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Securitisation

Ireland: Law & Practice
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1. Structurally Embedded Laws of General Application

1.1 Insolvency Laws

Ireland is a leading domicile within Europe for securitisation activity – it is home to more securitisation special purpose entities than any other jurisdiction in Europe. While the Irish legislative regime incorporates a number of measures supportive of the securitisation industry from a taxation perspective, no equivalent measures exist in the area of insolvency law. Notwithstanding this, issuers and originators operating in Ireland are subject to the general insolvency law and as such, utilise well-established structures to insulate the underlying assets from the balance sheet (and insolvency estate) of the originator.

While we have seen an increase in synthetic securitisations, an Irish securitisation of receivables is typically structured as a "true sale" via an assignment from the originator directly, or through an intermediary vehicle, to the issuer. A true sale may also be achieved by declaration of trust, sub-participation or novation; although these methods are typically employed only where an assignment is not possible where, for example, the contracts for the underlying receivables prohibit assignment. Regardless of the method used, true sale transactions are subject to two principal risks in an originator insolvency: first, whether a sale could be recharacterised as a secured loan to the issuer and, secondly, whether the liquidator of an originator could seek to have the sale rescinded (ie, to exercise a claw-back). In addition, the provisions of the EU (Bank Recovery and Resolution) Regulations 2019 (S.I. No 127 of 2019) and the Central Bank Acts 1942 to 2018 (the Central Bank Acts) would also be relevant where the originator is a credit institution.

Characteristics: True Sale v Secured Loan

A transfer of assets purporting to constitute an outright sale may in certain circumstances be recharacterised by an Irish court as a secured loan. In determining whether a transaction constitutes a true sale as opposed to a secured loan, a court will look to the substance of the transaction as a whole, including the economic features, together with the intention of the parties and irrespective of any labels applied by the parties.

There is little Irish case law as to how any transfer of property can be recharacterised as a transfer by way of security (although there is some case law which suggests transactions can be so recharacterised). The recent judgment of the Irish High Court in Bank of Ireland v ETeams International Limited [2017] IEHC 393 (which was subsequently upheld by the Court of Appeal in Bank of Ireland v ETeams (International Ltd) [2019] IECA 145) endorsed the principles set out in the English cases of Re: George Inglefield [1933] Ch.1, Welsh Development Agency v Export Finance Co. Limited [1992] BCLC 270 (the Exfinco case) and Orion Finance Limited v Crown Financial Management Limited [1996] BCLC 78. In Re: George Inglefield, Romer LJ. prescribed three indicia which distinguish a sale transaction from a transaction of mortgage or charge.

Return of the asset

In a sale transaction the vendor is not entitled to get back the subject matter of the sale by returning to the purchaser the money that has passed between them; whereas in the case of a mortgage or charge the mortgagor is entitled, until the security has been enforced, to get back the subject matter of the mortgage or charge by returning to the mortgagee the money that has passed between them.

Sale at a loss

If a mortgagee realises the mortgaged property for a sum that is insufficient to repay him or her then the mortgagee is entitled to recover from the mortgagor any balance; whereas in a sale and purchase contract the purchaser has to bear any loss suffered on a subsequent sale of the asset by him or her.

Sale at a profit

If a mortgagee realises the subject matter of the mortgage for a sum more than sufficient to repay (together with interest and costs) the money that has passed between him or her and the mortgagor he or she has to account to the mortgagor for any surplus; whereas in a sale and purchase contract any profit realised by the purchaser is for the purchaser's account.

A transaction structured by the parties as a sale will be upheld as such for the purposes of the registration of company charges unless either: (i) the transaction is, in substance, a mortgage arrangement; or (ii) the transaction is a sham. With regard to (i), if one or more provisions of the relevant documents are inconsistent with a sale, then the court will look to the provisions of the documents as a whole to determine the substance of the transaction. With regard to (ii), the court will find the transaction to be sham where the documents do not represent the intentions of the parties. None of the indicia of a mortgage identified by Romer LJ. in Re George Inglefield is necessarily inconsistent with a sale. A transaction structured as a sale may be upheld as such notwithstanding the fact that it bears all three of these indicia.

Subject to the individual terms of a transaction, the following features are generally considered to be consistent with a true sale securitisation:

- a seller acting as servicer for the sale assets or retaining some credit risk on the sale assets;
- a seller repurchase obligation in respect of assets which do not comply with asset warranties in the sale agreement; and

- extraction of profits for the seller via the waterfall after transaction expenses have been met.

Protection for the Transferred Assets in Insolvency: True Sale v Secured Loan

An asset transferred by way of true sale becomes an asset of the purchaser which holds the equitable interest in the asset and, subject to perfection, the legal title to that asset. The seller does not retain any interest in the transferred asset and it would not be available to the creditors of the seller in the event of its insolvency.

The chargor under a secured loan is the legal and beneficial owner of the charged asset which it holds subject to the security interest granted to the chargee. Upon insolvency of the chargor, the chargee is entitled to enforce its security to recover the sum owed to it by the chargor. Any amounts recovered in excess of the sum owed must be returned to the chargor.

Subject to the list of "excluded assets" set out in Section 408(1) of the Irish Companies Act 2014 (as amended) (the Companies Act), the particulars of any security created by an Irish company must be registered with the Irish Registrar of Companies within 21 days of its creation. In practice, this is done at closing to secure priority under the Companies Act, which confers priority from date of registration. Failure to register within the time limit renders the security void as against any liquidator or creditor of the company. It is not the practice in Ireland to make precautionary security filings in respect of true sale transactions – the Registrar of Companies is unlikely to register such filings in any event. As such, a true sale which is recharacterised as a secured loan would constitute an unregistered security interest of the originator and render the issuer an unsecured creditor of the originator in respect of the transferred assets. The transferred assets would return to the ownership of the originator and form part of its insolvency estate.

As an unsecured creditor of the originator, the issuer's claim would rank pari passu with claims of other unsecured creditors and behind the claims of secured creditors, the claims of preferential creditors, the costs and fees of the insolvency process and certain insolvency officials and certain amounts deducted from employees' remuneration.

Legal Opinion – Bankruptcy Remoteness

A legal opinion on the enforceability of the transaction, including the sale of the assets, as well as the capacity and authority of the issuer to enter into the transaction is typically provided to all parties to a securitisation transaction, other than the noteholder(s). It does not specifically cover bankruptcy remoteness per se, but the opinion does address solvency-based factual representations in the transaction documents, certificates to the law firm and searches made on public registers in respect of an issuer.

Other Material Insolvency Law Considerations

Examinership

Examinership is a court moratorium/protection procedure which is available under the Companies Act to facilitate the survival of Irish companies in financial difficulties. Where an Irish incorporated company is, or is likely to be, unable to pay its debts an examiner may be appointed on a petition to the Irish Circuit Court or Irish High Court (depending on the size of the company) if the relevant court is satisfied that there is a reasonable prospect of the survival of the company and all or part of its undertaking as a going concern. Petitions may be presented by the company, its directors, a creditor, a contingent or prospective creditor or members of the company holding at least one-tenth of the voting share capital of the company. Customary non-petition provisions in securitisation documents are intended to prevent the presentation of such petitions in respect of an issuer. However, an argument could be made that such provisions should not be given effect to on the basis that they oust the jurisdiction of the Irish courts or restrict the right of access to the Irish courts and accordingly are contrary to public policy. This point has not been considered in the Irish courts to date.

An examiner is appointed for a period of 70 days, which period can be extended by a further 30 days where the court is satisfied that it is required to enable the examiner to complete his or her work. During the period of protection, the examiner will formulate proposals for a compromise or scheme of arrangement to assist the survival of the company or the whole or any part of its undertaking as a going concern. A scheme of arrangement may be approved by the relevant court when at least one class of creditors has voted in favour of the proposals and the relevant court is satisfied that such proposals are fair and equitable in relation to any class of members or creditors who have not accepted the proposals and whose interests would be impaired by implementation of the scheme of arrangement.

There has been no instance to date of an examiner's being appointed to an entity with the typical characteristics of a securitisation special purpose entity SPE (including no employees, no real property Ireland, no material unsecured creditors, establishment as a bankruptcy remote SPE for a limited purpose, and with the benefit of limited recourse and non-petition provisions). It should be noted however, that it is not possible to definitively anticipate the position of an Irish court in the future.

Disclaimer of onerous contracts by liquidator

The Companies Act confers power on a liquidator, with leave of the court, at any time within 12 months of the commencement of the liquidation, to disclaim any property of the company being wound up which consists of, amongst other things, unprofitable contracts or any property that is unsellable or not readily saleable (by reason of its binding the possessor to the performance of any onerous act or to the payment of money).

Exercise of claw-back
Several provisions of Irish company law may be triggered on the winding-up of an originator resulting in claw-back of the asset transfer to the issuer.

