

The Irish Investment Limited Partnership

A real contender for illiquid strategies

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Ireland's long-awaited reforms to its limited partnership structure are welcomed by leading international law firm, Simmons & Simmons, which opened a Dublin office in 2018. Simmons & Simmons currently have three funds partners in Dublin, with an additional six private funds partners in London, in addition to its well-known hedge funds practice. Ireland is a well-established domicile for liquid strategies, and now has aspirations to compete on the illiquid side, mainly with Luxembourg, where Simmons also has an office, opened in 2015. "Luxembourg was an earlier mover in creating structures to capture the post-AIFMD demand for onshore investment vehicles for illiquid strategies. Ireland was slower partly due to political priorities, timing around elections and also latterly due to Covid. The bill to update the 1994 Act was nearly through the Irish houses of parliament in early 2020 and so should have been passed a year ago," says Fionán Breathnach, Partner and Country Head of Simmons' Dublin office.

The updated Irish investment limited partnership (ILP) structure has been years in the making and it reflects a multi-year trend towards onshore vehicles: "Private funds and fund managers were traditionally offshore and unregulated, but AIFMD brought them onshore and into the regulatory net," says Dublin office Managing Associate, James McKnight.

Regulation has also been increasing in offshore jurisdictions: "It is notable that all private funds in Cayman are now required to register with CIMA and to ensure that depositary-like functions are carried out in terms of safekeeping, oversight and cashflow monitoring. As the regulatory gap narrows, onshore jurisdictions such as Ireland more often become a bigger part of the scoping and planning stage, due in part to increased distribution capabilities, whereas previously certain managers would default to offshore," notes McKnight.

European distribution

Regulatory decisions on (any) third country marketing passport for non-EU AIFMs under AIFMD seem to have been indefinitely postponed, with ESMA's recommendations for the 2020 review of AIFMD in theory focusing on further harmonizing national private placement regimes (NPPRs) and reverse solicitation regimes within the EU. In practice, the impetus to create a level playing field seems to be stronger on reverse solicitation, where an alert flagging up "questionable practices around reverse solicitation" was published by ESMA on January 13, 2021. "New regulations on cross-border funds regulation make it harder to rely on reverse solicitation," says McKnight.

Meanwhile, NPPRs may be a feasible option for some countries, mainly in Northern Europe, but remain effectively shut in many European countries and certain jurisdictions have not yet even implemented article 42 of AIFMD.

ESMA is pushing funds towards passporting options and many lawyers recommend that non-EU managers appoint an EU AIFM to avail of the AIFM management company marketing passport throughout the EEA.

This also guides other structuring choices around master and feeder relationships, which are not prescribed by the ILP nor the ICAV legislation. "For a feeder fund to avail of the passport, both it and the master fund would need to be EU domiciled. It could have offshore feeders but an ILP feeding into an offshore master fund could not avail of the passport," says McKnight. "EU master funds, with Cayman or Delaware feeders, or parallel structures are popular options".

"The structuring choices are very much investor driven in terms of managers assessing their target investor communities. European institutional

investors are more likely to require a regulated vehicle, while others may prefer to stay in an offshore vehicle. We are seeing many parallel structures with Cayman for US investors, Delaware for US taxable investors, and Irish for European ones," says Breathnach.

Some private equity and venture capital funds could also have other options, whether or not they operate under AIFMD. "Some funds can also consider the European Venture Capital Fund (EuVECA) passport, which offers broader coverage than AIFMD as it provides access to certain high net worth individuals, though it has not yet attracted a great uptake," says McKnight.

Runway of growth

Ireland is already home to over 3,000 AIFs housing USD770 billion of assets, as of November 2020 according to Irish Funds, and is confident about servicing illiquid strategies. Breathnach guesses that perhaps 25% of AIFs might be in private equity or private debt, but there is potential for far more. "Ireland has great expertise and experience in servicing private equity and private debt, as funds administered in Ireland, including non-Irish funds, account for 40% or so of global alternative assets. This should be a great accelerator for private equity and private debt funds. European private equity funds have been raising Euro100 billion a year in the past three years and Ireland should capture some of this," says Breathnach.

