

IREF Guidance Note Part 27 / Chapter 1B

This document should be read in conjunction with Chapter 1B of Part 27 TCA 1997

This document was created September 2017

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Introduction

The purpose of this manual is to provide an overview of the operation of the Irish Real Estate Fund (“IREF”) regime. The IREF regime, found in Chapter 1B of Part 27 was introduced by Finance Act 2016. Where a fund is described as a ‘widely held’ fund in these notes, this is a reference to a fund which has a large number of unconnected unitholders and in respect of which consideration of the Personal Portfolio IREF (“PPIREF”) rules is unlikely to occur.

Given the complexity of the regime, this manual is being published chapter by chapter as each chapter is completed. The schedule of updates is tracked in Appendix I.

1 Key definitions

1.1 Interests in an IREF

1.1.1 Unit [s.739B(1)]

A “unit” is defined in s.739B(1) as any investment, such as a subscription for shares or a contribution as capital, that entitles the investor to a share of the profits or a right to a regular payment from the fund. In most cases it is clear what the units in the fund are. However, arrangements such as profit participating notes, which would not historically have been seen in the Irish funds industry, would also fall within the definition of a unit.

1.1.2 Unit holder [s.739B(1)]

The unit holder is defined in s.739B(1) as the person who is entitled to a share of the profits. A nominee holder of units is not entitled to a share of the profits and therefore the beneficial owner of the unit, rather than the nominee in whose name the unit may be registered, is the unit holder. Coupling this with the definition of unit (which requires the making of an investment) then means that it is the beneficial owner of the units, and not simply a nominee holder of the unit.

1.1.3 Holder of Excessive rights [s.739O(1)]

A holder of excessive rights is defined as someone who is beneficially entitled, directly or indirectly, to at least 10% of the units of a fund. In many funds, this will simply be any person who holds more than 10% of the units in the funds. However, where units have varying rights this will be, based on the definition of units, either an entitlement to 10% of the profits of the IREF or having made 10% of the investments into the IREF.

1.2 PPIREF [s.739M(1) and (2)]

A personal portfolio IREF (PPIREF) is defined in s.739M. While the concept is closely linked to that of a Personal Portfolio Investment Undertaking (PPIU) in s.739BA¹ and Personal Portfolio Life Policy (PPLP) in s.730BA, there are a number of important differences and guidance given in relation to PPIUs or PPLPs that will not necessarily have application to the concept of the PPIREF.

¹ Refer to [Investment Undertakings General Guidelines for Calculating Tax Due and for Completing Declaration Forms](#) and [manual 27-04-01](#) for more details

The definition of PPIREF has two different applications within Chapter 1B, being in relation to:

- i. the definition of a specified person (refer to 1.3) and
- ii. the definition of IREF excluded profits, which is relevant to whether or not there is withholding tax on distributions of gains from investments in Irish land which has been held for over 5 years [refer to definition of IREF excluded profits in s.739K(1)].

1.2.1 Selection and influence [s.739M(1) and (2)]

An IREF will be a PPIREF of a unit holder if, under the terms of the IREF, the unit holder is in a position to select or influence the conduct of the IREF business, whether directly or indirectly (s.739M(1)). The indirect selection or influence may be through:

- a person acting on behalf of the unit holder, e.g. an investment advisor to the IREF;
- a person connected (within the meaning of s.10) with the unit holder, e.g. a trustee of a trust in respect of which the unit holder is the settlor;
- a person connected with a person acting on behalf of the unit holder, e.g. an investment advisor appointed to represent the interests of the unit holder; or
- the unit holder and a person connected with the unit holder or a person acting on behalf of both the unit holder and a person connected with the unit holder, e.g. situations where the selection or influence is jointly exercisable by more than one person.

Regard should be had to paragraph 1.2.2 for examples of situations that will not be treated as resulting in PPIREF status of a particular investment.