Unfair preference

Any transaction in favour of a creditor of a company which is unable to pay its debts as they become due, which occurs during the six months prior to the commencement of a winding-up of the company, and with a view to giving that creditor a preference over the other creditors constitutes an unfair preference of its creditors and is invalid. Case law relevant to the predecessor to this provision indicates that a dominant intent on the part of the company to prefer one creditor over the other creditors of the company is necessary in order for an unfair preference to occur. No question of unfair preference can arise where the originator was able to pay its debts as they become due at the date of the true sale transaction. It is therefore the practice for the originator to deliver a solvency certificate at closing.

The six month "hardening period" is extended to two years where the transaction is in favour of a "connected person", which term includes any director, shadow director or de facto director of the company and any related companies. In addition, any such act in favour of a connected person is deemed to be made with a view to giving the connected person a preference over the other creditors and as such to be an unfair preference and invalid accordingly. Consequently, the burden is on the connected person to show that any such act was not an unfair preference.

Fraudulent disposition

Any conveyance (which includes an assignment, charge or mortgage) of property made with the intention of defrauding a creditor or other person is voidable by any person thereby prejudiced. However, this does not apply to any estate or interest in property conveyed for valuable consideration to any person in good faith not having, at the time of the conveyance, notice of the fraudulent intention; or affect any other law relating to the bankruptcy of an individual or a corporate insolvency.

Pooling orders

An Irish court, where satisfied that it is just and equitable to do so, may order that two or more "related companies" (as defined in Section 2(1) of the Companies Act) which are being wound up are treated as one company and wound up accordingly (a "pooling order"). In deciding whether to make a pooling order a court will have regard (but not exclusively), as between related companies, to any intermingling of businesses, involvement of one company in the management of the other, conduct towards each other's creditors and responsibility of one company for the circumstances giving rise to the winding-up of the other.

Contribution orders

An Irish court has a further jurisdiction to order that any company, which is or was related to a company which is being would up, contributes an amount equivalent to the whole or part of all or any of the debts provable in that winding-up (a "contribution order"). Such an order can only be made where the court is satisfied that it is just and equitable to do so. The court must consider as regards the related company, amongst other things, its involvement in the management of, and its conduct towards creditors of, the company being wound up, together with the likely effect of a contribution order on the creditors of the related company.

A contribution order cannot be made unless the High Court is satisfied that the circumstances that gave rise to the winding-up are attributable to the actions or omissions of the related company. Furthermore, there is no reported judicial authority in Ireland which would assist in clarifying the circumstances in which the High Court would exercise its discretion to grant either a pooling order or a contribution order.

The use of an orphan SPE and compliance with standard separateness covenants in a typical securitisation structure reduce the likelihood that an issuer and an originator would be considered related companies.

1.2 Special Purpose Entities

As a general rule, an Irish SPE is established as a bankruptcy remote orphan company. A typical structure for an orphan company would consist of an Irish private limited company (an LTD), a "designated activity company" (a DAC) or (for retail offerings) a public limited company (a PLC) whose entire issued share capital is held on trust for charitable purposes. The shareholders can be individuals or nominee shareholder companies all of whom hold their shareholding under a declaration of trust executed in favour of Irish charities.

In addition to ensuring that the SPE is an orphan company and enters into contractual relations on a non-petition/limited recourse basis the following steps should be taken:

- the activities of the SPE should be limited to the particular securitisation and the activities incidental thereto;
- the board of directors should be comprised of independent persons (for example, employees of a corporate service provider or independent professional directors);
- the SPE should be prohibited from merging/consolidating with another entity that is not subject to the same restrictions;
- the SPE should maintain its assets in a way which segregates and identifies those assets, separate and apart from the assets of any other person or entity;
- the SPE should hold itself out to the public as a separate legal entity distinct from any other person or entity; and
- the SPE should conduct business solely in its own name.

Non-consolidation

Irish courts are slow to disregard the separate legal personality of corporate entities. However, as outlined above, they have jurisdiction under Irish insolvency law to consolidate assets and unwind transactions in certain limited circumstances. See section **1.1 Insolvency Laws** – Other Material Insolvency Law Considerations.

The risk of consolidation is minimised by an SPE taking the following steps:

- preparing and maintaining its own full and complete books, record and financial statements separately from those of any other entity, including the originator;
- in all dealings with third parties and the public, identifying itself by its own corporate name as a separate and distinct entity;
- ensuring that all decisions with respect to its business and daily operations are and will be independently made by it and not directed or dictated by any other entity;
- entering into all transactions on an arm's length basis;
- not commingling, mixing or pooling any of its funds or other assets with those of any other entity;
- acting solely in its own corporate name and through its own authorised officers and agents;
- ensuring that its assets are and will be kept separate from those of any other entity and maintained in a manner which facilitates their identification and segregation;
- observing all corporate formalities and governmental requirements and making all required filings to all applicable authorities;
- paying the salaries of its own employees (if any) and discharging all expenses and liabilities incurred by it out of its own fund, and allocating fairly and reasonably any shared overheads; and
- ensuring that its bank accounts are kept separately from the bank accounts of any other person.

Legal Opinion – Non-consolidation

As noted above, a legal opinion will address the enforceability of the transaction and sale of the underlying assets to the issuer, in each case to the extent governed by Irish law, as well as the corporate capacity and status of the issuer. A legal opinion may also address specifically non-consolidation where required for a particular transaction, however, in a typical securitisation transaction, a non-consolidation opinion is generally not necessary.

Other Material Legal Considerations in Relation to an SPE

Issuer related

An SPE must comply with the Irish company law requirements applicable to its particular corporate form. Irish SPEs are typically established as: (i) an LTD; (ii) a DAC; or (iii) a PLC. The form chosen will depend on the type of securities to be issued and whether or not they will be listed. An LTD can issue unlisted notes falling within the "excluded offer" exemption under Regulation (EU) 2017/1129 (the Prospectus Regulation). A DAC can issue both listed and unlisted notes falling within the excluded offer exemptions. Only a PLC may offer securities to the public, other than pursuant to an excluded offer and/or list securities other than notes/debentures. Most securitisations involve the issuance of listed debt securities via a DAC.

Asset related

The SPE may be subject to additional rules depending on the underlying asset class. In particular, where the underlying obligor is a consumer, regard must also be had to relevant provisions of consumer law – see **4.10 Banks Securitising Assets**. It is customary for the seller/originator to warrant to the issuer compliance with these measures. Personal data held by an SPE, whether in relation to underlying obligors or its members, officers or agents falls within the scope of Regulation (EU) 2016/679 (the GDPR), the Irish Data Protection Acts 1988 to 2018 and SI No 336 of 2011 (the ePrivacy Regulations).

In addition, a securitisation SPE which provides credit may be required to register as a "Schedule 2 firm" with the Central Bank of Ireland (the CBI) for anti-money laundering purposes; and to submit detailed data on the performance of its loan portfolio to the Central Credit Register maintained by the CBI under the Credit Reporting Act 2013 (as amended) (the Credit Reporting Act).

See also **2. Tax Laws and Issues** and **4. Laws and Regulations Specifically Relating to Securitisation**.

1.3 Transfer of Financial Assets

As noted, in **1.1 Insolvency Laws**, there are four principal means by which an issuer can acquire the underlying assets: (i) assignment (legal or equitable); (ii) declaration of trust over the underlying assets; (iii) novation and (iv) sub-participation. The response in this section relates to assignment as this is the most commonly utilised method in Ireland. A valid legal assignment of a debt is effected where the assignment:

- is absolute;
- is in writing and signed by the assignor;
- assigns the whole of the debt; and
- is expressly notified in writing to the debtor.

An assignment which does not meet all of the above requirements will take effect in equity only. Both legal assignments and equitable assignments are capable of executing a true sale. Most Irish securitisations use an equitable assignment (achieved by omitting the notification to the underlying obligors) to transfer financial assets to the issuer. The issuer is permitted, upon the occurrence of certain trigger events specified in the asset sale or purchase agreement, to perfect the assignment by notifying the underlying obligors of the assignment. Default under the notes, issuer insolvency and default of the servicer are standard trigger events.

Additional perfection requirements apply in relation to certain asset classes and these must also be satisfied following a trigger event. In particular, an assignment of rights in respect of real property must be registered with the Irish Land Registry (for registered land) or Irish Registry of Deeds (for unregistered land) in order to take effect as a legal assignment.

Transfer Requirements: True Sale v Secured Loan

A secured loan is not used by Irish SPEs to transfer assets for securitisation as it exposes the SPE to the insolvency risk of the originator. If required, however, this could be achieved using an assignment by way of security. The requirements for a valid legal assignment by way of security are the same as those for a valid legal assignment absolutely (as set out above), including in relation to perfection by delivery of notice. As noted, in **1.1 Insolvency Laws**, the particulars of any security created by an Irish company must be registered with the Irish Registrar of Companies. Failure to register within the requisite period renders the security void as against any liquidator or creditor of the company.

