

Going further with ETFs.

A guide to the establishment
of Exchange Traded Funds

November 2025

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Section 1

Introduction

Exchange traded funds (“**ETFs**”) were launched in Europe in 2000 as a bespoke type of investment fund, structured in such a way as to facilitate intra-day trading of its shares on a stock exchange, using real time pricing. ETFs allow investors to achieve diversified exposure through a regulated investment fund structure and so they are used by both retail and professional investors.

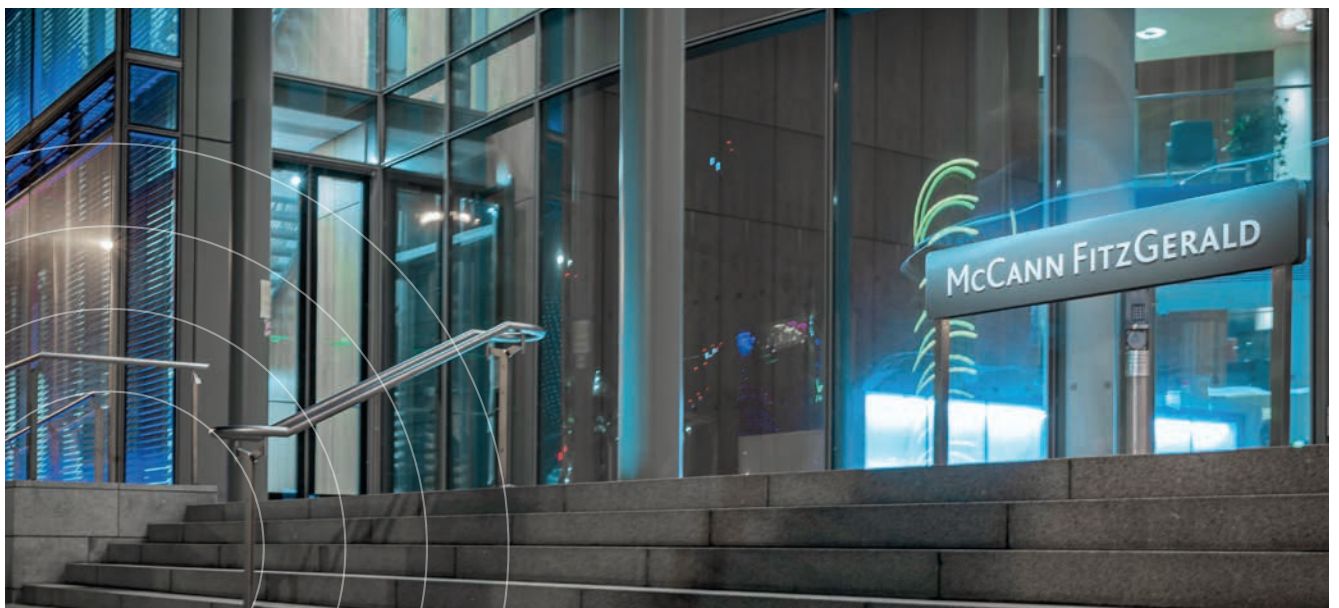
As ETFs are traded like equities, investors are able to buy or sell ETFs in the same way that they could trade any other listed stocks. In Europe, the vast majority of ETFs are structured as UCITS funds, which are governed at an EU level by Directive 2009/65 (the “**UCITS Directive**”) and at a domestic level by S.I. No. 352/2011 - European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011, as amended, (the “**UCITS Regulations**”) overseen by the Central Bank of Ireland (“the **CBI**”).

Since their inception, Ireland has been the European domicile of choice for ETFs, with Irish domiciled ETFs currently amounting for approximately 74% of the EU’s ETF market, while 95% of new ETF product launches in 2024 were Irish domiciled. Ireland is an attractive location for ETFs for a number of reasons, most notably its favourable and transparent taxation regime, its well-established and stable domestic regulator and regulatory framework, its highly skilled and educated English speaking workforce and its status as an EU member state.

To date, the CBI has authorised the largest number of European ETFs and has placed itself at the forefront of these developments, responding and adapting to the ever-changing sphere of ETFs.



Investors are able to buy or sell ETFs in the same way that they could trade any other listed stocks





Section 2

Establishment of ETF as a UCITS

The first step in the establishment of a UCITS ETF is the establishment of a UCITS fund. UCITS funds are undertakings for collective investment in transferable securities, which take the form of an open-ended investment fund, which are required to invest in highly liquid assets that are listed and traded on a regulated exchange. ETFs can be structured as active or passively managed UCITS. One of the key advantages of a UCITS ETF, is that the ETF can then avail of the EU “passporting” regime.