The reference to the terms of an IREF may refer to the subscription agreements, or fund documentation, as well as other contractual arrangements or agreements. This is clear from the provisions of 739M(2) which clarify the terms of an IREF extend to the terms of the IREF and any other agreement between any of the persons referred to and the IREF. If terms are agreed as part of an umbrella fund, but can lead to the influence or selection of a sub-fund (the IREF), then they will be taken to be a term of the IREF.

In many funds the written terms of the fund will preclude the unit holders from having any input into the conduct of the fund's business. While this is prima facie evidence that the IREF is not a PPIREF, regard must also be had to the conduct of the IREF and any implied terms, which includes looking to the actions of the fund and making reasonable inferences. For example, if the written terms provide that the unit holder may have no hand, act nor part in the conduct of the business but yet that unit holder attends material meetings (either board meeting or investment meeting) and is actively engaged in material discussions on how the business is to be conducted, then that fund would be a PPIREF with respect to that unit holder.

The following material is either exempt from or not required to be published under the Freedom of Information Act 2014.

[...]

S.739M(2) expressly provides that certain terms of a fund will be treated as permitting the selection of the IREF assets. Where a unit holder can appoint an investment advisor to the IREF, then that IREF will be a PPIREF of that unitholder (s.739M(2)(b)). The IREF will also always be a PPIREF of a unitholder where the terms of the IREF or any other agreement between the IREF and the unit holder, or persons acting on behalf of the unit holder:

- i. allow the unit holder, or those acting on behalf of the unit holder, to exercise an option to select the IREF property or IREF business;
- ii. give the IREF the discretion to offer the unit holder, or those acting on behalf of the unit holder, the right to select the IREF property or IREF business; or
- iii. allow the unit holder, or those acting on behalf of the unit holder, the right to request a change in the terms of the IREF to allow the unit holder, or those acting on behalf of the unit holder, to select the IREF property or IREF business.

If the unit holder has the power to positively influence the investment manager to acquire an asset, or to carry out the IREF business in a particular way, it will clearly cause the IREF to be a PPIREF of that particular unit holder. In addition, if the unit holder has a power of veto over the choices of the investment manager that would also amount to the unit holder having the ability to select or influence the choice of IREF assets or the conduct of the IREF business. Whether or not the right to direct, or the power of veto, is exercised is not relevant.

There is no actual requirement that the unitholder selects or influences. It is sufficient if there is an ability to do so.

Example 1 ‘Acting on behalf of’ a unitholder

An investor invests in an IREF under the terms of which none of the unitholders is permitted to have any involvement in the selection of property to be acquired by the IREF and, as a matter of fact, the unitholder does not approve or veto any property acquisitions. However, the unitholder arranges for its investment advisor to be appointed as an advisor to the IREF and, in that capacity, the investment advisor influences the selection of property. In these circumstances, the IREF would be considered a PPIREF in respect of that unitholder.

Example 2 Acquiring units in a PPIREF

An investor acquires/invests in units in an existing IREF. The units were acquired from a unitholder with respect to whom the IREF was a PPIREF. The IREF had already acquired its property portfolio and does not intend to make additional investments.

The new unitholder had no involvement in the selection of the existing property portfolio and, in accordance with the scheme rules, does not get involved in the ongoing management of the business.

However if the new unitholder was connected with the person from whom the units were acquired, and in respect of whom the IREF was a PPIREF, then in the majority of cases the IREF shall also be a PPIREF with respect to the new unitholder. In such circumstances, the provisions relating to PPIREFs in the definition of IREF excluded profits may apply towards the calculation of the IREF taxable amount in respect of the new unit holder.

Absent such connections, the IREF should not be considered a PPIREF with respect to this new investor as there could not have been any involvement in property selection and the investor is not involved in ongoing management of the business.

Example 3 “Large” unit holders

IREF A has one unitholder who has a greater than 50% stake in the IREF. Whether the IREF should be considered to be PPIREF in respect of that unitholder who holds more than 50% of the IREF, should be determined with reference to the facts and circumstances of the case. However, the fact that one unitholder has such a large stake in the fund warrants closer scrutiny of the facts and circumstances than would be necessary where no one person has a controlling stake.