Transfer Requirements: Rights of Transferee

Prior to the perfection, the SPE as assignee under an equitable assignment is exposed to the following risks:

- the rights of the SPE are subject to any prior equities that have accrued to the underlying obligor, including rights of set-off (in this regard, the originator is required to warrant that no such rights have arisen on or before the date of assignment);
- the underlying obligor can exercise any rights of set-off which accrue after the date of the assignment;
- the SPE may not sue for the debt in its own name and must join the originator to any action – this risk is managed by the SPE appointing the originator as servicer of the underlying assets, including with power to enforce the underlying assets on behalf of the SPE;
- repayment of the debt to the originator is a valid discharge of the debt and as such the SPE is reliant on the originator to forward receipts to it as required under the transaction documents; and
- the SPE would rank behind any third party being a bona fide purchaser for value without notice which takes a legal assignment of the underlying assets, exposing the SPE to the possibility of negligence or fraud of the originator, although this is a particularly remote risk.

1.4 Construction of Bankruptcy-Remote Transactions

Where transfer by assignment is not possible, for example, due to restrictions in the contracts governing the financial assets, an originator may instead declare a trust over the financial assets in favour of the SPE. The SPE obtains an equitable interest in the financial assets. However, unlike an equitable assignment, it is not possible to elevate this interest to a legal interest by delivery of notice. As such, the SPE will remain subject to the risks set out in **1.3 Transfer of Financial Assets** at Transfer Requirements: Rights of Transferee for so long as the trust subsists.

See also **8. Synthetic Securitisations**.

Legal Opinion – Other Bankruptcy-Remote Structures

A trust is validly constituted where there is certainty as to the intention to create the trust, the subject matter of the trust and the beneficiaries of the trust. The legal opinion will be required to confirm that the trust satisfies these requirements subject to certain factual assumptions, including as to the correct identification in the sale agreement of the financial assets.

2. Tax Laws and Issues

2.1 Taxes and Tax Avoidance

Stamp Duty

Irish stamp duty is a tax on instruments and can apply on instruments of transfer (including agreements to transfer) which are executed in Ireland or which relate to Irish situate assets. The current rate of stamp duty on non-residential property is 7.5%, or 1% in the case of shares in an Irish incorporated company. While the transfer of assets without a change in beneficial ownership (eg, to a nominee of the beneficial owner) should not trigger a charge to stamp duty, a transfer of financial assets by an originator to an SPE would typically involve a change in beneficial ownership. However, a number of exemptions for the charge to stamp duty are available in respect of various financial assets. For example, an agreement for the sale, or a transfer on sale, of debts is exempt from stamp duty where the sale is in the ordinary course of business of the seller or the purchaser. This is commonly relied on in the case of the acquisition of loans by Irish SPEs which are in the business of buying and/or selling loans/receivables. In addition, loan capital (as defined) is exempt from stamp duty on transfer/sale. Exempt loan capital for these purposes means any debenture stock, bonds or funded debt, or any capital raised by a company which has the character of borrowed money. The exemption applies where the loan capital:

- is not convertible into Irish shares or marketable securities;
- does not carry similar rights to shares;
- has not been issued at a discount of more than 10% of its nominal value; and
- is not index linked in terms of repayment or interest.

Other common exemptions include the transfer of shares in a non-Irish incorporated company, Irish shares which are traded on the ESM of the Irish Stock Exchange, American depositary receipts, swap agreements, forward agreements, financial futures agreement and options (each as defined). Specific exemptions also apply in case of stock borrowing and stock repos. The transfer of a mortgage is also outside of the charge to Irish stamp duty. Irish SPEs are also typically structured so as to avail of the Irish securitisation tax regime set out in Section 110 of the Taxes Consolidation Act 1997 of Ireland, as amended (Section 110). The issue or transfer of securities issued by a Section 110 company is exempt from Irish stamp duty where the money raised by those securities is used in the course of its business. In circumstances where a stamp duty exemption is not available, non-Irish situate assets may occasionally be transferred by way of instrument executed outside of Ireland. Alternatively, it may be possible to effect a novation, or to transfer economic exposure only by way of sub-participation and not give rise to a stamp duty charge.

VAT
Irish VAT at the rate of 23% can apply on the supply of services (which can include the supply of intangible assets – eg, financial assets). However, financial services consisting of the issuing, transferring or otherwise dealing in existing stocks, shares, debentures and other securities are exempt from VAT.

2.2 Taxes on SPEs
Where the SPE qualifies as a Section 110 company, it would be subject to Irish corporation tax at the rate of 25% on taxable profits. Section 110 companies can avail of Ireland's favourable securitisation tax regime which permits certain financial transactions to be carried out in a tax efficient manner where certain conditions are met. Section 110 provides for the taxable profits of a Section 110 company to be computed on the same basis as a trading company. This allows for the cost of funding and other revenue expenditure, incurred wholly and exclusively for the purposes of its business, to be tax deductible.

In addition, a Section 110 company can deduct profit participating interest (and interest which exceeds a reasonable commercial rate of return) in computing its taxable profits (subject to conditions). Accordingly, while a Section 110 company is subject to corporation tax at the higher 25% rate, the tax is levied on the company's net taxable profit which is generally maintained at a negligible level by matching deductible expenditure with income through the sweep-out mechanism of a profit participating loan or note.

A qualifying company, for the purposes of Section 110, is one which is resident in Ireland for tax purposes and which, among other things, carries on in Ireland a business of holding, managing, or both the holding and managing of qualifying assets (financial assets, commodities and plant and machinery) and apart from activities ancillary to that business, carries on no other activities. It is also a requirement of Section 110 that the first assets held or managed by the SPE have an aggregate value of not less than EUR10 million. This requirement applies only to the first transaction entered into by the Section 110 company and the value of subsequent transactions is irrelevant for this purpose. An SPE will not be a qualifying company for Section 110 if any transaction is entered into by it otherwise than by way of a bargain made at arm's length. However, there is an exception to this requirement in certain circumstances in relation to the payment of profit participating interest.

In accordance with Section 110 anti-avoidance rules, deductions for profit participating interest are disallowed except in the following circumstances:

- the interest is paid to an Irish tax resident person or a person who is otherwise within the charge to Irish corporation tax;
- the interest is paid to certain pension funds or other tax exempt bodies that are resident in a "relevant territory" (ie, an EU member state or double tax treaty country); or
- under the laws of a relevant territory, the interest is subject to a tax (without any reduction computed by reference to the amount of the interest) and that tax corresponds to Irish corporation tax or income tax and applies generally to profits, income or gains received in that territory by persons from sources outside that territory.

The anti-avoidance rules generally do not apply to transactions where the debt is issued as a quoted Eurobond or wholesale debt instrument (see **2.3 Taxes on Transfers Crossing Borders**) and the investors are third-party persons otherwise unconnected with (through the sale of assets or holding of shares or voting power or significant influence) the Section 110 company.

An interest restriction applies in respect of the payment of profit participating and/or excessive interest by Section 110 companies investing in Irish real estate-related assets (eg, Irish real estate-secured loans). Provided the financial assets acquired by the SPE are not related to Irish real estate, the interest restriction should not apply.

2.3 Taxes on Transfers Crossing Borders

Irish withholding tax applies at the rate of 20% to payments of yearly interest which have an Irish source and are made to both Irish resident persons and non-Irish resident persons. Interest is considered to be yearly interest if the principal is outstanding (or is capable of being outstanding) for at least one year.

A number of exemptions from withholding tax are available to Section 110 companies such as the quoted Eurobond exemption for securities which are quoted on a recognised stock exchange (subject to conditions). There is also no obligation to withhold tax in respect of interest paid by a Section 110 company to a person who is tax resident in an EU Member State (other than Ireland), or in a country with which Ireland has signed a double tax treaty. In addition, Section 110 companies can take advantage of the "wholesale debt" exemption, which, inter alia, applies to debt instruments which are issued in denominations of not less than EUR500,000 and which mature within two years (subject to conditions).

Where interest is profit dependent (or represents more than a reasonable commercial return), a Section 110 company is only entitled to claim a tax deduction for the interest if certain conditions are met (see discussion in **2.2 Taxes on SPEs**). If these conditions are not met, the interest would be recharacterised as a non-deductible distribution and 25% dividend withholding tax may apply (subject to certain exceptions).

2.4 Other Taxes

The issue or transfer of securities, issued by a Section 110 company, is exempt from Irish stamp duty where the money raised by those securities is used in the course of its business.

The activities of a Section 110 company are often exempt activities for the purposes of Irish VAT. However, if the Section 110 company's investments are located outside of the EU, partial VAT recovery may be available. There are specific exemptions from Irish VAT in relation to investment management and corporate administration services provided to a Section 110 company. However, legal and audit services provided to a Section 110 company in Ireland will be subject to VAT. To the extent that a Section 110 company receives taxable services from outside of Ireland the company will be obliged to register for VAT and self-account for Irish VAT on those services on the reverse-charge basis at the rate of 23%.