A competitive legal structure

The right legal structure and some adjustments to the regulatory framework were the only missing pieces of the jigsaw. "In broad terms the Irish fund structures had been focused on liquid alternatives and open-ended funds, so the rules needed to be revised for illiquids with generally closed end structures," says McKnight. The previous regime was "not fit for purpose, but the updates are extremely positive which includes an expanded list of safe harbour actions that limited partners can take without losing limited liability," says McKnight. Most notably "the GP itself was required to be separately authorised and maintain minimum regulatory capital of EUR 125,000, which was out of step with every other jurisdiction. This requirement has been gone since November," says McKnight. The general CBI rule that all investors in an Irish regulated fund must have a pro-rata share of all of the assets of the fund can now be disapplied for closed-ended funds, which permits the ability to include excuse and exclude rights, "which is important for investors who may not be able to take part in certain investments, for instance tobacco or alcohol and will also allow for a certain level of ESG screening where agreed in advance with the investor," notes McKnight.

Distribution outside the EU

Outside Europe, managers need to navigate the patchwork quilt of private placement regimes for distribution in Asia, the Middle East, South America and so on. For these markets, it is not clear that an Irish fund offers any advantage over offshore domiciles such as Cayman, Jersey or Guernsey. "Ireland has memoranda of understanding with regulators in countries such as Hong Kong and Singapore relating to UCITS funds, but AIFs do not derive any benefit from these agreements and would still need to use private placements. The assistance of local distributors or law firms with a global footprint will usually be required to navigate the disparate regulatory landscapes in such regions," says McKnight.

1907 Act Unregulated Partnerships

In common with the 1994 act, The Limited Partnerships Act 1907 is being reformed. “It can still be used as an unregulated fund and is an active and viable vehicle in contrast to the legacy 1994 regime,” says Breathnach.

Simmons has been involved in the consultation processes for both. McKnight sits on the Irish Funds ILP legislative update committee, and co-chairs the 1907 LP sub-committee. “The 1907 Act is the same act as is currently on the UK statute book, as it predates Irish independence. The act is being updated based on a consultation process. Our UK office has closely followed the UK reforms, and we have responded to the Irish consultation to suggest that the Irish act should at least be updated to match the changes made to the UK act, such as allowing for private fund limited partnerships, and removing the cap of 20 on the number of limited partners,” says McKnight. “Our hope is that once the 1907 act is updated, Ireland will then have regulated and unregulated limited partnership structures. Currently the 1907 structure is used most often for smaller venture capital and property managers,” he adds.

The 1907 structure may only be marginally faster than the new ILP, however. “The time taken to get all stakeholders to agree on documents and structures would be the same. The only time saving would be the one day for QIAIF approval,” says McKnight.

Flexible and versatile

The ILP can now also accommodate umbrellas and sub-funds with statutory segregation between the assets and liabilities of each sub-fund from one another but also from the ILP itself and which allows different strategies within sub funds or different sets of investors within the same legal structure. “This is also convenient because there is no need to set up a separate structure every time a new strategy is launched – the service provider agreements with administrators, depositaries and AIFMs can remain intact. Our normal presumption with any new manager is for an umbrella structure, but equally umbrella LPs are relatively rare, and we may see more standalone ILPs,” says Breathnach.

ILPs can cater for institutional or retail investors and be open or closed ended. “Most ILPs are expected to be QIAIFs (Qualifying Investor AIFs) and closed ended. There are not many RIAIFs (Retail Investor AIFs) and we expect the proportion will be similar or possibly less due to the type of asset. We envisage mostly closed-ended funds but also some hybrid structures. We expect that open-ended ILPs will be very rare,” says McKnight.

Investment freedom and cryptocurrencies

The ILP can also be used to house a single asset as it has no diversification criteria, unlike some regulated fund structures. The asset classes and strategies into which ILPs can invest are not prescribed: “in theory

the ILP could house cryptocurrency assets, but we are not at a stage where the CBI has approved them. We expect they will follow the European agenda,” says Breathnach. “Submissions have been made to the CBI with regards to cryptocurrencies in Irish funds but approval of the first crypto fund in Ireland is not likely to be imminent. We expect it will happen with the right types of custody and depositary arrangements, and increasingly regulated crypto exchanges,” says McKnight. In the meantime, other domiciles could be considered. “Globally, Simmons has acted for the first crypto managers in the UK and in Hong Kong and we have established a number of funds investing in crypto in offshore jurisdictions,” points out Breathnach.