If the facts and circumstances lead to the conclusion that an IREF is a PPIREF in respect of a particular unit holder, consideration should be given to whether or not the exclusions in s.739N may be applicable.

Example 4 Investing in a specific property – no involvement

An IREF is established, or is intended to be established, with a view to acquiring an Irish property portfolio. A specific property is identified by the promoter of the fund and a prospectus drawn up for potential investors. The promoter is able to attract one or more investors who decide to invest in units in the IREF based on the proposal contained in the prospectus. While the property had not been acquired prior to the investment being made by the unitholder(s), the fact that the property had been specifically identified prior to the units being marketed to the unitholder(s) concerned (and provided that those unitholders undertake no involvement in the ongoing business of the IREF) the fund should not be considered to be a PPIREF with respect to those unitholders.

Example 5 Investing in a specific property – pre involvement

The facts are the same as set out in Example 4, but one unitholder influenced the promoter in selecting or identifying the properties to be included in the portfolio prior to their making an investment decision. The IREF will be a PPIREF in respect of that unitholder.

Example 6 GP / LP investment structures

Individual or institutional investors invest in an IREF through a limited partnership. These investors have not selected the IREF's assets nor influenced the IREF's business nor do they have the ability to do so. The general partner of the limited partnership is in the same group and/or connected with the investment manager or investment advisor of the IREF.

Under s.10 all partners in a partnership are connected persons. The IREF is a PPIREF of all partners as under s.739M the assets/business of the IREF are selected/ influenced by a person connected with the unitholder and/or a person connected with a person acting on behalf of the unit holder.

(see also Example 16)

Example 7 Acquiring units in a PPIREF continued

The facts are the same as those set out in Example 2 but subsequent to the purchase in the IREF, the directors of the IREF decide to raise new capital and acquire new properties. The unitholder becomes involved in the selection of the new properties acquired by the IREF.

It will be important to determine why the unit holder can now become involved in the selection of the new properties.

- If additional rights are given to the unitholder, for example in return for investing additional amounts in the fund, then the IREF will commence to be a PPIREF of the unitholder from the date those rights were granted.
- If they are involved in the selection under a pre-existing term of the IREF or other agreement this will mean the investor always had that ability and was choosing not to use it. The IREF has therefore been PPIREF of the unitholder at all times.

Example 8 IREF ceasing to be a PPIREF

Pension Fund A has a large investment in an IREF. A new investment manager is appointed. As Pension Fund A is unsure of how the investment manager will perform, the rights of Pension Fund A as unitholder are, on the appointment of the new investment manager, amended to give Pension Fund A a right to select or influence the IREF assets and business. Pension Fund A never has cause to exercise the right of selection.

The IREF is therefore a PPIREF of Pension Fund A as 'some or all of the IREF assets or IREF business may be... selected or influenced by' the unit holder.

After a period Pension Fund A determines that it no longer wishes to have the power of selection or influence. The terms of the IREF are amended accordingly.

It is no longer true to say that 'some or all of the IREF assets or IREF business may be... selected or influenced by the unit holder'. They may have been in the past, but the retrospective test is that 'some or all of the IREF assets or IREF business ... was... selected or influenced by the unit holder'. In this case, if Pension Fund A can show that it never selected or influenced the IREF assets or business then the IREF will cease to be a PPIREF of Pension Fund A.

1.2.2 Selection and influence not giving rise to PPIREF status

An employee of the fund manager of an IREF acquires units in that IREF in his/her personal capacity. In his/her capacity as an employee of the fund manager, the employee is involved in the selection of properties to be invested in by the IREF. However, in undertaking his/her employment duties, the individual acts for the benefit of all investors in the IREF and cannot make selections which are designed to benefit him/her personally to a greater extent than any of the other investors. In these circumstances, the IREF should not be a PPIREF with respect to that individual.