Similar to all EU member states, Ireland is required to implement a number of corporation tax measures as a result of the EU Anti-Tax Avoidance Directive (ATAD) – the EU's response to the OECD's Base Erosion and Profit Shifting (BEPS) project of corporation tax reform. Of the measures proposed in ATAD, the "interest limitation rule" and the "hybrid mismatch provisions" could have an impact on Section 110 companies by restricting or denying a deduction for interest in certain circumstances. The Irish Finance Act 2019 includes legislation dealing with hybrid mismatches and came into effect on 1 January 2020. However, a noteholder should not in general be treated as an associated enterprise of a Section 110 company merely as a result of holding notes, meaning that in many cases payments of interest by a Section 110 company should not come within the scope of hybrid mismatch provisions. Reverse hybrid mismatch provisions are expected to be introduced by 2022. The implementation date for the interest limitation provision in Ireland is yet to be announced. Accordingly, the final form and impact of the interest limitation rule on Section 110 companies in Ireland remains uncertain.

2.5 Obtaining Legal Opinions

Legal opinions are generally provided by counsel to the issuer in a securitisation transaction. The opinion typically addresses, in an Irish tax context, whether the issuer meets the conditions to qualify for the Irish securitisation tax regime, whether interest on the relevant debt securities is deductible for Irish tax purposes and can be paid by the issuer free from withholding tax, whether stamp duty arises in connection with the entry into of the transaction documents and certain VAT confirmations (eg, that the services of the investment manager and corporate services provider to the issuer are exempt from Irish VAT).

3. Accounting Rules and Issues

3.1 Legal Issues with Securitisation Accounting Rules

The accounting analysis of a securitisation is undertaken by accountancy professionals independently of the legal analysis. Key considerations are balance sheet treatment of the transferred assets and consolidation for accounting purposes of the SPE into the originator's group. It is not uncommon for a securitisation to be considered on-balance sheet for accounting purposes and off-balance sheet from a legal perspective.

3.2 Dealing with Legal Issues

No legal advice or opinions are provided on accounting matters.

4. Laws and Regulations Specifically Relating to Securitisation

4.1 Specific Disclosure Laws or Regulations

The specific measures relating to securitisation are:

- Regulation (EU) 2017/2402 (the Securitisation Regulation);
- the Irish domestic securitisation regulations (SI No 656 of 2018, the Irish Securitisation Regulations); and
- as regards reporting by securitisation SPEs, Regulation (EU) No 1075/2013 (the FVC Regulation) and Section 18 of the Central Bank Act 1971 (as amended, Section 18 CBA 1971).

Securitisation Regulation

The Securitisation Regulation became directly applicable in Member States on 1 January 2019. It replaced the previous patchwork of sector-specific legislation governing European securitisations with harmonised rules on due diligence, risk retention and disclosure applying to all securitisations and also created a framework for simple, transparent and standardised (STS) securitisations.

Together with the related regulation amending the Capital Requirements Regulation (Regulation (EU) No 575/2013) (Regulation (EU) 2017/2401, the CRR Amending Regulation), the development of a simple, transparent and standardised securitisation market constitutes a building block of the Capital Markets Union and aims to strengthen the legislative framework implemented after the financial crisis to address the risks inherent in securitisation.

Under the Securitisation Regulation the originator, sponsor and SPE are responsible for making detailed information relating to the securitisation available to the holders of a securitisation position, to competent authorities and, upon request, to potential investors in a securitisation. They must designate and identify, in the transaction documents, one entity amongst themselves as responsible for making these disclosures. Although market practice is still developing, it appears that SPEs will be designated for this purpose. The disclosure obligations are more onerous than under the previous regime and include:

- detailed loan-level disclosures on the underlying exposures on a quarterly basis;
- disclosure of all underlying documents relating to the securitisation that are essential for the understanding of the transaction;
- disclosure of a detailed transaction summary for "private" deals (ie, where a prospectus is not required to been prepared);
- in the case of an STS securitisation, disclosure of the STS notification;
- disclosure of quarterly investor reports;
- disclosure of inside information concerning the securitisation required to be made public pursuant to Regulation (EU) No 596/2014 (Market Abuse Regulation (MAR));
- where the MAR does not apply, disclosure of significant events such amendment to, or material breach of, transaction documents or changes in structural features or risk characteristics that may materially impact the performance of the securitisation.

There is also a requirement that: (i) any inside information relating to the securitisation that the originator, sponsor or SPE is obliged to make public in accordance with MAR; and (ii) any material changes to the securitisation (including breaches of the transactions documents and material changes in the structural features of the transaction) are made available without delay.

The European Commission published a Commission Delegated Regulation (Securitisation Delegated Regulation) setting out disclosure related requirements under the Securitisation Regulation in October 2019. The Securitisation Delegated Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Securities and Markets Authority (ESMA) specifying the information and the details of a securitisation which are required to be made available by the originator, sponsor and SPE to various parties under the Securitisation Regulation. It is expected that the Securitisation Delegated Regulation, including the reporting templates, will be adopted in early 2020. For "public" deals, disclosures must be made via a securitisation repository – an entity registered with ESMA under the Securitisation Regulation for the purpose of collecting and maintaining centrally the records of securitisations. The means of disclosure for private deals is not prescribed in the Securitisation Regulation or the Irish Securitisation Regulations. The ESMA Q&A on the Securitisation Regulation (ESMA33-128-53) confirms that, in the absence of any instructions or guidance provided by national competent authorities, reporting entities are free to make use of any arrangements that meet the conditions of the Securitisation Regulation. Barring any further guidance from the CBI, it is logical to assume that parties reporting to the CBI in its capacity as a competent authority should use the same channels of communication as are used for Central Bank Notification (as defined below).

The CBI has been designated as a competent authority in Ireland with regard to the Securitisation Regulation, with the exception of competencies concerning pension funds which have been allocated to the Irish Pensions Authority.

Irish Securitisation Regulations

The Irish Securitisation Regulations introduce a requirement for the originator, sponsor or SPE – where one of them is located Ireland – to notify the CBI of a securitisation within 15 working days of the first issue of securities (the Central Bank Notification). This notification requirement applies in respect of all securitisations, including private securitisations. The Central Bank Notification must include:

- the International Securities Identification Number (ISIN) of the securitisation;
- whether the person making the notification is an originator, sponsor or SPE;
- where the originator, sponsor and SPE have been allowed to designate one of their number to comply with the reporting obligation, that entity's name and address; and
- details of whether the person making the notification is a corporate or non-corporate entity and the name, registered address, corporate status and Legal Entity Identifier (LEI) (if any) of the person making the notification, if that person is not the notifying party, the originator, sponsor or SPE.

The Central Bank Notification must be submitted in the manner set out on the CBI's Securitisation Regulation webpage. Firms supervised/regulated by the CBI must use their pre-existing channels of communication with the CBI. SPEs that are subject to the Central Bank's financial vehicle corporation (FVC) registration regime (described below) must use the channels prescribed for that regime, and other in-scope entities must notify via email to securitisation@centralbank.ie.

FVC Regulation and Section 18 CBA 1971

See **4.4 Periodic Reporting** - FVC Regulation and Section 18 CBA 1971.

Sanctions

The CBI is empowered to impose significant sanctions for any contravention, whether intentional or negligent, of the Irish Securitisation Regulations or the Securitisation Regulation. Possible sanctions include administrative fines for natural persons and corporates of up to EUR5 million and 10% of annual turnover, respectively; bans from participating in the management of any originator, sponsor or SPE; and temporary withdrawal of authorisation from the entity responsible for confirming compliance with STS requirements. Sanctions may also be imposed on regulated financial service providers pursuant to the Irish Central Bank Act 1942 (as amended) for contraventions of the Irish Securitisation Regulations. Criminal liability may also be imposed on any person who knowingly provides to the CBI information, required pursuant to the Securitisation Regulation or the Irish Securitisation Regulations, that is false or misleading in any material respect.

4.2 General Disclosure Laws or Regulations

In addition to the specific disclosure regime for securitisations, issuers must also have regard to the general regime applying to the issue of securities. The requirements that apply will depend on whether or not a prospectus is required, whether by virtue of a non-exempt offer of securities to the public or listing on a regulated market. These measures include the following:

- Regulation (EU) 2017/1129 (the Prospectus Regulation);
- EU (Prospectus) Regulations 2019 (the Irish Prospectus Regulations);
- MAR;
- Directive 2014/57/EU on criminal sanctions for market abuse (CSMAD);
- EU (Market Abuse) Regulations 2016 (the Irish Market Abuse Regulations);
- Directive 2004/109/EC (the Transparency Directive); and
- Transparency (Directive 2004/109/EC) Regulations 2007 (the Irish Transparency Regulations).

