension and / or life assurance funds. Pension funds are typically entitled to favourable withholding tax treatment on investment income and, as such, it will be important to ensure that the pooled vehicle is completely tax transparent and that the local pension or life assurance fund may continue to claim all available tax treaty benefits on the same basis as if they had invested in the underlying securities directly. A number of collective investment schemes may be considered exempt from tax in their home jurisdiction but regarded as a taxable entity in third party countries in which they invest and this has traditionally been a roadblock to cross-border pooling and remains so in other jurisdictions.

The Irish CCF was created with the express aim of facilitating cross-border pooling without any tax-drag for participants. It is completely tax transparent for Irish tax purposes and this tax transparent nature has also been recognised by a large number of countries globally. Consequently, profits which arise to an Irish CCF will be treated as profits which arise to the unitholders in the fund. There will be no increase in domestic or foreign withholding taxes and no withholding taxes on distributions by the CCF. By comparison with some other jurisdictions offering similar vehicles, the Irish CCF has been specifically created for the purposes of asset pooling and tax transparency is expressly provided for in the implementing legislation. As a result, the CCF is not liable to be recognised in Ireland as tax transparent for some purposes and non-tax transparent for others. This feature has assisted in ensuring recognition of tax transparency by third party countries.

It should also be noted that while CCFs were initially designed for pension funds in order to ensure that they can maintain existing favourable tax treatment, they may be used by any entity, other than individuals, which seeks to avail of a tax transparent structure.

CCFs may be structured as UCITS and avail of the EU passport permitting marketing throughout Europe, or alternatively as alternative investment funds (“**AIFs**”) which have added investment policy flexibility and speed to market capabilities pursuant to the Central Bank of Ireland’s (“**Central Bank**”) fast track authorisation process.

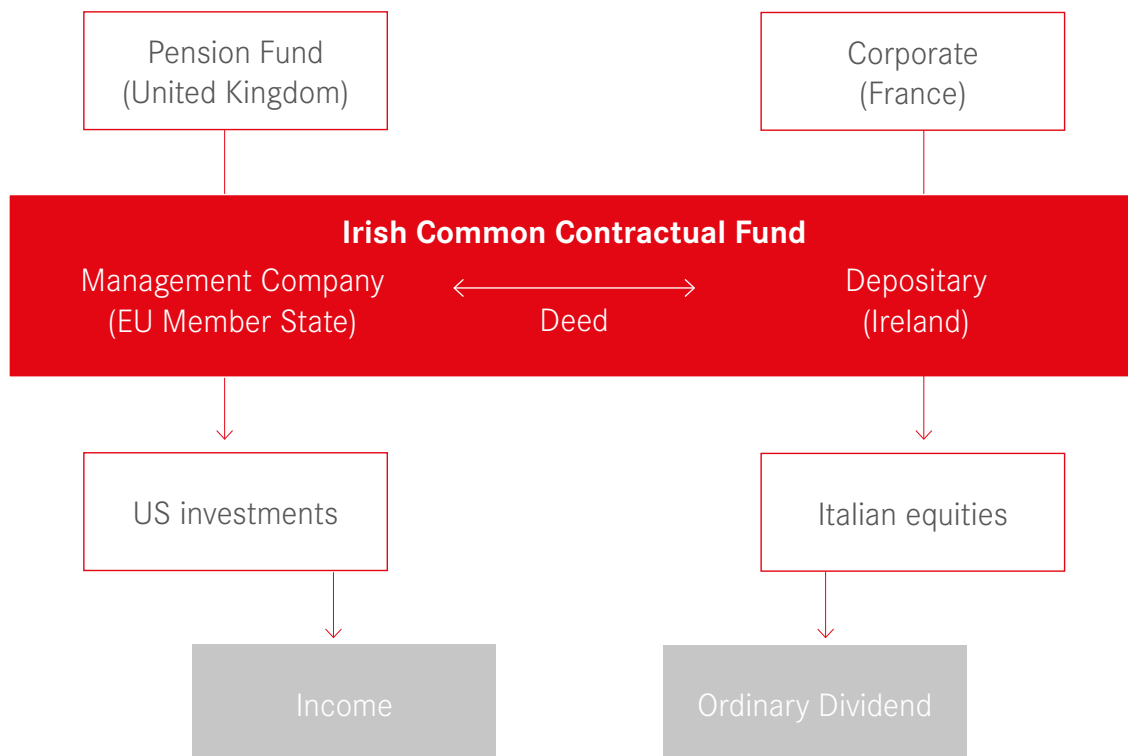
Ireland is the fastest growing fund servicing centre in the world with extensive industry experience and expertise in the areas of fund management, administration, custody, legal and auditing. At present, there are over 16,000 professionals working in the Irish funds industry and all of the major global administration and custody groups are present in the Irish market to service Irish collective investment schemes. These service providers have invested in creating the technology and processes needed to address the particular requirements of CCFs, including the ability to apply different rates of withholding tax to different investors (depending on the provisions of the double taxation treaty between an investor’s home country and the country of investment), systems to apply tax relief at source, processing and tracking of tax reclaims, completion of tax documentation, tax reporting and tracking of security information at investor level.