Example 9 Fiduciary capacity - unit holder in own right

Matt is an employee of Fund Manager Ltd. Fund Manager Ltd is the fund manager for IREF A, a large widely held IREF. Matt holds a small number of units in IREF A. In his capacity as an employee of Fund Manager Ltd Matt selects and influences the investment decisions made by IREF A. However, he is doing this in a fiduciary capacity on behalf of all unit holders and not for his own personal benefit. IREF A will not be regarded as a PPIREF of Matt solely because of his performing the duties associated with his employment with Fund Manager Ltd.

Example 10 Fiduciary capacity – office holder as unit holder

A director of a widely held IREF holds a small number of units in that IREF. As part of the duties of her office, she is involved in evaluating and recommending which properties the IREF will acquire. In these circumstances, the IREF would not be considered a PPIREF in respect of that investor solely because of the duties performed in her capacity as a director of the IREF.

Paragraph (b) in the definition of ‘personal portfolio IREF’ in s.739M(1) provides that an IREF will be a PPIREF of a unit holder if someone acting on behalf of that unit holder selected or influenced the IREF business. Whether an investment manager is acting on behalf of a unit holder depends upon the terms of their appointment. If they are appointed by an IREF to provide investment advice it may be that they have no contractual relationship with the unit holders. They act, and are appointed solely by the IREF. If, however, they are appointed to advise both the unit holders and (either under a separate agreement or otherwise) also advise the IREF, then the position is likely to be different. As stated in 1.2.1 above whether an IREF is a PPIREF must be determined with reference to each unit holder separately. The fact that an investment manager in an IREF acts on behalf of all investors equally in a widely held IREF will not cause an IREF to be a PPIREF.

1.3 Specified person [s.739K]

Tax will arise on the happening of an IREF taxable event in respect of a specified person. The starting point for the definition is that any person who will be subject to exit tax under Chapter 1A will not also be subject to tax on the same event under Chapter 1B (thus, for example, excluding Irish resident individuals). Also excluded from the definition of specified person are:

- i. investment limited partnerships (the reference to s.739D(6)(c) in the definition of specified person and the declaration provided to the investment undertaking under Chapter 1A will suffice for the purposes of the application of Chapter 1B) whose investors are taxed on a look through basis under s.739J;
- ii. exempt unit trusts (the reference to s.739D(6)(e));
- iii. NTMA and any fund investment vehicles of the NTMA (reference to s.739D(6)(kb));
- iv. Irish pension funds, ARFs and PRSAs that are not PPIREFs (refer to 1.2) where a valid declaration is provided to the IREF;
- v. Irish investment undertakings that are not PPIREFs where a valid declaration is provided to the IREF;
- vi. Irish life assurance companies that are not PPIREFs where a valid declaration is provided to the IREF;
- vii. Charities where a valid declaration is provided to the IREF;
- viii. Credit unions where a valid declaration is provided to the IREF;
- ix. EEA equivalents to Irish pension funds, PRSAs, investment undertakings and life assurance companies, that are not PPIREFs, where a valid declaration is provided to the IREF;
- x. Qualifying companies, within the meaning of section 110, where a valid declaration is provided to the IREF (the anti-avoidance amendments to section 110 brought in by Finance Act 2016 provide that this payment will, if appropriate, be taxed in the qualifying company).

1.3.1 PPIREFs and specified persons [s.739M(3) and s.739N]

Sections 739M(3) and 739N are only relevant where the unit holder is a person within paragraphs (a), (b), (c) or (f) of the definition of a specified person in section 739K.

Whether or not a pension scheme, investment undertaking or life assurance company (including their EEA equivalents) is a specified person in respect of an IREF involves applying the PPIREF tests set out in 1.2 at two levels.

The first level at which the test is applied is whether the IREF itself is a PPIREF of the unit holder which is a pension scheme, investment undertaking or life assurance company [s.739M(3)(a)].

If applying the test at the first level results in an IREF not being a PPIREF in respect of that unit holder, then the second test must also be passed in order for the pension scheme, investment undertaking, or life assurance company not be treated as a specified person. The second test is whether or not that unit holder (the pension scheme, investment undertaking, or life assurance company) would itself be regarded as a PPIREF in respect of any of its unit holders in a hypothetical scenario where it (the pension scheme, investment undertaking, or life assurance company) is treated as an IREF and its IREF business comprised its investment in the actual IREF. That is, if the IREF does not have its assets or business selected or influenced by the pension scheme, investment undertaking or life assurance company, is the pension scheme, investment undertaking or life assurance company's ownership of the IREF selected or influenced by any of its members, investors, policyholders, as the case may be?