Prospectus Regime

The measures comprising the Irish prospectus law are the Prospectus Regulation and the Irish Prospectus Regulations. Under Irish prospectus law, an issuer seeking to list its debt securities on a regulated market or offer its securities to the public, must publish a prospectus and have it approved by a "competent authority" of the applicable EU member state. For Irish purposes the competent authority is the Central Bank. There are a number of exemptions to this requirement – the main exemptions in the context of debt securities are where the offer of debt securities:

- is addressed solely to qualified investors;
- is addressed to fewer than 150 natural or legal persons, other than qualified investors;
- is addressed to investors who acquire securities for a total consideration of at least EUR100,000 per investor, for each separate offer;
- where the denomination per unit amounts to at least EUR100,000; and
- has a total consideration in the European Union of less than EUR1 million, (which shall be calculated over a period of 12 months).

In the context of securitisation, an issuer will rarely make an offer of securities to the public. Rather, the requirement to publish a prospectus is triggered by the listing of securities on a regulated market for the purpose of the Prospectus Regulation. In such cases the issuer will need to comply with the requirements as to the format and context of a prospectus as stipulated under prospectus law. It will also need to comply with applicable stock exchange listing rules.

The Prospectus Regulation requires that a prospectus contains "necessary information which is material to an investor" for making an informed assessment of: (i) the assets and liabilities, profits and losses, financial position, and prospects of the issuer and of any guarantor; (ii) the rights attaching to the securities; and (iii) the reasons for the issuance and its impact on the issuer. Risk factors included in a prospectus must be limited to those specific to the issuer or securities and material to making an informed investment decision. Detailed requirements as to the content of a prospectus are contained in Commission Delegated Regulation (2019/980) and Commission Delegated Regulation (2019/979).

A wide range of potential penalties may be applied for breaches of Irish prospectus law, including criminal penalties (including terms of imprisonment) and administrative sanctions, with potential prescribed fines of up to EUR20 million or 3% of turnover for the most serious breaches. Sanctions may also be imposed on regulated financial service providers pursuant to the Irish Central Bank Act 1942 (as amended) for contravention of the Irish Prospectus Regulations.

Market Abuse Regime

As of 3 July 2016, a new market abuse regime came into effect in Ireland and across all EU member states with the MAR. MAR, along with CSMAD replaces, modifies and expands the previous market abuse rules (stemming from the Market Abuse Directive (2003/6/EC), MAD). As a regulation, MAR is consequently directly applicable in the EU member states. The Irish Market Abuse Regulations transpose CSMAD into Irish law. The CBI has also published rules and guidance on market abuse.

The market abuse regime imposes significant obligations on all listed issuers whose securities are listed on the Irish Stock Exchange (trading as Euronext Dublin). MAR extended the scope to a wider range of securities (including to issuers of debt securities listed on the exchange regulated market, the Global Exchange Market (GEM) of Euronext Dublin (not previously covered under the old regime)).

Market abuse consists of insider dealing and the offence of "market manipulation" in respect of financial instruments admitted to trading on a regulated market (such as the Euronext Dublin's Official List) or for which a request for admission for trading on such a regulated market has been sought irrespective of whether or not the transaction itself actually takes place on that regulated market and has been extended to financial instruments traded on organised trading facilities (OTFs) and financial instruments traded on multilateral trading facilities (MTFs), admitted to trading on an MTF or for which a request for admission to trading on an MTF has been made.

The market abuse regime provides that it is an offence to use inside information to buy or sell financial instruments. "Inside information" comprises information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments. Issuers subject to market abuse rules must inform the public as soon as possible of inside information which directly concerns the said issuer.

In addition, issuers, and persons acting on their behalf or for their account, must maintain a list of persons working for them who have access to inside information (whether as employees or otherwise performing tasks through which they have access to inside information (for example advisors or accountants)). Commission Implementing Regulation (EU) 2016/347 lays down implementing technical standards with regard to the format of insider lists and details the content of the insider lists that must be prepared and maintained (and includes more detail than previously required). Information that must be included on insider lists includes the identity of any person with access to inside information, the reason why they are on the list and the date on which they were included on the list. The Central Bank, as competent authority in Ireland, may request that an issuer provide its insider list and the list must be maintained for at least 5 years after it was prepared or last updated.

MAR and CSMAD expanded greatly on the sanctions regime created by MAD. MAR gave competent authorities the power to impose administrative sanctions, including monetary penalties on corporates of up to EUR15 million or 15% of annual turnover for insider dealing and market manipulation. CSMAD required member states to introduce a harmonised regime of criminal sanctions, incorporating, amongst other things, terms of imprisonment of up to four years for natural persons found guilty of certain market abuse offences. Sanctions may also be imposed on regulated financial service providers pursuant to the Irish Central Bank Act 1942 (as amended) for contravention of the Irish Market Abuse Regulations.

Transparency Regime

The Irish Transparency Regulations came into operation on 13 June 2007, transposing the Transparency Directive into Irish law. The objective of the transparency regime is to enhance information made available about issuers whose securities are admitted to trading on a regulated market. The Irish Transparency Regulations set down minimum requirements in relation to the disclosure of periodic financial information and ongoing information by issuers and requires ongoing information about major shareholders.

The Irish Transparency Regulations created a sanctions regime for contravention of its provisions. Sanctions available to the CBI include, for corporates, monetary penalties of up to the higher of EUR10 million, 5% of annual turnover, and twice the amount of the profits gained or loss avoided by the contravention. Natural persons may be subject to monetary penalties of up to the higher of EUR2.5 million and twice the amount of the profits gained or loss avoided by the contravention.

Legal Opinions
The legal opinion will identify any authorisations, consents, approvals or registrations required by the issuer in connection with the securitisation; including, where an issuer has published a prospectus, the requirement to obtain the approval by the CBI as competent authority of any prospectus prepared.

4.3 Credit Risk Retention

The risk retention rules require that an originator/sponsor/original lender (the "retainer") hold, on an ongoing basis, a material net economic interest of not less than 5% in the securitisation for the duration of the transaction. The Securitisation Regulation provides five methods by which this is can be achieved – the retainer can retain:

- a vertical slice of the securitisation representing at least 5% of the nominal value of each tranche sold or transferred to investors;
- where the securitisation is of a revolving pool of assets, an interest in the pool equal to at least 5% of the nominal value of the securitised assets;
- randomly selected assets equal to at least 5% of the nominal value of the securitised assets provided that:
  (a) the selected assets and the securitised assets together number at least 100; and
  (b) the selected assets would otherwise have been securitised;
- the first loss tranche of the structure equal to at least 5% of the nominal value of the securitised assets; and
- the first 5% loss exposure on each securitised asset.

The Securitisation Regulation does not recognise other methods of risk retention. As such, substitutive compliance is not possible. The retained interest may not be subject to risk mitigation techniques such as hedging. Prior to the Securitisation Regulation's becoming effective, investors in a securitisation were required to verify that the risk retention requirements were satisfied (this was known as the "indirect" approach). The Securitisation Regulation has maintained the "indirect" approach whilst also introducing a new "direct" approach to risk retention compliance by creating a direct obligation on originators, sponsors and original lenders to comply with the risk retention requirements.

Sanctions
See **4.1 Specific Disclosure Laws or Regulations** – Sanctions.

Legal Opinion - Risk Retention
Legal counsel advise, as part of the structuring of a securitisation transaction, in relation to the possible methods of risk retention. However, it is not customary for a formal legal opinion to confirm compliance with risk retention requirements under Article 6 of the Securitisation Regulation.

4.4 Periodic Reporting

Periodic reporting is required under a number of measures, including the Securitisation Regulation, the FVC Regulation, Section 18 CBA 1971 and the Credit Reporting Act. Financial reporting is also required as a matter of Irish company law but falls outside the scope of this chapter.

Securitisation Regulation
The quarterly reporting required under the Securitisation Regulation (see **4.1 Specific Disclosure Laws or Regulations** – Securitisation Regulation), must contain:

- material information on the credit quality and performance of underlying exposures;
- information on events which trigger changes in the priority of payments or the substitution of any counterparties, and data on the cash flows generated by the underlying exposures and by the liabilities of the securitisation; and
- risk retention compliance information.

This information must be made available simultaneously each quarter at the latest one month after the due date for the payment of interest.

In relation to sanctions, see **4.1 Specific Disclosure Laws or Regulations** - Sanctions.

FVC Regulation and Section 18 CBA 1971
Irish securitisation SPEs falling within the definition of FVCs are obliged to report statistical data to the CBI on a quarterly basis pursuant to the FVC Regulation (Regulation (EU) No 1075/2013). An FVC is an entity whose principal activity meets both of the following criteria:

- it carries out securitisation transactions and is insulated from the risk of bankruptcy or any other default of the originator; and
- it issues securities, securitisation fund units, other debt instruments and/or financial derivatives – and/or legally or economically owns assets underlying the issue of securities, securitisation fund units, other debt instruments and/or financial derivatives that are offered for sale to the public or sold on the basis of private placements.

Many Section 110 SPEs fall within the category of FVCs. Since 2015, the CBI has extended this regime to non-FVC SPEs (via Section 18 CBA 1971) which must furnish the CBI with quarterly balance sheets and annual profit and loss data.

