Contributed by: Andrew Traynor, Aisling Burke, Ian McNamee and Sinéad Gormley, **Walkers**

Walkers is a leading international law firm that provides legal, tax, listings, corporate, fiduciary and compliance services to some of the most innovative firms and institutions, global corporations, capital markets participants and investment fund managers across the financial markets. Walkers has over 145 partners and over 1,250 staff, providing a 24/7 service to its clients. Walkers' Finance and Capital Markets team is ranked as a Band 1 firm for debt capital markets, securitisations and structured products by Chambers.

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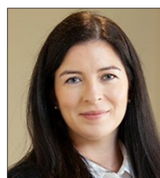

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1. Specific Financial Asset Types

1.1 Common Financial Assets

A wide range of asset classes have been securitised by Irish special purpose entities (SPEs): residential mortgages; commercial mortgages; auto loans; consumer loans; SME loans; corporate loans; shipping assets; aircraft lease rentals; trade, credit card and hire purchase receivables; commodities; royalties; carbon assets; and non-performing loans (NPLs).

Irish SPEs can be successfully deployed for the full range of securitisation products, including:

- ABS;
- CMBS;
- RMBS;
- CDOs;
- CLOs;
- distressed debt/NPLs;
- LPNs;
- repacks;
- SRT/CRT;
- US life settlements;
- ILS/catastrophe bonds; and
- receivables transactions.

1.2 Structures Relating to Financial Assets

The structure of a securitisation is generally determined by desired regulatory capital treatment or investor requirements.

Typically, the issuer is established as an off-balance sheet, tax neutral SPE which is funded exclusively by debt. Its key counterparties will include a local corporate services provider (CSP), an arranger, note trustee, security trustee (secured deals), paying agent, registrar, transfer agent, servicer, originator and investment advisor (as applicable).

It should have at least two independent directors who are tax resident in Ireland. The CSP typically provides the SPE's independent directors, company secretary, registered office and various other services.

The SPE is resident in Ireland for tax purposes; typically a designated activity company (DAC) or a PLC (retail) acquires, holds and manages qualifying assets and has no other business.

The assets held or managed by the SPE is its first transaction must have an aggregate value at least EUR10 million. The SPE must notify the Revenue Commissioners of its intention to be a "qualifying company" within eight weeks of commencing activities – see further **7.2 Taxes on Profit**.

1.3 Applicable Laws and Regulations

The principal measures applicable to securitisations are as follows (each as amended, as applicable):

Corporate and Tax

- Companies Act 2014 (the Companies Act);
- Taxes Consolidation Act 1997 of Ireland (the TCA 1997);
- EU (Preventive Restructuring) Regulations 2022;
- Regulation (EU) 2015/848.

Markets and Securities

- Regulation (EU) 2017/2402 (the SR) and related technical standard (RTS);
- EU (General Framework for Securitisation and Specific Framework for Simple, Transparent and Standardised Securitisation) Regulations 2018 (the Irish Securitisation Regulations);
- Regulation (EU) 2017/1129 (the PR), related RTS and guidance published by the Central Bank of Ireland (CBI) and the European Securities and Markets Authority (ESMA);
- EU (Prospectus) Regulations 2019 (the Irish Prospectus Regulations);
- Listing rules of The Irish Stock Exchange plc, trading as Euronext Dublin in respect of a listing on Euronext Dublin's regulated market or Global Exchange Market (the GEM), as applicable;
- Regulation (EU) 596/2014 (MAR), related technical standards and guidance published by the CBI and ESMA;
- EU (Market Abuse) Regulations 2016 (the Irish Market Abuse Regulations);
- Directive 2004/109/EC (the TD), related technical standards and guidance published by the CBI and ESMA;
- Transparency (Directive 2004/109) Regulations 2007 (the Irish Transparency Regulations);
- Part 2 (Transparency Requirements), Part 3 (Market Abuse Requirements) and Part 4 (Prospectus Requirements) of the Central Bank (Investment Market Conduct) Rules 2019;
- Part 23 (Public Offers of Securities, Financial Reporting by Traded Companies, Prevention of Market Abuse etc) and other relevant parts of the Companies Act regarding offers of securities;
- Regulation (EU) 1060/2009 on credit rating agencies (the CRA Regulation)
- Regulation (EU) No 909/2014 on central securities depositaries (the CSDR);
- Regulation (EU) 648/2012 (EMIR) (as amended in particular, by Regulation (EU) 2019/834 (EMIR Refit) and Regulation (EU) 2019/2099 (EMIR 2.2)) and related technical standards;
- Regulation (EU) 2015/2365 on securities financing transactions (SFTR).