This means that through engagement with the CBI, ETFs can gain access to any EU member state and effectively be passported into the relevant EU member state, without having to engage with the host regulator. The ability to avail of the passporting regime reduces administrative and regulatory burdens placed on fund sponsors, whilst increasing the potential investor pool for UCITS ETFs.

UCITS are a retail investment product. The UCITS Regulations specify the types of assets a UCITS may invest in and set out diversification and concentration limits at portfolio level. Generally speaking, UCITS are restricted to investing in “transferable securities”, namely liquid assets. The concentration limits applicable to UCITS are often referred to as the “5/10/40” rule. This means that the UCITS’ total holdings in one single issuer which is greater than 5% of its net asset value, cannot amount to more than 40% of the UCITS’ total assets. Furthermore, UCITS are not permitted to invest more than 10% of their assets in the securities of any single issuer.



**ETFs can be structured
as active or passively
managed UCITS**

While UCITS ETF funds may be established as either a standalone product or as an umbrella fund with a number of sub-funds, given the nature of ETFs, umbrella fund structures are the vehicles of choice. UCITS ETF umbrella structures enjoy segregation of assets and liabilities amongst sub-funds. Additionally, a UCITS can create a listed (or ETF) share class in an otherwise unlisted sub-fund. Where a UCITS has both UCITS ETF share classes and unlisted share classes, the UCITS' offering document must clearly identify each type of share class so that investors can distinguish between both share class types, including by way of tabular comparison and with respect to the different dealing mechanism applicable to a UCITS ETF share class and an unlisted share class.

Since its introduction in 2015, the Irish Collective Asset Management Vehicle ("**ICAV**") has become the most popular fund structure for Irish domiciled investment funds and for good reason, as ICAVs established in Ireland are subject to the bespoke Irish Collective Asset Management Vehicles Act 2015.

This Act was specifically introduced to regulate and govern ICAVs in Ireland, meaning that the provisions under this Act are specifically tailored to investment funds. A further advantage of the ICAV vehicle, is that an ICAV can choose to be treated as a transparent entity for the purposes of US federal income tax.

While in theory a UCITS ETF may be established as a "self-managed" entity, all UCITS ETFs (and indeed UCITS Funds) now appoint a management company to oversee its day-to-day operations. Future service providers to be appointed (either directly by the UCITS ETF or as a delegate of the management company) are:

- (i) an administrator;
- (ii) a depositary;
- (iii) an investment manager; and
- (iv) one or more authorised participant(s).

Directors of the ETF, of which two must be Irish resident directors and one must be completely independent, will need to be approved in advance by the CBI. Such directors will need to be able to prove that they are "fit and proper" to undertake the role of director of the ETF.



UCITS are restricted to investing in "transferable securities", namely liquid assets



Section 3

Documents for a UCITS ETF



The documents that will be required to be produced in the establishment of a UCITS ETF are as follows:

- (i) prospectus – essentially the ETF's offering document, which will have to be approved by the CBI in advance;
- (ii) supplement(s) – an offering document will need to be produced per sub-fund and approved by the CBI in advance;
- (iii) constitutional document;
- (iv) depositary and administration agreement – these agreements will outline the obligations of the depositary and the administrator in respect of the UCITS ETF;
- (v) management agreement – this agreement will govern the relationship between the UCITS ETF and the UCITS management company;
- (vi) outsourcing agreements to govern any outsourcing arrangements in place, such as an investment management agreement and/or a distribution agreement; and
- (vii) key investor information document ("**KIID**"), required if the ETF is being marketed in the UK and a packaged retail and insurance-based investment product ("**PRIPs**") KIID if the ETF is being marketed in the EU.

ETFs allow investors to achieve diversified exposure through a regulated investment fund structure



Section 4

ETF Requirements

(i) Authorised Participants

An important part of the establishment of a UCITS ETF will be the appointment of “authorised participants”. The authorised participants play a central role in the operation of an ETF. They are appointed by the management company of a UCITS ETF and are the only entities authorised to directly subscribe and redeem shares to/from the UCITS ETF. Subscriptions and redemptions are usually facilitated in large blocks of shares known as “creation units”.