This strong pool of expertise in the area of asset pooling and CCFs has given Ireland a significant advantage over other jurisdictions which have sought to enact similar legislation but which have not developed the operational systems or obtained the tax rulings or opinions in key markets to implement these structures.

2 Structuring a Common Contractual Fund in Ireland

An investment undertaking that is established under the relevant Irish regulations and is not constituted under company law or trust law (ie, it is constituted under contract law) is not chargeable to tax if it meets certain criteria. For Irish tax purposes it is “tax transparent”. The legislation essentially treats, for tax purposes, the profits that arise under an investment vehicle as being profits that arise to the unitholders themselves. As a result, a significant number of multinational companies and asset managers have established CCFs for the purposes of pooling pension fund assets of their subsidiary companies.

The chart below illustrates a typical CCF structure. In the example below, the tax liability of the investors located in the United Kingdom and France will be governed by the double taxation treaty between their country of residence for tax purposes and the country in which the CCF has invested, the US and Italian tax treaties respectively. The exact tax liability is derived by reference to those tax treaties and the actual income types in those markets.



Overview of UCITS and AIFs Vehicles

UCITS

The UCITS regulatory regime relates to open-ended retail investment vehicles investing in transferable securities and other liquid financial assets. The advantage of establishing a fund as a UCITS is that it can generally be sold without any material restriction to any category or number of investors in any EU Member State, subject to filing appropriate documentation with the relevant regulatory authority in the EU Member State(s) where it is to be sold. There are restrictions on the investment and borrowing policies of UCITS and on the use by UCITS of leverage and financial derivative instruments.

Alternative Investment Funds

AIFs offer greater flexibility with respect to investment styles and restrictions. AIFs may be established as retail investor AIFs (“**RIAIFs**”) or qualifying investor AIFs (“**QIAIFs**”). RIAIFs are subject to general investment diversification and borrowing restrictions whereas QIAIFs are subject only to minimal investment restrictions and are not subject to any leverage restrictions¹. AIFs are managed by authorised alternative investment fund managers (“**AIFMs**”) and can be marketed throughout Europe by EU AIFMs on a passported basis under the AIFMD.

Further information in relation to UCITS and AIFs and the Irish regulatory regime for collective investment schemes is set out in the [Asset Management and Investment Funds](#) section of our website or upon request.

Typical Structure of a Common Contractual Fund

A CCF is established under a deed of constitution pursuant to contract law (not company law or trust law) which provides that investors participate as co-owners in the assets of the fund. Interests in the fund are represented by ‘units’ which are issued and redeemed in a similar manner to a unit trust and there are a number of other similarities with a unit trust structure. For example:

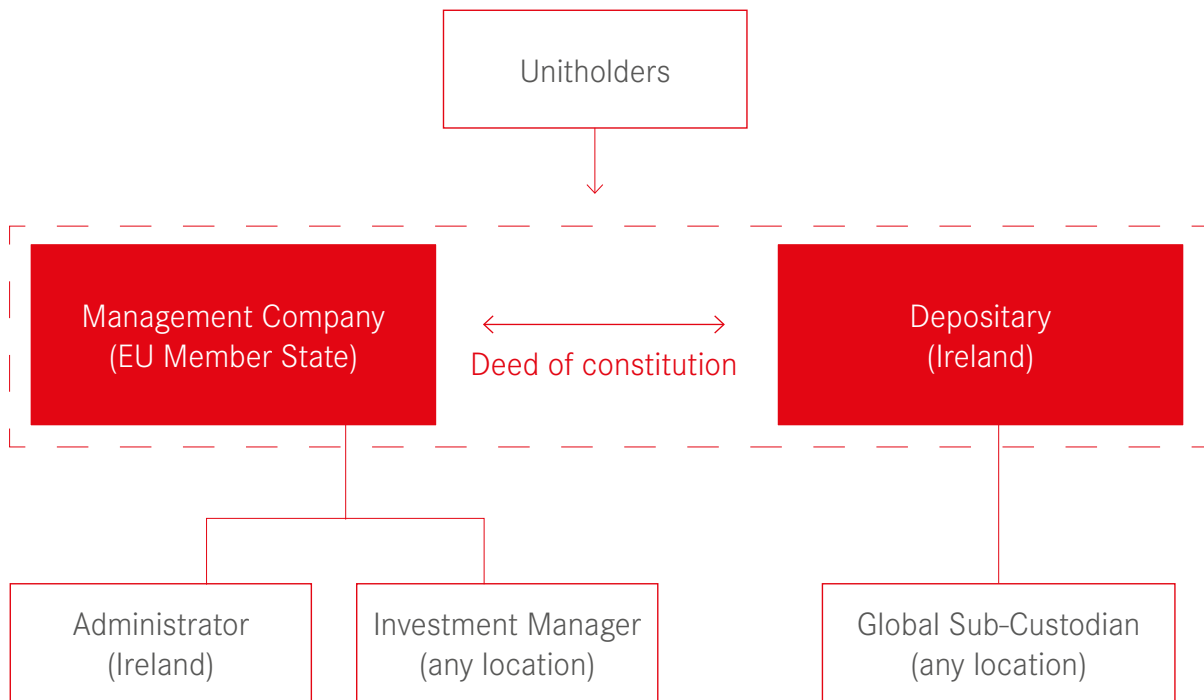
- where the CCF is established as an umbrella, the assets and liabilities of the various sub-funds are segregated. In particular, Irish law includes an express provision to the effect that a CCF established in an umbrella structure will not be subject to cross liability between sub-funds in the umbrella;
- the liability of unitholders is limited to their subscription amount; and
- the depositary has the same duties and responsibilities as with other fund types.

The deed of constitution creating the CCF will be executed under seal by the manager and the depositary of the proposed fund. The manager will have primary responsibility for the management and administration of the fund and will generally discharge this obligation by appointing an investment manager, who will take charge of the day-to-day management of the investments of the fund, and an administrator with responsibility for the processing of subscriptions and redemptions, calculation of net asset values, maintenance of the books and records of the fund and the preparation of accounts on behalf of the fund.

The depositary will have responsibility for the safekeeping of the assets of the fund and the settlement of trades. In accordance with the requirements of the Central Bank, the depositary is also under a duty to supervise the investment activities of the fund and to report to the unitholders on an annual basis as to whether the fund and the manager have operated in accordance with the prospectus and the applicable regulations. The depositary may arrange for the holding of assets of the fund through its global sub-custody network.

¹ QIAIFs which are established as direct lending vehicles are subject to a leverage limit of 200% of gross asset value.

A typical CCF structure is illustrated below.



The unitholders in a CCF will hold a co-ownership interest in the assets of the fund as tenants in common with the other unitholders. No unit shall confer any interest in any particular part of the assets of a CCF but shall determine the portion of the underlying assets of the CCF to which each unitholder is beneficially entitled.

As CCFs can be structured as umbrella funds, one approach which we have seen in the market has been the creation by a multinational or fund promoter of umbrella CCFs, the initial sub-fund of which is used for pooling its own pension assets. As a fee generating mechanism, further sub-funds within the structure may then be made available to the pension plans of multinationals lacking the scale required to establish their own pension pooling vehicles.

3 Tax Advantages of an Irish Common Contractual Fund

A CCF is not chargeable to tax if all its units are: (i) an asset of a pension fund or are beneficially owned by persons other than an individual; or (ii) are held by a depository or trustee for the benefit of persons other than an individual.

Irish Tax Treatment of a Common Contractual Fund

For Irish tax purposes, a CCF is “tax transparent” which means that the income and gains arising or accruing to it are treated as arising or accruing to its unitholders in proportion to the value of the units beneficially owned by them, as if such income and gains did not pass through the hands of the CCF. Essentially therefore, for tax purposes, the profits that arise to this type of investment vehicle are treated as being profits that arise to the unitholders themselves.

The main tax advantages of such a fiscally transparent investment vehicle are as follows:

- the character of the income received by the investor does not change;
- there is no increase in domestic or foreign withholding taxes;
- the CCF is exempt from tax on its income and gains; and
- there is no withholding tax on distributions from the CCF.

It is intended that as the CCF is a fiscally transparent entity for tax purposes, it should enable the unitholders to access double taxation treaty benefits of their home jurisdiction.