Substance and directors

Substance requirements for the ILP should not be too onerous. “It is still technically possible to set up a self-managed structure – and some legacy ones exist – but in practice this is difficult as it would require the GP to be authorized by the CBI, which defeats one object of the reforms,” says McKnight. “Therefore, in most cases managers of ILPs will appoint an AIFM to which the substance requirements apply. If an AIFM was not appointed, substance requirements would apply to the GP, which would be undesirable”.

“Substance requirements are in fact more relevant for asset managers’ Brexit planning. The Irish

“Brexit is generally not positive for the Irish economy, with the exception of international financial services, asset management and funds.”

Central Bank CP86 thematic inspections cover fund management companies and governance. The exact substance requirements will depend on the nature, size and complexity of the structure,” says Breathnach.

Directors and meetings

The GP of an ILP requires two Irish resident directors, approved by the CBI. “But for the ILP substance requirements does not hang on them because they are not corporate vehicles,” says McKnight. Remote meetings post Covid are not an entirely new phenomenon – but may not become the new normal either. “Ireland has always allowed for some remote company meetings, as far as articles of association and constitutional documents allow. The Central Bank of Ireland has been flexible around this and recognizes that severe travel restrictions make meetings difficult, but we are not sure if this sets a template for the future. Once normality returns, we would expect meetings for regulated entities will take place in Ireland at least twice per year, though this could vary with the composition and location of the board,” says Breathnach.

Comparison with Luxembourg structures

The main difference between the Irish and Luxembourg structures for illiquids is that the ILP is a common law LP structure, while the Luxembourg SCSp is grounded in civil law, reflecting their respective legal systems and that the ILP is a regulated fund vehicle.

Ireland’s law is based on English law. “Since Ireland is the largest English-speaking jurisdiction in the EU with English as the first language, it is also a more natural home for Anglosphere managers,” says McKnight.

He also finds that the working styles in Ireland can also be more similar to the UK and the US than perhaps in continental Europe, and further argues that this could also be a factor leading to a more competitive cost of doing business.

Green finance

In other regards, Ireland and Luxembourg could be equally attractive. Luxembourg has a strong reputation in green finance, and Ireland is also prioritizing this with its strategic document “Ireland for Finance 2025”, which makes sustainable finance an integral part of the Central Bank of Ireland’s plans for greening the financial system. “The ILP should be a huge attraction for long term capital projects such as renewables, energy efficiency and carbon capture. We expect Ireland will become a key jurisdiction,” says Breathnach.

Taxes are also not an important differentiator between the two domiciles. “In terms of tax differences, they are likely to be minimal, since both vehicles are tax transparent and not subject to local taxes,” says McKnight. There was a time when Ireland had a slightly lower withholding tax rate than Luxembourg on US dividends, but that is no longer the case.

A global network

“As a global firm with a sector focus on investment funds, we will frequently deal with clients that are considering different jurisdictions as part of our daily work. Ireland and Luxembourg are the standout domiciles for European and outward distribution. Elsewhere in the EU, we do not see a lot of clients considering Malta or Cyprus,” says Breathnach.

Simmons’ alliance with Seward and Kissel also leads to weekly discussions and a two-way traffic of business: European clients might set up Delaware funds for the US market and US clients could set up Irish funds for the European market.

“We also have a very strong presence in Hong Kong, where I lived for over four years, and in Singapore. Everyone has their own preferences on domiciles and if a manager wants access to China, they could look at a Hong Kong structure whereas the Singapore VCC is worth considering for an ASEAN offering. Unlike some of our competitors in Ireland we can provide a global service and as such we will not push managers into an Irish fund if it is not the best fit,” says McKnight.

Time to market

Some offshore domiciles assert that a faster time to market gives them an edge, with either management company formation or fund formation or both. But Breathnach questions this view, at least for fund formation: “we do have a process in Ireland for approving QIAIFs, which is a 24-hour filing with regulators once all stakeholders have agreed on documents and filed with the CBI. This is very much a speed to market that matches offshore”.

Brexit could well accelerate the volume of launches: “we are very much working in partnership rather than in competition with London on post-Brexit solutions in Ireland. Brexit is generally not positive for the Irish economy, with the exception of international financial services, asset management and funds,” says Breathnach. “Covid has not demonstrably or identifiably had a negative impact,” he confirms. [THFJ](#)

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