The second test includes a main purpose test such that the second test will not cause the pension scheme, investment undertaking or life assurance company to be a specified person if the purpose for interposing that pension scheme, investment undertaking or life assurance company between the IREF and the ultimate investors was not for the purposes of avoiding tax under Chapter 1B [s.739M(3)(b)(ii)]. In other words, if the main purpose for the investment by the pension scheme, investment undertaking or life assurance company in the IREF was not to avoid tax under the IREF provisions the fact that the scheme, undertaking or company would itself be regarded as a PPIREF in respect of any of the unitholders in the hypothetical scenario outlined above, would not cause it to be a specified person.

Where the pension scheme, investment undertaking, or life assurance company had invested in the IREF prior to the announcement of the changes introduced in Finance Act 2016 (upon its publication on 18 October 2016), Revenue would not envisage that such a structure was put in place for the main purpose of avoiding tax under Chapter 1B, for the simple reason that the legislation did not exist.

1.3.2 Exceptions to s.739M(3) [s.739N]

There are a number of occasions when an IREF may appear technically to be a PPIREF under the first level test in s.739M(3)(a) in respect of a pension scheme, investment undertaking or life assurance company (including their EEA equivalents), but where, in reality, there is no benefit to that connection. S.739N provides that in these circumstances the pension scheme, investment undertaking or life assurance company will not be a specified person.

- If an IREF would be a PPIREF of a pension scheme, investment undertaking or life assurance company (including their EEA equivalents) but that pension scheme, investment undertaking or life assurance company is widely held and would not be considered a PPIREF of any of its investors then the IREF will not be a PPIREF [s.739N(1)]. This is applying a modified second level test to the pension scheme,

investment undertaking or life assurance company as the 'main purpose' test in s.739M(3)(b)(ii) is not applied in this exception.

Example 11 Widely held fund investing in an IREF

A Luxembourg regulated fund invests in units in an IREF and is involved in the selection of property invested in by the IREF. None of the investors in the Luxembourg fund had any involvement in, or control over, the selection of assets invested by the Luxembourg fund including the investment in the units in the IREF. The IREF should not be considered a PPIREF with respect to the Luxembourg fund.

Example 12 Pension funds collectively investing in IREFs [s.739N(3)]

EEA regulated Fund, which is opaque, invests in an IREF to acquire Irish property. The EEA fund is held by a number of EEA based pension schemes. EEA based pension schemes are widely held IORP and/or Government pension schemes.

Investment advisors for the EEA pension schemes and the EEA regulated fund are involved in property selection; however, none of the underlying beneficiaries in the pension schemes can influence property selection.

It is likely that the IREF will not be a PPIREF as, depending on the exact make up of the pension funds, the investment is likely to fall within s.739N(1).

Example 13 Layered ownership [s.739N(1)]

A widely held EU pension scheme, invests in a Luxembourg FCP, which invests in a Luxembourg SICAV, which in turn invests in an IREF. The investment manager for the entities at each level is the same and is involved in selecting the property. The pension scheme would not be considered a personal portfolio for any of its beneficiaries.

S.739N(1) can only apply to a single layer. Therefore, the presence of multiple layers may cause the IREF to be regarded as a PPIREF in respect of its immediate unitholder.

However a refund of the IREF WHT may be available and regard should be had to s.739Q(3) (dealt with in 1.3.3 below) where the EU pension scheme is equivalent to an Irish pension scheme.

- If an IREF would solely be considered a PPIREF of a unit holder that is a pension scheme, investment undertaking or life assurance company (including their EEA equivalents) because of a contribution *in specie* of assets on the scheme of amalgamation to which s.739D(8C) applied, then that IREF will not be considered a PPIREF in respect of those unit holders [s.739N(2)]. However, if there is any other reason that the IREF should be considered a PPIREF in respect of a unit holder then it will be a PPIREF.