The intention is that for example, a UK pension fund investing in US securities would have regard only to the US / UK double taxation treaty. This would depend on how the US and UK tax authorities view the CCF.

How do other jurisdictions view common contractual funds?

It would be necessary that the tax authorities in the jurisdictions in which the individual pension scheme / life assurance fund is established are satisfied that they will be able to certify any double taxation treaty claims made by participants in the CCF. The source country tax authorities (ie, the country of issue of the relevant security) must also recognise the fiscal transparency of the CCF and grant double tax treaty relief to the CCF participants (not the fund itself) in respect of income and gains.

The fiscal transparency of the CCF has been recognised by a number of jurisdictions, including the US, the UK, the Netherlands, Australia, Austria, Belgium, Germany, Canada, Denmark, Finland, France, Ireland, Italy, Sweden, Switzerland and Norway (amongst others) and it is probable that other OECD jurisdiction tax authorities would also regard the CCF as tax transparent. In the case of other jurisdictions, it should be possible to seek a specific revenue ruling in advance of any proposed investments.

4 Key Steps to Establishing a Common Contractual Fund

As with any other investment fund authorised by the Central Bank, the authorisation of a CCF is a standardised process and we have outlined the essential elements of this below.

Investment Manager Approval

The Central Bank must be satisfied with the experience, expertise, reputation and resources of the investment manager responsible for investing the assets of the fund. If an investment manager has been previously cleared by the Central Bank to act in respect of an Irish authorised fund, no further approval of that entity will be required. In the case of an investment manager holding an authorisation under MiFID or which is a credit institution regulated within the European Economic Area, the applicant investment manager can avail of a fast-track approval process. There is a slightly longer approval process for an entity regulated outside of the European Economic Area (eg, entities regulated by the US Securities and Exchange Commission). This process can be run in conjunction with the drafting of the required fund documentation.

Management Company Approval

A CCF must have a management company which will enter into the deed of constitution with the depositary. If it is intended to structure the CCF as a UCITS, then where a new Irish entity is intended, the proposed management company must apply to the Central Bank for authorisation as a UCITS management company and comply with certain minimum requirements set out at EU level. This will include the submission of an application form, business plan and other supporting documentation. Alternatively, a UCITS management company may passport its authorisation from another EU country into Ireland.

Pursuant to AIFMD, an AIF be required to appoint an AIFM. An Irish AIFM will need to be approved by the Central Bank or an EU AIFM will need to passport its authorisation in another EU country into Ireland in advance of the AIF application for authorisation.

A UCITS management company or AIFM will generally delegate its day-to-day functions to third parties (investment manager, administrator, distributor, etc) and have no employees, but it must hold periodic board meetings in Ireland and be tax resident in Ireland. While the authorisation of a management company is relatively straightforward, there is also the option to avail of pre-existing management companies set up by service providers in the Irish market.

Approval of Directors

All directors of Irish domiciled management companies must be pre-approved by the Central Bank. Sufficient information in respect of all directors must be submitted to the Central Bank to demonstrate the appropriate expertise and good reputation of a proposed director. Proposed directors of Irish management companies, whether previously approved or not, are required to submit information to the Central Bank in the form of a prescribed “individual questionnaire”.

Selection of Depositary and Administrator

It will be necessary to appoint a Central Bank approved depositary for the safe-keeping of assets and a Central Bank approved administrator which is responsible for maintaining the books and records of the fund, calculating the net asset value of the fund and maintaining the shareholder register. In each case the entity must be located in Ireland and the relevant service contracts will form part of the filing with the Central Bank. As noted above, all major fund service providers have a presence in Ireland and a number of service providers have developed expertise in the provision of services to CCFs.

Approval of Documentation by the Central Bank

In the case of a UCITS or RIAIFs, the offering documents are filed with the Central Bank for prior approval. Once these documents have been cleared of comment by the Central Bank, they may be dated and submitted in final form.

The authorisation procedure for QIAIFs is a streamlined one day process, subject to the provision of the relevant confirmations, and pre-approval of the directors and investment manager.

Full details of the Asset Management and Investment Funds Department, together with further updates, articles and briefing notes written by members of the Asset Management and Investment Funds team, can be accessed at www.matheson.com.

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Please get in touch with your usual Asset Management and Investment Funds Department contact or any of the contacts listed in this publication should you require further information in relation to the material referred to in this update.

Full details of the Asset Management and Investment Funds Department, together with further updates, articles and briefing notes written by members of the Asset Management and Investment Funds team, can be accessed at www.matheson.com.