

## Key features of the Investment Limited Partnership in Ireland

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### ILP as a flexible form of mutual fund in Ireland

The Investment Limited Partnership (“**ILP**”) is a form of regulated fund structure which may be organised in Ireland, is established by way of partnership agreement pursuant to legislation, and is available and well suited, to all manner of investment strategies. It is particularly suited to investment in private equity, real estate, venture capital, infrastructure assets, credit and loan assets, as well as hedge fund strategies.

The ILP is a regulated structure under the provisions of the EU AIFM Directive and is most suited as a form of Qualifying Investor Alternative Investment Fund (“**QIAIF**”) suitable for institutional investors.

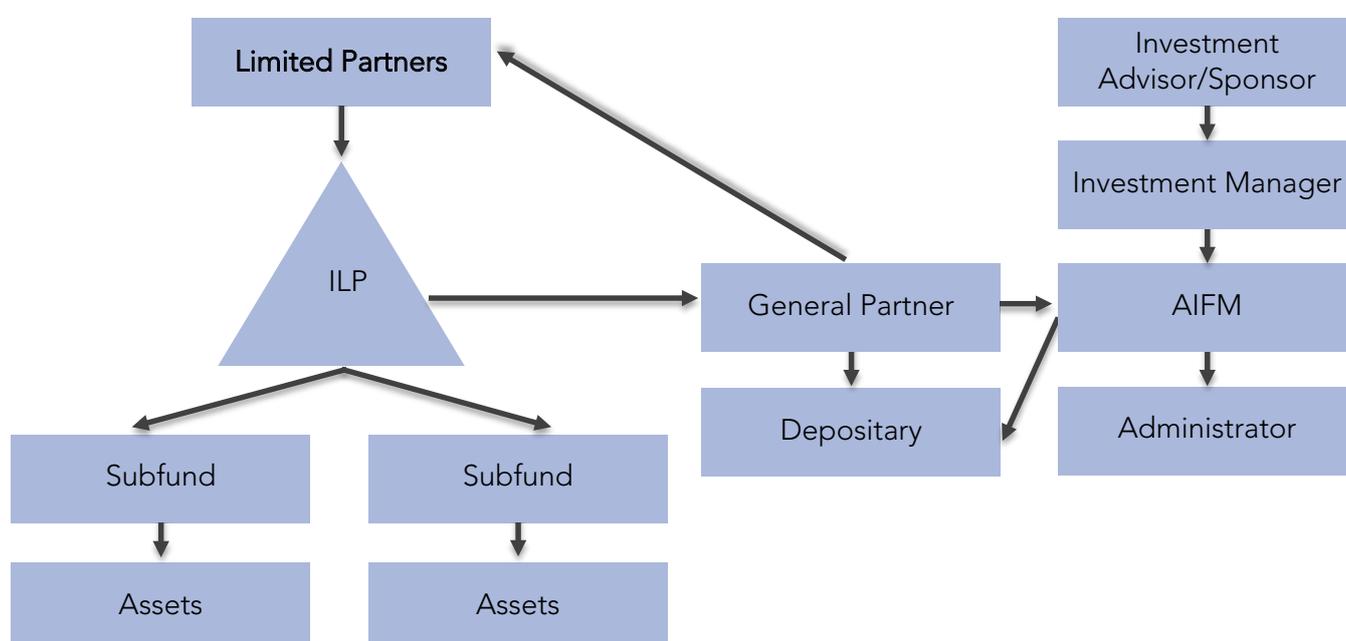
A QIAIF ILP is authorised by the Central Bank of Ireland (“**CBI**”) and where managed by an EEA established Alternative Investment Fund Manager (“**AIFM**”) it benefits from the pan-EU cross-border marketing passport under AIFMD.

The legislation for ILPs has been overhauled in the ILP (Amendment) Act of 2020 as a flexible form of investment structure with the following key features:

- An ILP is constituted by way of Limited Partnership Agreement (“**LPA**”) between the General Partner (“**GP**”) and one or more Limited Partners (“**LPs**”);
- An ILP can be set up as a stand-alone fund or as an umbrella fund with statutory ring-fencing of liabilities between individual sub-funds;
- As a QIAIF, the ILP must have an AIFM responsible for the management of the assets of each fund, along with a third party depositary and administrator in line with the provisions of the CBI AIF Rulebook;
- LPs are liable for the debts and liabilities of the ILP up to the amount of their agreed capital contribution and they benefit from an extensive white list of permitted activities (e.g. participation in an investment committee) without losing the protections of limited liability;
- Unlike partnerships in certain other jurisdictions, the ILP is an unincorporated entity and the GP is responsible for managing the affairs of the ILP and is personally liable for the debts and liabilities of the ILP, including delegated activities;
- An ILP is treated as tax transparent under Irish law, with income, gains and losses accruing directly to the partners;
- Distributions by an ILP to all partners are free of withholding tax in Ireland;

- An ILP must make an annual return to Irish Revenue Commissioners by 28 February in the year following the year of assessment (called a "Form ILP1"), providing information regarding the income, gains and losses of the ILP, as well as details of the names and addresses of all partners (including both general and limited partners) in the ILP;
- The GP may be appointed as AIFM or may appoint a third party AIFM, in which case the GP will be an un-regulated firm, although in any event the directors of the GP are required to be approved for the purpose of managing the partnership (i.e. they must be considered fit and proper) by the CBI;
- An ILP may be established as a open-ended fund or as a closed-ended (i.e. raising capital only once) fund and, under revised CBI guidelines, may differentiate returns among investors in a single fund; and
- An ILP as a QIAIF is subject to registration and authorisation by the CBI under the provisions of the CBI AIF Rulebook.