Regulatory and AML/CFT

- Regulation (EU) 575/2013 on capital requirements (the CRR);
- Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (the CJA 2010);
- EU (Anti-Money Laundering: Beneficial Ownership Of Corporate Entities) Regulations 2019;
- Credit Reporting Act 2013 (the CRA 2013);
- Part V (Supervision of Regulated Business) as it relates to credit servicing of the Central Bank Act 1997 (the CBA 1997);

- EU (Credit Servicers and Credit Purchasers) Regulations 2023;
- Regulation (EU) 1075/2013 (the FVC Regulation) and Section 18 of the Central Bank Act 1971 (Section 18 CBA 1971);
- Protected Disclosures Act 2014 (the PDA 2014).

Consumer and Personal Data

- Consumer Credit Act 1995 (the CCA 1995);
- EU (Consumer Mortgage Credit Agreements) Regulations 2016 (the MC Regulations);
- Consumer Rights Act 2022 (the CRA 2022);
- Regulation (EU) 2016/679 (the GDPR); and
- Data Protection Acts 1988 to 2018 (the DPAs).

1.4 Special-Purpose Entity (SPE) Jurisdiction

Ireland is firmly established as the leading European centre of excellence for SPEs for financial investment transactions including warehousing, securitisation, significant risk transfer/capital relief trades (SRT/CRT), repacks, receivables financing and distressed asset investment as well as a broad range of other structured finance deals.

Ireland is an onshore jurisdiction and a member of the EU and the OECD with a long-standing, trusted and transparent securitisation tax regime and an extensive network of 76 double tax treaties, which may allow for the return generated by underlying assets to be paid to an SPE with zero or reduced foreign withholding tax, no Irish stamp duty and clear VAT rules which exempt certain activities and services for VAT purposes.

It has a respected, stable and robust legal system which facilitates structured finance transactions. It has the appropriate infrastructure with an excellent choice of experienced legal and accounting professionals and CSPs. Efficient listing of securities can also be undertaken on Euronext Dublin.

Ireland is a common law jurisdiction. Its legal concepts will therefore be familiar to investors and promoters. Establishing an SPE in Ireland is a straightforward and inexpensive process.

As at the end of Q2 2023, there were over 3,300 active Irish SPEs holding combined assets of almost EUR1.1 trillion. This accounts for 31.8% by number of euro-area market securitisation SPEs.

1.5 Material Forms of Credit Enhancement

The type and level of credit enhancement is typically driven by rating requirements to reduce credit risk/default risk on the underlying portfolio. Commonly utilised forms include:

- subordinated notes or loan;
- deferred purchase price;
- over-collateralisation;
- excess spread;
- liquidity facilities, credit default swaps or guarantees; and
- reserves in the form of cash and highly liquid investments.

Credit enhancement from the originator must be on arm's length commercial terms – see the "Claw-Back" section of **6.1 Insolvency Laws**.

2. Roles and Responsibilities of the Parties

2.1 Issuers

The issuer is an SPE established solely for the purposes of the transaction. It does not have

any other business or employees. It purchases the underlying assets and issues securities to investors who ultimately bear the economic risk on the portfolio.

See **6.2 SPEs** and **4. Laws and Regulations Specifically Relating to Securitisation**.

2.2 Sponsors

The sponsor, often an originator, typically establishes and manages the securitisation and may be a credit institution, a large corporate or a fund.

See:

- **4.3 Credit Risk Retention** as to retention obligations;
- "Securitisation Regulation" section of **4.1 Specific Disclosure Laws or Regulations** as to transparency and STS notification obligations;
- "SR Article 9(1)" section of **4.9 Banks Securitising Financial Assets** as to obligations concerning credit granting; and
- "Irish Securitisation Regulations" section of **4.1 Specific Disclosure Laws or Regulations** as to the CBI Notification.

2.3 Originators/Sellers

The originator/seller is the entity which, either directly or through an affiliate, advances or acquires the financial assets which will be sold to the SPE and may also act as servicer. It is typically a bank, insurer or other corporate with a significant book of receivables. It may also be a separate entity established to aggregate assets for sale to the SPE.

See:

- **4.3 Credit Risk Retention** as to retention obligations and the "sole purpose test";
- "Securitisation Regulation" section of **4.1 Specific Disclosure Laws or Regulations** as to transparency and STS notification obligations;
- "Irish Securitisation Regulations" section of **4.1 Specific Disclosure Laws or Regulations** as to the CBI Notification; and
- **4.9 Banks Securitising Financial Assets** regarding credit granting and consumer law.

2.4 Underwriters and Placement Agents

Underwriters and placement agents are typically investment banks. It is not required to appoint underwriters and/or placement agents but it is usual to do so for public deals being widely marketed to a diverse investor base. They assist in structuring and marketing and, in a constrained fundraising environment, the underwriter will agree to purchase notes if third-party investors cannot be found.