Credit Reporting Act

The Credit Reporting Act established a central credit register which is a national mandatory database of borrower information that is maintained and operated by the CBI. In-scope lenders, which include SPEs that have acquired portfolios of loans, must comply with detailed and ongoing credit reporting obligations on the performance of (and amendments to) loans within the scope of the Credit Reporting Act and related regulations.

An in-scope lender, or a complicit or negligent officer of that lender, that knowingly provides false information to the CBI or that uses information to which it has been given access for the purposes of the Credit Reporting Act for any other purpose may be liable to a fine (of unspecified amount), imprisonment for a term of up to five years, or both.

4.5 Activities of Rating Agencies (RAs)

The Regulation 1060/2009 (the CRA Regulation) and related regulatory technical standards established a regulatory framework for credit rating agencies (CRAs) based in the EU requiring that they be registered with, and supervised by, nationally competent authorities, avoid conflicts of interest and apply sound rating methodologies. The CRA Regulation was amended by Regulation 513/2011 (CRA 2), which transferred the responsibility for registration and supervision to ESMA and by Regulation 462/2013 (CRA 3), which addressed issues including the reliance of firms on external credit ratings, sovereign debt ratings, competition in the CRA industry, the civil liability of CRAs and the independence of CRAs.

EU financial institutions can only use for regulatory purposes credit ratings that have been: (i) issued by a CRA registered with ESMA; (ii) issued in a third country and endorsed by a registered CRA; or (iii) issued by a third-country CRA certified by ESMA, and in the case of (ii) and (iii) subject to compliance with certain conditions.

Additional requirements are imposed in relation to the rating of securitisations. In particular, issuers must seek ratings in respect of each tranche from at least two CRAs and must consider appointing a CRA which has less than 10% of the total market share. Directors will typically consider and note this at a board meeting of the issuer. Prior to the entry into force of the Securitisation Regulation, Article 8b of the CRA Regulation required issuers, originators and sponsors to make periodic disclosures in relation to securitisation positions via an ESMA website. This provision was repealed by the Securitisation Regulation and will be replaced by the requirements set out in the Securitisation Delegated Regulation which is expected to enter into force in early 2020.

As to the consequences of contravention of these requirements by securitisation parties, see **4.1 Specific Disclosure Laws or Regulations** – Sanctions.

4.6 Treatment of Securitisation in Financial Entities

Credit institutions and investment firms must calculate their regulatory capital requirements as required under the CRR.

An originator of a securitisation, which is a credit institution or investment firm, can exclude the underlying exposures from the calculation of its risk-weighted exposure amounts and expected loss amounts if:

- significant credit risk on the underlying exposures has been transferred to third parties; or
- the originator applies a 1.25% risk weight to all securitisation positions it holds in the securitisation, or deducts these securitisation positions from its common equity tier 1 items.

The competent authority may decline to allow an originator to apply the capital treatment outlined above if it considers that it not justified on the basis of the credit risk being effectively transferred to third parties; but may allow the capital treatment where the originator demonstrates that the reduction in own-funds requirements achieved by the securitisation is justified by a commensurate transfer of credit risk to third parties.

Positions held in certain STS securitisations and certain SME synthetic securitisations may also benefit from preferential capital treatment.

4.7 Use of Derivatives

The principal regime governing the use of derivatives in securitisations is contained in the Regulation (EU) No 648/2012 (EMIR) (as amended by Regulation (EU) 2019/834 (EMIR Refit)) and its related delegated regulations and technical standards. Obligations are imposed on parties to derivative contracts, according to whether they are "financial counterparties" (FCs), such as investment firms and credit institutions or "non-financial counterparties" (NFCs) or their third-country entities equivalents.

NFCs whose transactions in over the counter (OTC) derivative contracts exceed EMIR's prescribed clearing threshold (NFC+s) are generally subject to more stringent requirements under EMIR than NFCs whose transactions in OTC derivative contracts do not exceed this clearing threshold. Counterparties may exclude from their threshold calculations contracts that are objectively measurable as reducing risks directly relating to the NFC's commercial activity or treasury financing activity. EMIR Refit, amongst other things, introduced a new method for NFCs such as SPEs to determine whether clearing thresholds have been exceeded.

Broadly, EMIR's requirements in respect of derivative contracts are: (i) mandatory clearing by FCs and NFC+s of OTC derivative contracts declared subject to the clearing obligation through an authorised central counterparty (a CCP); (ii) risk mitigation techniques in respect of uncleared OTC derivative contracts; and (iii) reporting and record-keeping requirements in respect of all derivative contracts.

Enforcement

The CBI is responsible for the supervision of compliance with EMIR. Powers available to the CBI, where a derivative counterparty contravenes a provision of EMIR or the Irish EMIR regulations (SI 443 of 2014) include: (i) the issuance of a direction to an FC or NFC, including a prohibition on entering into derivative contracts; (ii) the issuance of a contravention notice; and (iii) the appointment of an assessor to investigate a suspected contravention and the imposition of sanctions, including administrative fines of up to EUR2.5 million. Criminal liability may also be imposed.

4.8 Specific Accounting Rules

No response provided, section answered at firm's discretion.

4.9 Investor Protection

Investor protection is addressed in the following measures:

- the disclosure requirements under the Securitisation Regulation are intended to protect investors by allowing them to perform diligence and monitor securitisations properly (see **4.1 Specific Disclosure Laws or Regulations** and **4.4 Periodic Reporting**);
- the disclosure requirements under the Prospectus Regulation aim to provide "necessary information which is material to an investor" for making an informed assessment of the securities they are acquiring (see **4.2 General Disclosure Laws or Regulations**);
- the MAR is also intended to protect investors by preventing insider dealing and market manipulation (see **4.2 General Disclosure Laws or Regulations**); and
- the Transparency Regulations which implement the Transparency Directive into Irish law aim to enhance information made available about issuers whose securities are admitted to trading on a regulated market (see **4.2 General Disclosure Laws or Regulations**).

4.10 Banks Securitising Financial Assets

Banks Securitising Assets

A bank securitising its assets must have regard to the laws and regulations governing the origination and servicing of those assets, which will vary depending on the asset class. It may be required to provide warranties to the issuer as to compliance with certain of those measures up to the date of transfer in the asset sale or purchase agreement. A number key measures are summarised below.

Consumer Credit Act and Consumer Mortgage Credit Regulations

The primary regulations governing mortgage loans are contained in the Consumer Credit Act 1995 (as amended, the CCA) and the EU (Consumer Mortgage Credit Agreements) Regulations 2016 (the Mortgage Credit Regulations). Mortgage loans offered by banks in Ireland are principally regulated by the CCA where the credit agreement was effective prior to 21 March 2016. For credit agreements effective from 21 March 2016, where the borrower borrows as a consumer, both the Mortgage Credit Regulations and certain provisions of the CCA apply. Relevant obligations under the CCA include rules on advertising and requirements on information provided to consumers, including warnings regarding the potential loss of the person's home and information about fees and charges. The CCA also requires banks to give prior notice to the CBI of any proposal to impose a new charge, or increase an existing charge, for the provision of a service to customers, following which, the CBI may direct the notifying bank to refrain from imposing, or to amend, the proposed new charge or increased charge. The Mortgage Credit Regulations impose, amongst other things, obligations to assess and verify a borrower's creditworthiness prior to entering into a credit agreement, to provide and explain adequately prescribed information, and to act in the best interests of the customer when advising in relation to mortgage loans.

Consumer Protection Code

The Consumer Protection Code 2012 (as amended, the CPC) is a legally binding code published by the CBI. It applies to regulated financial services and specifies, amongst other things, how regulated entities, including banks and credit servicing firms, must deal with "personal consumers" and "consumers" for the purposes of the CPC. The CPC requires regulated entities to know their customers, assess their suitability for products or services and to include prescribed information in their terms and conditions. Post-sale/origination, it imposes ongoing information requirements; strict timelines for complaints resolution; and rules on arrears handling.

Of particular relevance for securitisation transactions, the CPC also requires a regulated entity which intends to transfer all or part of its "regulated activities" to another regulated entity to provide at least two months' notice to affected consumers to enable them to make alternative arrangements; to ensure that all outstanding business is completed prior to the transfer or provide for continuity of service following the transfer; and inform the consumer that his/her details are being transferred to the other regulated entity where applicable. "Regulated activities" comprise the provision of products or services that are provided in Ireland by a regulated entity and which are subject to the regulation of the CBI. This broad definition brings within the scope of the requirement any securitisation which involves for example, residential mortgages, loan agreements or credit card debts.