The purchase and redemption of shares by authorised participants directly with the UCITS ETFs occurs on what is known as the “primary market”. The authorised participants will then make a market in the UCITS ETF shares within the secondary market on a stock exchange through which investors will buy and sell shares intra-day in real time.. The price at which the ultimate investor on the secondary market buys and sells shares should correspond approximately to the net asset value per share of the UCITS ETF (i.e., the primary market price) based on the value of the UCITS ETF’s underlying assets.

In terms of the operational infrastructure behind the UCITS ETF, the appointment of authorised participants and the negotiation of the relevant contracts with the authorised participants will be a key part of the initial launch of the UCITS ETF. Numerous authorised participants may be appointed to each UCITS ETF and the appointment may be concluded at the umbrella level, meaning the authorised participants can act for each of the sub-funds that are created within that umbrella fund.

The authorised participant agreements are not reviewed by or filed with the CBI, however the CBI recently carried out a ‘Thematic Review’ in which it examined the primary and secondary markets trading arrangements of ETFs in Ireland pursuant to which it published industry guidance setting out its expectations with respect to the appointment, monitoring and oversight of authorised participants by UCITS management companies. While no response was required to be submitted to the CBI, it was noted that the CBI may engage in further supervisory engagement to assess the implementation of its guidance.



Subscriptions and redemptions are usually facilitated in large blocks of shares known as “creation units”

(ii) ETF Specific Disclosure Requirements

All UCITS ETFs must comply with the following provisions:

UCITS ETF Identifier— an ETF authorised as UCITS must use the UCITS ETF identifier in its name. This can be used on:

- (i) an umbrella level (if all of the sub-funds in the umbrella will be ETFs); or
 - (ii) a sub-fund level where an umbrella UCITS has some sub-funds which are UCITS ETF sub-funds and some which are not; or
 - (iii) a share class level where a UCITS has both listed and unlisted share classes.
- Treatment of secondary market investors — the prospectus of the UCITS ETF is required to include disclosures outlining that if the stock exchange value of the shares of a UCITS ETF significantly varies from the sub-fund's net asset value then the UCITS ETF is obliged to provide investors who have acquired their shares on the secondary market with the ability to sell their shares directly back to the ETF at their net asset value, rather than only having the option of selling them on a secondary market. In such situations, information should be communicated to the regulated markets on which the shares are traded, indicating that the UCITS ETF is open for direct redemptions at the level of the UCITS ETF. UCITS ETFs are required to disclose the process to be followed by investors in such circumstances in the prospectus, as well as the potential costs involved. The costs are not allowed to be excessive or punitive and should reflect the actual costs to the UCITS ETF of providing this service. In reality, this requirement has never been tested.
 - Portfolio transparency — each UCITS ETF is required to disclose in the prospectus, PRIIPs KID, KIID and marketing communications the policy regarding portfolio transparency and where information on the portfolio may be obtained, including where any indicative net asset value ("iNAV") is published.

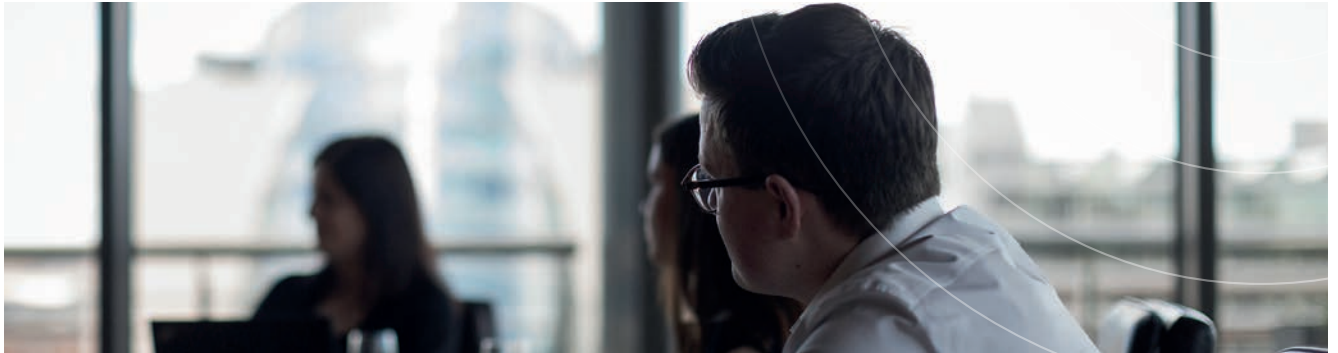
(iii) Active ETFs – Disclosure and Portfolio Transparency

Active ETFs are subject to the standard UCITS eligible asset and concentration rules. However, in addition to complying with such rules, an active ETF is also subject to the following points:

- Prospectus Disclosure: The prospectus of the active ETF must clarify that the fund does not track an index and that it is actively managed by the investment manager. Information should also be provided within the prospectus of how the investment manager intends to meet its investment policy.
- Portfolio Holdings Disclosure: An important point relating to the authorisation of an active ETF in Ireland relates to the CBI requirements with respect to the disclosure of portfolio holdings. Historically, all UCITS ETFs were required to disclose its portfolio holdings on a daily basis, however with the rise in popularity of actively managed UCITS ETFs the CBI has recently revised its position on portfolio disclosure to allow for semi-transparent ETFs which effectively allows for quarterly disclosure of portfolio holdings for all ETFs within 30 business days of the relevant quarter-end.



Active ETFs are subject to the standard UCITS eligible asset and concentration rules



(iv) Index Tracking ETFs

A UCITS ETF which tracks an index must comply with both CBI and UCITS rules, regardless of whether the passive ETF is tracking an index through physical replication or synthetically through a financial derivative instrument. A UCITS ETF can only track an index that complies with the UCITS rules, which require that such an index must:

- (i) represent an adequate benchmark for the market;
- (ii) be sufficiently diversified;
- (iii) be published and accessible by the public; and
- (iv) be provided by an independent index provider.

In the instance of an index tracking UCITS, the rule in respect of the concentration limit of the UCITS is modified, allowing an index tracking UCITS to invest up to 20% of its net assets in shares or debt securities of any single issuer. This concentration limit is increased to 35% in respect of one component of the index, in exceptional market circumstances.

For indices that cannot be invested in directly or that contain ineligible assets, the UCITS ETF management company must certify that the index complies with the requirements contained in the UCITS Directive, as well as the regulatory requirements for financial indices. In considering such a certification, the following factors should be taken into account: diversification, publication, independence of management of the index and the rationale of how the proposed index achieves its objective. Furthermore, any index that the UCITS ETF is tracking must comply with the requirements of the Benchmark Regulations.

There are additional index requirements which must be adhered to, which stem from the European Securities and Markets Authority ("**ESMA**"), published in 2014 and are as follows:

- (i) due diligence in respect of the index must be carried out by the UCITS ETF prior to investment and on an ongoing basis;
- (ii) the index should have a clear, singular objective to represent an adequate benchmark for the market;
- (iii) regarding commodity indices, the relevant commodity index must be made up of different commodities;
- (iv) the UCITS ETF is not permitted to invest in an index (a) which rebalances on a daily or intraday basis (or at a frequency that inhibits investors replicating the index) (b) which does not disclose in an easily accessible and free manner to investors prescribed details of the calculation methodology which is sufficient to enable investors to replicate the index and (c) of which information on its performance is not freely available; and
- (v) the index must (a) publish its constituents and weightings in an accessible manner (b) the index must have selection methodology and rebalancing based upon set pre-determined rules and objective criteria (c) the index provider must not accept payments from potential index components for inclusion in the index (d) the methodology of the financial index must not permit retrospective changes to previously published index values and (e) be subject to independent valuation.

Information as to the indices should be included in the ETF's Prospectus and/or Supplement(s), PRIIPs KIDs and KIIDs, in order to comply with CBI and ESMA requirements.

Section 5

Listing Requirements

UCITS ETFs will need to comply with the requirements of the various stock exchanges it intends to list on.

Before listing the UCITS ETF on an EU stock exchange, the UCITS ETF must have been passported within the EU jurisdiction. It is also important to note that each individual stock exchange will have its own clearing and settlement system. Some of the systems provide for the trading and settlement of shares in “dematerialised” form (shares which are transferred without requiring the transfer to be evidenced by written transfer of ownership). An international centralised securities depository has been introduced into the market which will facilitate the centralised settlement of all shares in the UCITS ETF, regardless of listing location. This now has been emerging as the settlement cycle of choice for newly established ETFs.





Section 6

Why McCann FitzGerald LLP?

McCann FitzGerald LLP has a well established and market leading Investment Management Group, comprising of eight partners with extensive experience in advising domestic and international clients upon all aspects of the authorisation and operation of investment funds, including ETFs. McCann FitzGerald LLP also has a listings team with significant expertise in the listing of investment funds and ETFs.



Significant expertise in the listing of investment funds and ETFs

Connect with our team of experts

For more information in relation to Exchange Traded Funds, or any other Irish investment structure, please feel free to contact one of the members of our team below.



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