A placement agent must comply with the market soundings regime of the MAR when disclosing information on a prospective issuance to potential investors.

2.5 Servicers

The servicer is responsible for the day-to-day administration of the assets. It is often the originator/an affiliate. Specialist servicing companies are becoming more commonplace.

Servicers engaging in "the business of a credit servicing firm" for the purposes of the CBA 1997 must be authorised by the CBI. A separate authorisation is required by "credit servicers" of in-scope NPLs which were not authorised as credit servicing firms as at 30 December 2023 or otherwise exempt pursuant to the EU (Credit Servicers and Credit Purchasers) Regulations 2023.

See **4.3 Credit Risk Retention**.

2.6 Investors

Investors are generally financial institutions, insurance companies, pension funds, private equity investors and funds. Investors may have responsibilities under the terms of the notes and note purchase agreement or by virtue of being regulated.

See:

- "As Investor" section of **4.9 Banks Securitising Financial Assets**.
- "As Investor" section of **4.3 Credit Risk Retention**.

2.7 Bond/Note Trustees

The trustee role is performed by professional trustee companies. It may be divided between the functions of note trustee and security trustee or be combined in a single role of trustee. The note trustee holds the benefit of the issuer's covenant to pay and other contractual undertakings on behalf of the noteholders. The security trustee holds the benefit of the transaction security for the investors and key service providers. The note trustee and the security trustee represent noteholders vis-à-vis the issuer.

Most securitisations use trustees but it is not required. The covenant to pay, contractual undertakings and transaction security can be given to noteholders directly. However, this may limit the liquidity of the notes and complicate transfers. Some listing venues require that a trustee or independent agent to be appointed to represent noteholders.

2.8 Security Trustees/Agents

See **2.7 Bond/Note Trustees**.

3. Documentation

3.1 Bankruptcy-Remote Transfer of Financial Assets

A bankruptcy-remote transfer is generally effected by a transfer agreement between the issuer, the originator and, in order to obtain the benefit of the contract only, the trustee. An Irish court will look at the substance of the transaction to examine whether it is a sham or if it is consistent with a sale. Key provisions include:

- agreement to sell and purchase;
- conditions precedent;
- originator's declaration of trust over proceeds deriving from the asset portfolio;
- warranties;
- perfection events;
- non-petition/limited recourse;
- indemnities;
- eligibility criteria;
- covenants;
- deemed collections; and
- repurchase provisions.

3.2 Principal Warranties

Originator representations and warranties include status, capacity, authority, licensing and solvency. A breach of any of the foregoing would breach the relevant transaction document, may trigger an event of default and may entitle the issuer to seek rescission and/or damages. The originator provides asset warranties addressing title and compliance with selection criteria and origination rules. A breach of asset warranty may trigger a repurchase obligation.

The issuer represents and warrants as to corporate status, capacity, authority, licensing, solvency and beneficial ownership of the portfolio. A breach of any such warranty may trigger a note event of default.

3.3 Principal Perfection Provisions

See **6.3 Transfer of Financial Assets**.

Perfection of Security

The particulars of security created by an Irish company must be registered with the Irish Registrar of Companies within 21 days of creation subject to exceptions. Failure to so register renders the security void as against any liquidator or creditor of the company.

The holder of a fixed charge over the book debts of a company must notify the Revenue Commissioners of the creation of such charge within the same 21-day period.

Where security is created by assignment, notice of such assignment must be delivered to the obligor. It will otherwise take effect in equity only. Securitisation documents customarily incorporate notice to the SPE's transaction counterparties.

3.4 Principal Covenants

An issuer covenants, amongst other things, to:

- comply with the provisions of the notes and transaction documents and take reasonable steps to ensure compliance by other transaction parties;
- provide the trustee with such information, certificates and opinions as it requires and copies of specified documents;
- prepare and deliver all specified reports;
- maintain any listing;
- maintain its tax status;
- preserve the portfolio assets and not deal with them other than as permitted;
- not engage in any other business;
- not have employees;
- make the CBI Notification (defined below); and
- perfect its security.

See "Non-consolidation" section of **6.2 SPEs** regarding separateness covenants.

Originator and servicer covenants include compliance with applicable laws and maintenance of authorisations.

Depending on the type of transaction, the issuer or originator will be designated as responsible for compliance with the reporting requirement under Article 7 of the SR. Where the issuer is so designated, it will delegate performance to one or more transaction counterparties.

Breach of covenant will constitute a breach of the transaction documents which may trigger an event of default.

3.5 Principal Servicing Provisions

The servicer is responsible for day-to-day administration including collections and enforcement. The transaction documents typically provide for replacement of the servicer upon insolvency or material breach of obligations.