Example 14 Exempt unit trust conversion (s.739N(2))

Pension Fund Z had, for many years, invested in Exempt Unit Trust Q. Exempt Unit Trust Q converted into an investment undertaking. Pension Fund Z will not, because of the contribution in specie which happened upon that conversion, be regarded as influencing the selection of the PPIREF business or assets.

However, if shortly after the conversion, Pension Fund Z appointed an investment advisor to IREF Q (the new name for Exempt Unit Trust Q), then IREF Q would be a PPIREF of Pension Fund Z.

- If an IREF would solely be considered a PPIREF of a unit holder that is a pension scheme, investment undertaking or life assurance company (including their EEA equivalents) because a person connected with that unit holder may select or influence the IREF, but where that connection cannot be to the benefit of the unit holder, then the IREF will not be a PPIREF [s.739N(3)]. Whether or not the connection can benefit the unit holder is determined through the application of a two pronged test:
 - a) can the connected person be influenced by the unit holder in the exercise of his or her duties?
 - b) can the connected person show any preference to the unit holder over other unit holders?

In order to fall within the exception in s.739N(3) it is necessary that the answer to both of these questions is 'no'.

It is important to note that this is only in relation to connected persons and not the wider sphere of person that must be considered when determining whether or not an IREF is a PPIREF of a unit holder.

Example 15 Group relationships [S.739N(3)]

Life Assurance Ltd invests in a large number of investment undertakings, some of which are IREFs, on behalf of its life policy holders. It invests in some widely held IREFs which are managed by Fund Managers Ltd. Fund Managers Ltd manages many investment undertakings, some of which are IREFs, on behalf of a wide variety of investors. Life Assurance Ltd and Fund Managers Ltd are both part of the same corporate group, so they are connected.

However, as Fund Managers Ltd cannot be influenced by Life Assurance Ltd and cannot show it any preference, s.739N(3) provides that the IREF will not be regarded as a PPIREF of Life Assurance Ltd.

Example 16 Partnership relationships [S.739N(3)]

GKH LP is a limited partnership which is the sole unit holder in an EU Fund which has invested in an IREF. The investment manager in the EU Fund and the IREF is connected with the general partner in GHK LP.

Applying s.739M(3)(a), the IREF is a PPIREF of the EU fund.

The exemption in s.739N(1) does not apply because the EU Fund is a PPIREF of its sole unit holder (the limited partnership) and neither does 739N(2) apply. Can it be said that the IREF is only a PPIREF of the EU Fund because a person connected with the unit holder may select or influence the IREF assets or business? It is likely, that as sole unit holder, the IREF would be a PPIREF of the EU Fund regardless of the involvement of a connected investment manager.

(see also Example 6)

The exceptions in s.739N do not apply to exclude a unit holder who is a specified person under s.739M(3)(b) from being a specified person. Therefore, it is possible that a pension fund, for example, would be a specified person under s.739M(3)(a) but for the application of s.739N(3), but is a specified person under s.739M(3)(b).

Example 17

An entity which invests in a widely held IREF (or company connected with that entity) is in the business of providing investment advisory services to funds and fund managers. In the course of that business, the entity / connected entity provides professional advice to the IREF in which it is a unitholder. In providing these services, the advisor is acting in a professional capacity and acting in a manner which is not designed to benefit primarily it / the connected entity in its investments. In these circumstances, the IREF should not be considered a PPIREF with respect to that investor.

1.3.3 Interaction with s.739Q(3)

While indirect investments by a pension scheme, investment undertaking or life assurance company (including their EEA equivalents) will in many cases attract withholding tax under Chapter 1B, s.739Q(3) provides that if such an entity would not have been a specified person had it been a direct unitholder then it can claim a refund of the withholding tax suffered from Revenue. Tax and Duty Manual Part 27-01b-01 refers.

Appendix I

Schedule of updates