Code of Conduct on Mortgage Arrears

The Code of Conduct on Mortgage Arrears 2013 (the CCMA) is a legally binding code published by the CBI. It governs the management by lenders of mortgage arrears and pre-arrears (where a borrower advises the lender, or the lender itself ascertains, that the borrower is in danger of going into financial difficulties and/or mortgage arrears) in respect of a borrower's principal dwelling house or sole residential property in Ireland. The CCMA details the actions that a lender is required to take to manage the mortgage arrears before seeking repossession of a mortgaged property. The actions include putting in place a mortgage arrears resolutions process (a MARP), agreeing alternative repayment arrangements if appropriate, and complying with strict requirements on communication with borrowers.

Consumer Protection Act

The Consumer Protection Act 2007 (the CPA) contains general prohibitions on unfair, misleading, aggressive and prohibited commercial practices and applies to all Irish law governed consumer contracts.

Unfair Terms in Consumer Contracts Regulations

The EC Communities (Unfair Terms in Consumer Contracts) Regulations 1995 to 2000 (the UTCCR) apply to contracts for the supply of services to consumers, including loans to consumers and related collateral. A "consumer" for this purpose is a natural person acting for purposes outside his or her business. A consumer may challenge a term in an agreement, including a loan agreement, on the basis that it is "unfair" within the meaning of the UTCCR and therefore not enforceable against the borrower.

Banks Investing in Securitisation Positions

See **4.6 Treatment of Securitisation in Financial Entities**.

4.11 SPEs or Other Entities

See **1.2 Special Purpose Entities** - Other Material Legal Considerations in Relation to an SPE (Issuer related) and **2.2 Taxes on SPEs**.

4.12 Activities Avoided by SPEs or Other Securitisation Entities

An Irish securitisation SPE is established for the limited purpose of executing a securitisation transaction and undertakes, in the transaction documents, that it will not engage in any other activity. When structuring a securitisation transaction, the parties seek to ensure that the issuer's activities are not characterised, in particular, as banking, writing insurance or carrying on a regulated business as a retail credit firm.

Banking

An entity which engages in Ireland in banking business or acceptance of deposits or other repayable funds from the public must hold an appropriate licence or authorisation from: (i) the CBI under the Central Bank Act 1971 (as amended); (ii) the European Central Bank (ECB) under Regulation 1024/2013 (the SSM Regulation); or (iii) its home member state competent authority in the case of an entity passporting into Ireland. In the case of (i) and (ii), failure to hold the appropriate licence or authorisation is an offence punishable by a fine of up to EUR64,000, a term of imprisonment of up to 5 years or both.

It is customary for an offering document for an issue of securities by an Irish SPE to contain a disclaimer that the securities do not have the status of a bank deposit and that the issuer is not regulated by the CBI.

Insurance

An insurance company operating in Ireland is required to obtain an authorisation from the CBI or appropriate authority in its home member state if passporting into Ireland.

A synthetic securitisation may be structured using a credit derivative under which credit protection is provided by an SPE to an originator or third party (a "beneficiary") in respect of losses occurring on a pool of assets. The securitisation transaction is structured to ensure that the credit derivative is not found to be a contract of insurance – in particular, payment to the beneficiary is not conditional on the beneficiary's sustaining or proving any loss or holding an "insurable interest" in the pool of assets.

Retail Credit Firms
A person carrying on a "regulated business" in Ireland for the purposes of Central Bank Act 1997 (as amended, the CBA 1997) is required to hold an authorisation from the CBI. The provision of cash loans directly to natural persons (other than professional clients under the Markets in Financial Instrument Directive (MiFID) or a person who is themselves a regulated financial services provider) in Ireland is considered a regulated activity. Firms engaging in these services are considered to be "retail credit firms". However, there are a number of carve-outs contained in the definition in the CBA 1997. These include: (i) entities that purchase loans originated by another party (unless they subsequently provide credit to individuals or restructuring activities, following the purchase of the loan, trigger an authorisation requirement); and (ii) entities that provide credit on a once-only or occasional basis, but only if the provision of the credit does not involve a representation, or create an impression (whether in advertising, marketing or otherwise), that the credit would be offered to other persons on the same or substantially similar terms. Contravention of this requirement is an offence punishable by fines of up to EUR100,000.

A securitisation transaction will be structured to ensure that the activities of the SPE fall within the carve-outs outlined above and the SPE may give undertakings in the transaction documents to this effect.

4.13 Material Forms of Credit Enhancement
Credit enhancement can be provided to a securitisation in a number of forms. The type and level of enhancement will typically be driven by rating requirements. The most commonly utilised forms include:

- subordination of junior notes, typically held by the originator or an affiliate (and satisfying risk retention requirements), or a subordinated loan from the originator or an affiliate;
- payment of the issuer of a deferred purchase price for the underlying assets;
- over-collateralisation where the assets are acquired by the issuer for an amount less than their book value;
- excess spread whereby the income on underlying assets is greater than the fixed coupon on the securities; and
- reserves in the form of cash and highly liquid investments.

Any credit enhancement provided by the originator must be on arms' length commercial terms to avoid any prejudice to the bankruptcy remoteness of the transaction. See **1.1 Insolvency Laws** – Other Material Insolvency Law Considerations (Exercise of claw-back).

4.14 Participation of Government-Sponsored Entities
Irish Government sponsored entities have not participated in the securitisation market to date. Subject to compliance with any particular terms in their constituting documents or enactments, there is no restriction on their doing so.

4.15 Entities Investing in Securitisation
The investor base for securitisations is diverse and includes credit institutions, insurance undertakings and investment funds.

5. Documentation

5.1 Bankruptcy-Remote Transfers
A bankruptcy remote transfer is generally effected under a sale agreement between the issuer and the originator. The security trustee will also be a party to this agreement in order to obtain the benefit of the issuer's agreements and undertakings. The principal provisions include:

- agreement to sell and purchase the asset portfolio;
- conditions precedent to the sale and purchase transaction;
- declaration of trust by the originator over any proceeds deriving from the asset portfolio which are at any time held by it for the benefit of the issuer and the security trustee;
- warranties by the originator in relation to the asset portfolio and the remedies for any breach of such warranties, which may include an obligation to repurchase affected portfolio assets;
- warranties by the originator in relation to its corporate status and solvency;
- where the transfer is effected by equitable assignment – see **1.3 Transfer of Financial Assets –** the circumstances in which the issuer can perfect its title to the asset portfolio; and
- non-petition and limited recourse.

5.2 Principal Warranties
The originator provides representations and warranties in relation to, amongst other things, its corporate status, capacity and authority to enter into the securitisation; licensing (if applicable) and solvency ("general representations and warranties"). A breach of one of the general representations and warranties will constitute a breach of the relevant transaction document, which may trigger an event of default under the securities; and a misrepresentation, entitling the issuer to make a claim for damages. The originator also provides a comprehensive war-

ranty package addressing, amongst other things, its title to the asset portfolio and compliance of the asset portfolio with any selection criteria and any rules governing the origination of the assets. A breach of warranty in relation to the asset portfolio may trigger an obligation, on the part of the originator, to reacquire the affected assets.

5.3 Principal Perfection Provisions

See **1.3 Transfer of Financial Assets**.

5.4 Principal Covenants

Principal covenants by the issuer include compliance with the transaction documents, maintaining its business and accounts separately from the originator and joining in any action necessary to preserve or enforce the portfolio assets if requested by the originator or trustee. The issuer is also bound by extensive negative covenants which restrict its activities to those contemplated by the transaction documents. Originator covenants include compliance with applicable laws and maintenance of authorisations. Breach of covenant will constitute a breach of the transaction documents which may trigger an event of default under the securities.

5.5 Principal Servicing Provisions

The originator will generally continue to administer the portfolio assets in the capacity of servicer and will maintain the original contact with the debtors. In these circumstances, the servicing agreement will typically require the servicer to administer the portfolio assets in the same manner as it administers equivalent assets on its balance sheet. The servicer is responsible for day-to-day administration including collection of payments and enforcement. The securitisation documentation will typically provide for replacement of the servicer upon its insolvency or material breach of its obligations.

The Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 (the 2015 Act) introduced regulatory protections for consumers and SMEs whose loans were purchased by entities that were otherwise unregulated by the CBI. The 2015 Act accomplished this by requiring the day-to-day servicing, management and administration of loans to "relevant borrowers" – ie, loans to: (i) natural persons within Ireland; and/or (ii) loans to SMEs, but in each case, only where those loans were first originated by a regulated financial service provider – be undertaken by regulated "credit servicing firms" on behalf of the owners of that credit.

The credit servicing regime introduced by the 2015 Act was the amended by the Consumer Protection (Regulation of Credit Servicing Firms) Act 2018 (the 2018 Act) which came into force on 21 January 2019. The introduction of the 2018 Act means that a number of previously unregulated entities (eg, SPEs) that: (i) hold legal title to relevant portfolios of Irish loans; and/or (ii) control the overall strategy or key decisions relating to credit, are now subject to regulation and a requirement to apply to the CBI for authorisation to carry on the business of a credit servicing firm (in the absence of any acceptable restructuring solution). It should be noted that the 2018 Act does contain an exemption for traditional securitisations, however, the availability of this exemption should be analysed on case-by-case basis.