Where the originator is servicer, it is required to treat the portfolio assets in the same manner as equivalent assets on its balance sheet.

3.6 Principal Defaults

Standard events of default are issuer failure to pay principal or interest within any applicable grace period, issuer breach of transaction documents, issuer insolvency and illegality. Default under the notes typically entitles the noteholders to instruct the trustee to declare the notes immediately due and payable and to enforce the transaction security.

3.7 Principal Indemnities

The scope of indemnification is a matter of negotiation and risk appetite.

The issuer usually provides full indemnities to the trustee, agents, CSP and managers/arrangers in respect of losses and costs incurred in the performance of their roles.

Indemnities received by the issuer include:

- from the originator/seller in relation to losses incurred on assets not complying with eligibility criteria at the time of purchase; and
- from its agents, the CSP and the servicer in respect of losses incurred by the issuer as a result of the relevant party's failure to comply with its obligations.

A trustee, prior to taking action in relation to the transaction, may require pre-funding, indemnification and/or additional security from the noteholders.

3.8 Bonds/Notes/Securities

Securitisation notes are constituted by a trust deed made between the issuer and the trustee. The trust deed schedules the form(s) of notes and their terms and conditions, which together govern the relationships between the issuer, the trustee and the noteholders.

Principal provisions include payment, priority, default and remedies, modification, liability and indemnity and responsibility for compliance with regulatory requirements, such as reporting under the SR.

Typically, notes of each class in a securitisation are represented by a single global note. The global note is prepared in "classic" form or "new" form and deposited with, respectively, a common safekeeper or a common depositary. The common safekeeper/common depositary is the legal owner of the note. Noteholders are beneficial owners and hold their interests via a clearing system. A global note sets out the limited conditions (eg, clearing system closure) in which it may be exchanged for definitive notes.

3.9 Derivatives

Interest rate and/or FX swaps are used to hedge the risk of interest rate and/or currency mismatch as between the receivables and payments to be made to noteholders and other transaction counterparties.

See:

- **5.1 Synthetic Securitisation Regulation and Structure**; and
- "Insurance" section of **4.11 Activities Avoided by SPEs or Other Securitisation Entities**.

3.10 Offering Memoranda

A typical securitisation involves the preparation by the issuer of a prospectus or a listing particulars. Private deals may have an offering circular or information memorandum for the purposes of providing deal information to prospective investors.

A prospectus is required in connection with the listing of securities on a regulated market for the purposes of Directive 2014/65/EU (MiFID II) (such as Euronext Dublin's regulated market) or an offer of securities to the public, in each case, falling within the scope of the PR. See "Prospectus Regime" section of **4.2 General Disclosure Laws or Regulations**.

An issuance of listed notes falling outside the prospectus regime – a "private" securitisation – requires the listing particulars conforming with

the rules of the exchange on which the notes will be listed. The exchange-regulated market in Ireland is the Euronext Dublin's GEM, which is multilateral trading facility (MTF) for the purposes of MiFID II.

4. Laws and Regulations Specifically Relating to Securitisation

4.1 Specific Disclosure Laws or Regulations

The specific disclosure measures for securitisation are (each as amended, as applicable):

- SR and related technical standards;
- Irish Securitisation Regulations; and
- FVC Regulation and Section 18 CBA 1971.

EU Securitisation Regulation

The SR imposes harmonised rules on due diligence, risk retention and disclosure for all securitisations (as defined therein). It provides a framework for simple, transparent and standardised (STS) securitisations, including STS synthetic securitisation and securitisation of non-performing exposures (NPEs).

Transparency requirements–SR Article 7

SR Article 7 requires the originator, sponsor and SPE to make available detailed information relating to the securitisation to the holders of a securitisation position, national competent authorities (NCAs) and, upon request, potential investors. They may designate one entity amongst themselves – commonly, the SPE – to undertake this reporting but remain jointly responsible for compliance. Obligations include making available:

- on a quarterly (or monthly in the case of ABCP securitisations) basis, detailed information on the underlying exposures and investor reports;
- all underlying documents that are essential for understanding the transaction;
- a transaction summary for private deals;
- the STS notification (if applicable);
- without delay, inside information required to be disclosed under MAR; and
- where the MAR does not apply, details of significant events that may materially impact performance.

Technical standards issued under SR Article 7 specify the precise information required and templates to be used for this purpose. The information must be made available simultaneously and at the latest one month after the due date for the payment of interest.

For public deals, disclosures must be made via a securitisation repository registered with ESMA. The means of disclosure for private deals is not prescribed. Per the latest ESMA Q&A on SR (July 2023), in the absence of any instructions or guidance from NCAs, reporting entities can use any arrangements that meet the conditions of the SR. Barring further guidance from the CBI, it is logical to assume that parties reporting to the CBI should use the same channels of communication as are used for CBI Notifications.