### Typical Form of Umbrella QIAIF ILP



### Role and Function of the General Partner

The GP is responsible for the day to day management of the affairs of the ILP and as such is liable for the debts and liabilities of the ILP.

The GP may be authorised to act as the AIFM or may delegate such function to a third party AIFM that is regulated by the CBI.

The GP will be set up as a limited company in many cases and its directors will require prior approval from the CBI for fitness and probity.

### AIFM, Depository, and Administrator

As a QIAIF authorised by the CBI, an ILP is required to appoint (i) an AIFM responsible for portfolio and risk management; (ii) a third party depository, responsible for safe-keeping of fund assets; and (iii) a regulated fund administrator responsible for ongoing calculation of fund NAV and acting as transfer agent.

## Limited Partners

A concern in relation to the original ILP legislation back in 1994 when enacted was that LPs might be unduly exposed to the debts and liabilities of the ILP. This legislative defect has been cured by an extensive range of activities that may be carried out by the LPs without compromising limited liability of LPs, including:

- Acting as a director, employee, agent of the ILP or the GP or acting as a shareholder, director or officer of a GP organised as company;
- Consulting with and advising the GP on the business of the ILP;
- Investigating, reviewing or being advised on the accounts or business affairs of the ILP;
- Acting as surety or guarantor or providing other security on behalf of the ILP;
- Participating in a decision to approve an alteration in the partnership agreement;
- Serving on any board such as a management advisory board, or appointing or electing a representative to any such board or acting on any such board; and
- Voting on members resolutions in relation to the ILP and its members.

Unlike the treatment of LPs in a 1907 Act LP, LPs in an ILP may transfer their interests, without prior approval of the GP, subject to the provisions of the LPA.

## Segregated Liability of ILP sub-fund

The ILP (Amendment) Act of 2020 provides for statutory ring-fencing of liabilities between sub-funds of an umbrella fund ILP, such that a liquidator may not apply (nor be obliged to apply) the assets of such fund in satisfaction of any liability incurred on behalf of or attributable to any other sub-fund of the same umbrella.

In order to safeguard the statutory provisions on segregated liability, the GP must:

- Ensure the words '*An umbrella fund with segregated liability between sub-funds*' are included in all letterhead and in any agreement with a third party; and
- Disclose to a third party that it is a segregated liability umbrella fund before it enters into an oral contract with a third party.

Subject to the foregoing, there shall be implied in every contract:

- The third party shall not seek, whether in any proceedings etc., to have recourse to any assets of any other sub-fund within the umbrella; and
- Any recovery in breach of the foregoing shall make the third party a debtor to the sub-fund to the value of the value obtained and likewise the third party shall hold any such assets on trust for the umbrella.

## Authorisation of an ILP as a QIAIF

As a QIAIF, available only to Qualifying Investors, there are no set limits under AIFMD in relation to Investment Objectives or Policies and there are no set limits on degrees of leverage either.

As in the case of any responsible fund being promoted, the selected investment strategy and degrees of leverage should be coherent and proportionate to the objectives of the Fund and approved by the GP, the AIFM, and, in certain cases, the CBI.

## Issues for Leverage Providers to ILPs

How and where to take security over interests in an ILP is a key question, and there are a variety of options:

### 1. Interests in Private Equity and Real Property Assets

- Typically most assets in an ILP will comprise shares in private limited companies and/or title to real estate assets, albeit that there may be a range of asset classes held, particularly in more alternative structures.
- Title to private equity securities and real estate assets are not, generally speaking, required to be held in custody by the Depositary under the AIFMD Level 2 Regulations (EC/231/2013) and instead are subject to verification duties by the Depositary under Regulation 90 of the AIFMD Level 2 Regulations.
- Attachment and perfection of security interests by way of fixed charge/mortgage in shares in a private limited company and in real property assets, should be carried out in the usual way under Irish law and other applicable laws.
- Assignment of the LPs' rights in the Depositary Agreement in favour of the lender, coupled with a consent to enforcement in the control agreement between the Fund and the Depositary.

## 2. Interests in Financial Instruments subject to the EU (Financial Collateral Arrangements) Regulations

- If the asset comprises an in-custody asset (e.g. a transferable security as provided under Regulation 89 of the AIFMD Level 2 Regulations), the asset will be held in the name of the Depositary or a collateral agent / manager in an account with an International Central Securities Depositary, and will only be capable of being transferred out of the account on instruction of an authorised signatory on behalf of the ILP (typically the AIFM).
- The Financial Collateral Directive, where it applies, abolishes the need for formal steps to be carried out in respect of the creation, perfection and enforcement of financial collateral and replaces them with the concept of appropriation of collateral on enforcement by the collateral taker.
- The FC Directive applies to financial collateral arrangements comprising (i) outright title transfer and (ii) transfers by way of security including fixed charges, which in either case need to be in writing.
- The mechanics of enforcement over the security interest is achieved typically through the issue of a written notice by the secured party to the Depositary (or other collateral holder) certifying that an event of default has occurred and continuing, entitling the Secured Party to enforce and instructing the Depositary or other holder to transfer the assets from the Control Account to the order of the Secured Party.
- Where security is taken by way of title transfer, the collateral taker will value the assets and set this credit against any sums due to it.
- Where security is taken by way of fixed charge, the secured party will foreclose by way of sale to itself at a price determined by an agreed method of valuation.

## 3. Security over LP Interests

A typical security package for a capital call/subsorption facility with an ILP consists of an assignment granted over the right to issue drawdown notices to call on investors/ LPs for further contributions, security over the account into which such subscription monies are lodged, coupled with a power of attorney in favour of the secured party. Due diligence will need to be undertaken on, among others, the LPA (and in particular, the GP's powers under the LPA), side-letters and subscription agreements and other constitutional documents.

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