5.6 Principal Defaults

Standard events of default are failure by the issuer to pay principal or interest due on the securities within any applicable grace period; breach by the issuer of any provision of the transaction documents and issuer insolvency. Default under the securities will typically entitle the holders of the securities to instruct the trustee, subject to its being indemnified to its satisfaction, to declare the securities immediately due and payable and to enforce the security granted by the issuer to the trustee.

5.7 Principal Indemnities

The extent of the indemnities provided in a securitisation will depend on the relative bargaining power of transaction parties. It is customary for the issuer to provide full indemnities to the trustee, agents and managers/arrangers in respect of losses and costs incurred in the performance of their roles under the transaction documents. In addition, prior to a trustee's taking any action in relation to the transaction, for example, enforcement of security, it will require indemnification from the holders of the securities.

5.8 Other Principal Matters

The principal matters addressed in the transaction documents for a typical securitisation are outlined above.

6. Enforcement

6.1 Other Enforcements

The principal aspects of securitisation enforcement are addressed elsewhere in this chapter.

6.2 Effectiveness of Overall Enforcement Regime

The Irish legal and tax regime provides for an extremely flexible and business-orientated securitisation framework with a high degree of legal certainty. However, specific case law in Ireland in relation to securitisation transactions is scarce, not only due to limited litigation but also to the out-of-court enforcement options under Irish law collateral arrangements which provide numerous well established self-help remedies for security trustees and other secured parties.

7. Roles and Responsibilities of the Parties

7.1 Issuers
An issuer in a securitisation creates and issues the debt securities, acquires/procures the acquisition of the underlying portfolio and remits/procures the remittance of the proceeds/cashflows arising from the underlying portfolio to the holders of the debt securities in accordance with the contractual waterfall provisions that are typically contained in the underlying transaction documents. The role and responsibilities of an issuer will change depending on the nature of the transaction. An issuer is generally a bankruptcy remote special purpose vehicle. See also **1.2 Special Purpose Entities** and **4.1 Specific Disclosure Laws or Regulations**.

7.2 Sponsors
The sponsor, often referred to as the originator, is typically the entity which initiates and structures the securitisation transaction. It, either directly or through an affiliate, will have originated or acquired the underlying portfolio and will typically also act as servicer in respect of the portfolio. In the main, the sponsor will be a credit institution, a large corporate or a fund.

7.3 Underwriters and Placement Agents
Underwriters and placement agents are generally referred to as arrangers or managers, and are typically investment banks. Where the originator is itself a bank, it may also act as placement agent. At least two arrangers will participate in most securitisations, where they may have equal roles as co- or joint arrangers or one arranger may act as lead arranger. Together with the originator, they have responsibility for structuring the transaction, as well as marketing the notes and in some cases, underwriting the notes.

7.4 Servicers
The servicer is responsible for the day-to-day administration of the underlying assets. It will typically be the entity that originated (or acquired) the underlying assets or an affiliate. However, it is becoming become more common to see specialist servicing companies appointed to this role, particularly where the underlying assets have been acquired by a non-bank entity. See also **5.5 Principal Servicing Provisions**.

7.5 Investors
Investors in securitisation positions are typically sophisticated market participants and can include financial institutions, private equity investors and funds. An investor may have responsibilities under the terms of the notes, for example in relation to tax-law compliance, or by virtue of its being a regulated entity. They subscribe for the notes, funding the acquisition by the issuer of the underlying assets.

7.6 Trustees
The role of the trustee is to enter into the transaction documents as trustee for the holders of the securities and often, to hold the transaction security for itself and for the benefit of the other secured parties. The trustee is typically appointed under the terms of a trust deed which contains a suite of restrictive covenants that restrict the actions that the issuer can take without the consent of the trustee. Trustees typically seek a direction from the holders of the debt securities before consenting to any matters that require trustee consent under the trust deed and/or the other transaction documents.

8. Synthetic Securitisations

8.1 Synthetic Securitisation
Synthetic securitisations are permitted in Ireland and are used primarily to transfer the credit risk of exposures held on-balance sheet by a credit institution to third parties (risk transfer transactions). They may also be used to arbitrage between the higher spread received on an underlying asset and the lower spread paid on related structured securities (arbitrage transactions).

8.2 Engagement of Issuers/Originators
Synthetic securitisation has not been common in recent years amongst credit institutions in Ireland, albeit that it is a leading jurisdiction for credit-linked note (CLN) issuers. Credit institutions generally participate in risk transfer transactions as originators (credit protection buyers) rather than investors (credit protection sellers). The purpose of the risk transfer transaction for a credit institution is two-fold. Firstly, it serves to transfer or manage the credit risk held on-balance sheet and, secondly, it achieves (in most cases) a significant risk transfer resulting in a regulatory capital relief.

Arbitrage transactions are usually investor and/or asset manager-driven and are structured to achieve a desired portfolio profile in terms of the seniority, rating and return desired by investors. Credit institutions usually arrange these transactions (for a fee) after being solicited by investors, who choose most of the conditions, such as the names to be included in the portfolio, tranche subordination and tranche size.

8.3 Regulation
Synthetic securitisations are regulated in the same manner as regular securitisations. The applicable regulatory oversight will depend on the structure of the transaction. See **4. Laws and Regulations Specifically Relating to Securitisation**.

8.4 Principal Laws and Regulations

Both synthetic and regular securitisations effect the transfer of credit risk from an originator. A regular (true sale) securitisation achieves risk transfer by transferring the actual underlying assets to an SPE, whereas a synthetic securitisation achieves risk transfer by means of a credit protection contract between the originator and an SPE (or investor), leaving the underlying exposures in the ownership of the originator and on its balance sheet.

The requirements, set out in **4. Laws and Regulations Specifically Relating to Securitisation**, apply equally to synthetic securitisations, provided that a synthetic securitisation may not achieve an STS designation. However, a position in a synthetic securitisation of SME exposures may qualify for the same capital treatment as a position in an STS-designed securitisation where it satisfies the requirements for STS (other than as to simplicity) contained in the Securitisation Regulation and certain other conditions set out in Article 70 of the CRR. The European Banking Authority launched a consultation in October 2019 on its proposals to extend the STS regime to synthetic securitisations.

The requirements, described in **4.7 Use of Derivatives**, also apply to a credit derivative used in synthetic securitisations. In addition, the EMIR provisions on margining may also apply where the issuer's transactions in OTC derivative contracts exceed EMIR clearing thresholds. See also **4.12 Activities Avoided by SPEs or Other Securitisation Entities** in relation to contracts of insurance.

8.5 Principal Structures

A synthetic securitisation may be structured to transfer the credit risk of underlying exposures to third party investors via: (i) a direct contractual arrangement (direct structure) between an originator and third party investors in the form of a credit default swap "CDS) or guarantee; or (ii) the issue by an SPE of CLNs.

In a direct structure, the originator buys credit protection directly from third party investors in respect of the underlying exposures. Upon the occurrence of certain specified loss-producing credit events affecting the underlying exposures, for example a payment default, the protection seller pays an amount equal to the loss suffered (subject to any agreed de minimus or excess) to the originator. In return for this protection, the originator must pay a periodic fee to the protection seller.

In a typical CLN structure, the originator transfers the credit risk on the underlying exposures to an SPE via a CDS or guarantee/credit protection deed (on terms similar to those outlined above in respect of direct structures). The SPE in turn issues CLNs, transferring the credit risk on to third party investors. The SPE uses the proceeds of the CLN-issuance to fund payments to the originator in respect of credit events under the CDS or guarantee/credit protection deed; and the periodic fee received from the originator to pay a coupon on the CLNs.

8.6 Regulatory Capital Effect

See **4.6 Treatment of Securitisation in Financial Entities**.

9. Specific Asset Types

9.1 Common Financial Assets

A wide range of asset classes have been securitised by Irish SPEs, including residential mortgages, commercial mortgages, loan agreements, aircraft lease rentals, trade receivables, credit card debts and hire purchase receivables.

9.2 Common Structures

The structure of a securitisation is generally determined by factors other than the class of underlying asset, for example, desired regulatory capital treatment or investor requirements.

Walkers is a global, integrated and market leading financial services law firm which practises law across six jurisdictions and has ten offices across the Americas, EMEA and Asia. Walkers has 115 partners and over 900 staff providing a 24/7 service to its clients. The Irish office provides market leading Irish legal, tax, listing and professional services solutions to local and international financial institutions, investment managers, hedge funds, private equity groups and corporations. The firm's expertise includes asset management and asset finance, corporate and M&A, employment, finance and capital markets, insolvency and dispute resolution, investment funds, real estate, regulatory and tax as well as listings and fiduciary services. Walkers' finance and capital markets team advises the world's leading international financial institutions on a wide range of debt capital markets and structured products. The firm's independent corporate services offering, Walkers Professional Services, provides a broad range of corporate, fiduciary and administration services to structured and asset finance vehicles.

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