Amendments to the disclosure regime are expected following the publication of the European Commission's (the Commission) Report on the Functioning of the SR, which considered, amongst other things:

- whether the information required by the disclosure templates for underlying exposures is useful and proportionate to investors' needs; and

- a dedicated reporting template for private securitisations.

Additional transparency requirements – STS securitisations

Originators and sponsors of STS securitisations are subject to additional pre-pricing transparency requirements, including making available to potential investors historical default and loss performance data on substantially similar exposures to those being securitised and liability cash flow models.

For STS securitisations of residential loans or auto loans or leases:

- the originator and sponsor may publish information on the environmental performance of the assets financed by the securitisation; or
- the originator may publish information on the principal adverse impacts (PAI) of the assets financed on "sustainability factors" for the purposes of Regulation (EU) 2019/2088 (the Sustainable Finance Disclosures Regulation or SFDR).

A final report on draft RTS on the content, methodologies and presentation of information on PAI was submitted to the Commission in May 2023 and awaits endorsement (and/or amendment). The RTS, when in force, will continue to allow originators and sponsors to choose between disclosure on environmental performance and PAI.

STS securitisations must be notified by the originator(s) and sponsor (or sponsor only for ABCP transactions) to ESMA pursuant to SR Article 27(1). Notifications for traditional securitisations are made via ESMA's online notification portal, and until further notice, via email for synthetic securitisations. Typically, the originator or sponsor makes this notification and sets out how the securitisation transaction fulfils the STS requirements. An optional process is also available whereby an authorised third-party verifier can attest compliance with STS criteria.

Synthetic Risk Retention Disclosure

Where risk retention for the purposes of SR Article 6(3) is achieved using a synthetic or contingent means, this must be disclosed and described in the offering document, prospectus, transaction summary or overview for the transaction.

Irish Securitisation Regulations

Where an originator, sponsor or SPE is located in Ireland, the Irish Securitisation Regulations require such party to notify the CBI of a securitisation within 15 working days of the first issue of securities (the CBI Notification). This notification must include:

- the securitisation's International Securities Identification Number;
- whether the person making the notification is originator, sponsor or SPE (or, if none of the foregoing, the person's name, address, corporate status and legal entity identifier (if any)); and
- the name and address of the entity designated to comply with SR reporting obligations.

The CBI 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. SPEs subject to the CBI's financial vehicle corporation (FVC) registration regime must use the channels prescribed for that regime. All other in-scope entities must notify via email to securitisation@centralbank.ie.

FVC Regulation and Section 18 CBA 1971

See "FVC Regulation and Section 18 CBA 1971" section of **4.4 Periodic Reporting**.

4.2 General Disclosure Laws or Regulations

Relevant general disclosure measures include the following (each as amended, as applicable):

- PR and related technical standards and Irish Prospectus Regulations;
- MAR, Directive 2014/57/EU on criminal sanctions for market abuse and Irish Market Abuse Regulations;
- TD and Irish Transparency Regulations;
- SI 366/2019 (the Market Conduct Rules);
- CSDR;
- PDA 2014;
- Companies Act;
- SFTR;
- EMIR;
- beneficial ownership regulations; and
- proposed European Single Access Point (ESAP) Regulation.

Prospectus Regime

An Irish issuer seeking to list debt securities on a regulated market or offer securities to the public must publish a prospectus and have it approved by the appropriate NCA – the CBI in Ireland. A number of exemptions exist, including for:

- offers addressed solely to qualified investors;
- offers addressed to fewer than 150 natural or legal persons per EU member state, other than qualified investors;
- offers with a denomination per unit of at least EUR100,000; and
- secondary issuances representing less than 20% of the number of securities already admitted to trading on the relevant regulated market.

A securitisation issuer rarely makes an offer of securities to the public in the true sense. The obligation to publish a prospectus is usually triggered by listing the notes on a regulated market. The prospectus must then satisfy both prospectus law and the applicable stock exchange rules.

A prospectus must contain the necessary information which is material to an investor for making an informed assessment of:

- the assets and liabilities, profits and losses, financial position, and prospects of the issuer and any guarantor;
- the rights attaching to the securities; and
- the reasons for the issuance and impact on the issuer.

Risk factors in a prospectus must be specific to the issuer or securities, ranked in order of materiality, and material to making an informed investment decision. Detailed requirements are contained in Delegated Regulations (EU) 2019/979 and (EU) (2019/980) (each as amended).

The Commission has adopted proposed amendments to the PR pursuant to the Listing Act which forms part of the Capital Markets Union. The Listing Act aims to reduce the financial and administrative burden for issuers seeking to access the capital markets. Changes include increasing the exemption for secondary issuances from 20% to 40% for the "regulated market trigger" and extending it to the "offer to the public trigger"; and removing the obligation to rank risk factors. The text of the proposed Regulation containing these changes was adopted by the Economic and Monetary Affairs Committee of the European Parliament (the Parliament) in October 2023 and will be progressed via the ordinary legislative procedure.

Market Abuse Regime

The market abuse regime prohibits insider dealing, unlawful disclosure of inside information and market manipulation in respect of financial instruments:

- admitted to trading on a regulated market or for which admission to trading has been sought;
- traded on organised trading facilities;
- traded or admitted to trading on MTFs (such Euronext Dublin's GEM) or for which admission to trading has been sought; and/or
- the value or price of which depends, or has an effect, on any of the above.

Issuers must make public as soon as possible inside information which directly concerns the issuer in a manner which enables complete and timely assessment by the public. Disclosures cannot be combined with marketing information and must be available on the issuer's website for at least five years. Disclosure can be delayed in limited circumstances; for the duration of such delay, the information must remain confidential.

The Listing Act will also amend the MAR, including as regards disclosure, conditions for delaying disclosure and market soundings.

Transparency Regime

The Irish Transparency Regulations specify minimum requirements for disclosure of periodic financial information and ongoing information by issuers whose securities are admitted to trading on a regulated market. Issuers of retail debt securities must prepare annual financial reports in the European single electronic format (ESEF).

See "Securitisation Regulation" section of **4.1 Specific Disclosure Laws or Regulations.**

PDA 2014

The PDA 2014 requires, amongst other things, that the following types of employer establish channels for the reporting by their workers of "relevant wrongdoing":

- public employers;
- private employers with at least 50 workers; and
- private employers who are subject to specified EU laws.

Relevant wrongdoing includes breaches of EU law in the area of financial services, products and markets and prevention of anti-money laundering (AML) and counter-terrorist financing (CTF).

Proposed ESAP Regulation

Proposals were adopted in November 2023 for a Regulation on a European single access point (ESAP). Information that is required to be published pursuant to, amongst other measures, the PR, the TD, and the MAR, must be submitted to a designated collection body for publication on ESAP. The platform is expected to operate from mid-2027.

See "EMIR Regime" and "SFTR Regime" sections of **4.7 Use of Derivatives.**

4.3 Credit Risk Retention

SR Article 6 requires that an originator, sponsor, original lender, or in the case of an NPE securitisation and subject to certain conditions, the servicer (the retainer) holds, on an ongoing basis, a material net economic interest of not less than 5% in the securitisation, which may not be subject to risk-mitigation techniques, for the duration of the transaction. The retention requirement for NPE securitisations is calculated by reference to the discounted purchase price of

the NPEs rather than their nominal value. Investors must verify compliance pre-investing.

An entity is not an "originator" for the purposes of SR Article 6 where it meets all of the criteria of the "sole purpose test" in Article 2(7) of the 2023 RTS (defined below).

The risk retention requirement is satisfied where the retainer holds any of the following:

- 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 Commission, in October 2023, adopted Delegated Regulation (EU) 2023/2175 (the 2023 RTS) which further specify the risk retention requirements pursuant to SR Article 6(7) and replace Delegated Regulation (EU) No 625/2014. The 2023 RTS address, amongst other things, the methods of risk retention, treatment of NPE traditional securitisations and the impact of fees on the retained net economic interest.

Sanctions

Possible sanctions for negligent or intentional contravention of the SR or Irish Securitisation Regulations include:

- administrative fines for corporates of up to 10% of annual turnover;
- 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 be imposed on regulated financial service providers under the Central Bank Act 1942 (as amended) for contraventions of the Irish Securitisation Regulations. Criminal liability may also attach to relevant parties.

4.4 Periodic Reporting

See:

- "Securitisation Regulation" and "Irish Securitisation Regulations" sections of **4.1 Specific Disclosure Laws or Regulations**;
- "Transparency Regime" section of **4.2 General Disclosure Laws or Regulations**; and
- "Sanctions" section of **4.3 Credit Risk Retention**.

FVC Regulation and Section 18 CBA 1971

Irish SPEs which are FVCs must report statistical data to the CBI on a quarterly basis under the Regulation (EU) No 1075/2013 (the FVC Regulation). An FVC is an undertaking whose principal activity meets both of the following:

- it carries out securitisations and is insulated from the risk of bankruptcy or 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 Irish SPEs are FVCs. The CBI extended reporting obligations to non-FVC SPEs incorporated in Ireland (via Section 18 CBA 1971), which must provide quarterly balance sheets and annual profit and loss data.

CRA 2013

The CBI operates a centralised repository (the Central Credit Register or CCR) for information on in-scope credit arrangements including loans, mortgages and hire purchase agreements originated in the state. The CRA 2013 requires, amongst other things, that in-scope lenders (including SPEs that acquire loan portfolios) provide monthly detailed and ongoing information on the performance of in-scope credit arrangements to the CBI.

A person who provides false information to the CBI or uses information accessed from the CCR for a non-permitted purpose (including any director, manager or officer who consented or connived in the offence) may be liable to a fine (of unspecified amount) and/or up to five years imprisonment. The CBI's sanctions regime applies in respect of breaches by regulated entities of the CRA 2013.

Financial reporting, including audited annual financial statements, is also required under Irish company law.

4.5 Activities of Rating Agencies

The CRA Regulation and related measures established a regulatory framework for credit rating agencies (CRAs) in the EU with the aim of reducing reliance on external credit ratings, in particular by EU financial institutions, within EU law. It requires, amongst other things, that CRAs:

- be registered with and supervised by ESMA;
- are independent and properly identify, manage and disclose conflicts of interest;
- maintain effective internal control structures; and
- apply sound rating methodologies.

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

Securitisation issuers must seek ratings for each tranche from at least two CRAs and consider appointing a CRA with less than 10% of the total market share. Issuer directors typically consider this at a board meeting.

CRAs must make every effort to comply with ESMA's Guidelines on Internal Controls for Credit Rating Agencies. These guidelines outline non-binding principles to support compliance with CRA Regulation requirements regarding internal controls.

EMSA may impose fines of up to EUR750,000 upon CRAs in respect of negligent or intentional infringement of specified provisions of the CRA Regulation. Periodic penalties may be imposed in respect of continuing infringements or to secure compliance with obligations. The CRA also incorporates a civil liability framework through which investors and issuers may claim

damages in respect of certain infringements by CRAs.

The CRA Regulation may be further amended by the proposed Regulation on ESG rating activities. The Commission's impact assessment on the proposed measure recommends, amongst other things, incorporation of ESG factors into creditworthiness assessments and requiring CRAs to disclose how their methodologies address ESG factors.

4.6 Treatment of Securitisation in Financial Entities

The prudential treatment of a securitisation position is principally determined for credit institutions and investment firms under the CRR and for insurers and reinsurers under Directive 2009/138/EC (Solvency II). This response focuses on the CRR.

As Originator

An originator which is a credit institution or an investment firm can exclude securitised exposures from the calculation of its risk-weighted exposure amounts (RWEAs) and expected loss amounts (ELAs) under the CRR if the securitisation complies with specified structuring and documentation conditions and either:

- significant credit risk on the securitised exposures has been transferred to third parties; or
- the originator applies a 1,250% risk weight to all securitisation positions it holds in the securitisation, or deducts the securitisation positions from its common equity tier 1 capital.

Significant risk transfer (SRT) can be achieved where either:

- the RWEAs of the originator-held mezzanine positions are not greater than 50% of all mezzanine positions in the securitisation; or
- if there are no mezzanine positions, the originator holds no more than 20% of the exposure value of the first loss tranche and can demonstrate that such exposure value is greater by a substantial margin than a reasoned estimate of the expected loss on the underlying exposures.

The NCA may refuse preferential treatment if it considers that it not justified on the basis of the credit risk being effectively transferred; but may allow the 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.

As Investor

Preferential treatment may be available for positions in STS securitisations that satisfy the requirements of CRR Article 243. Changes introduced to the CRR as part of the EU's COVID-19 Recovery Package include the extension of preferential treatment to positions in qualifying traditional NPE securitisations (other than where the external ratings-based approach is applied) and to qualifying senior positions in STS on-balance-sheet securitisations.

The European Supervisory Agencies' (ESAs) advice on the review of the securitisation framework (ESA Securitisation Advice) recommends, amongst other things, a reduction in the risk weight floor for senior tranches which are retained by an originator acting in the capacity set out in SR Article 2(3)(a) and which comply with prescribed eligibility criteria supporting lower risk. It remains under consideration by the Commission.

Positions held in STS securitisations meeting the requirements in Article 13 of the Delegated Regulation 2015/61 (as amended) qualify as Level 2B high quality liquid assets under the CRR, up to a maximum of 15% of the holder credit institution's liquidity buffer. The ESAs have not proposed changes in this regard.

See also **4.3 Credit Risk Retention**.

4.7 Use of Derivatives

The principal rules on derivatives are contained in:

- EMIR and related technical standards;
- EU (European Markets Infrastructure) Regulations 2014 (the Irish EMIR Regulations);
- SFTR; and
- EU (Securities Financing Transactions) Regulations 2017.

EMIR Regime

The EMIR regime imposes obligations 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 equivalents.

Broadly, EMIR's requirements in respect of derivative contracts are:

- mandatory clearing by FCs and NFCs whose transactions in over-the-counter (OTC) derivative contracts exceed EMIR's prescribed clearing threshold (NFC+s), of OTC derivative contracts declared subject to the clearing obligation through an authorised central counterparty (a CCP);
- application of risk-management procedures in respect of uncleared OTC derivative contracts; and
- reporting and record-keeping requirements in respect of all derivative contracts.

An SPE in an STS traditional securitisation under the SR is prohibited from using derivatives other than for the purposes of hedging interest rate risk and/or currency risk and from including derivatives in the pool of underlying exposures.

NFC+s are generally subject to more stringent requirements under EMIR than NFCs. NFCs may exclude from their threshold calculations OTC contracts that are objectively measurable as reducing risks directly relating to the NFC's commercial activity or treasury financing activity – the "hedging exemption". EMIR Refit, amongst other things, introduced a new method for NFCs such as SPEs to determine whether clearing thresholds have been exceeded.

Enforcement

The Irish EMIR Regulations empower the CBI to:

- issue directions and contravention notices;
- appoint assessors to investigate suspected contraventions; and
- impose sanctions, including monetary penalties of up to EUR2.5 million.

Criminal liability may also attach.

The first CBI enforcement action under the Irish EMIR Regulations concluded in November 2023 and resulted in the imposition of a monetary penalty of €192,500 for failure to report over 200,000 derivative trades over a 2.5 year period.

EMIR 3.0

Proposals to amend EMIR (EMIR 3.0), which aim to, amongst other things, reduce reliance by EU parties on non-EU CCPs, include a new obligation for FCs and NFC+s to hold active accounts

at EU CCPs for the purpose of clearing a minimum proportion of:

- interest rate derivatives denominated in euro and zloty;
- short-term interest rate derivatives denominated in euro; and
- credit default swaps (CDS) denominated in euro.

The minimum proportion for each derivative will be specified in an RTS.

It is also proposed to amend the hedging exemption so that only OTC contracts which are not cleared through a CCP authorised or recognised under EMIR should be included in the threshold calculation.

The Parliament and Council of the European Union (the Council) are considering the text of the proposals at the time of writing (December 2023).

SFTR Regime

An SPE constituting an NFC under SFTR may be subject to additional trade reporting obligations in respect of its securities financing transactions (SFT). An SFT is a transaction which deploys assets for funding, liquidity, collateral management or execution of investment strategies and includes repurchase transactions, securities or commodities lending or borrowing, buy-sell back or sell-buy back transactions and margin lending, in each case, not falling within the scope of EMIR. If in scope for SFTR, a counterparty to an SFT must report the details of that transaction, as well as any modification or termination thereof, to a registered or recognised trade repository no later than the working day following the conclusion, modification or termination of the transaction. A counterparty to an SFT may delegate its reporting obligation.

SFTR also imposes conditions on the reuse of financial instruments received as collateral, viz:

- the recipient has advised the provider of the risks involved in:
  - (a) consenting to the use of collateral under a security collateral arrangement; or
  - (b) concluding a title transfer collateral arrangement; and
- the provider has:
  - (a) given prior express consent to a security collateral arrangement; or
  - (b) expressly agreed to provide collateral in a title transfer collateral arrangement.

Enforcement

Sanctions available to the CBI include:

- issuing orders and contravention notices; and
- imposing administrative sanctions of at least three times the amount of the profits gained or losses avoided because of the infringement.

4.8 Investor Protection

Investors are afforded protection under the following regulations:

- SR disclosure requirements allow investors to diligence and monitor securitisations;
- PR disclosure requirements aim to provide “necessary information which is material to an investor” making investments;
- the MAR aims to prevent insider dealing and market manipulation; and
- the Irish Transparency Regulations provide minimum disclosure standards for information concerning issuers of securities admitted to trading on regulated markets.

ESAP will further enhance investor protection.

See **4.1 Specific Disclosure Laws or Regulations**, **4.2 General Disclosure Laws or Regulations** and **4.4 Periodic Reporting**.

4.9 Banks Securitising Financial Assets

As Originator

A bank securitising its assets must consider rules governing the origination and servicing of those assets which vary depending on asset class and type of borrower. Banks typically warrant compliance with relevant measures up to the date of transfer with breach of warranty triggering a repurchase obligation. Of particular relevance for banks are credit-granting criteria under the SR and consumer and data protection laws; some key elements of which (each as amended, as appropriate) are noted below.

SR Article 9(1)

Originators, sponsors and original lenders must apply the same "sound and well-defined" credit-granting criteria both to exposures that will be securitised and to non-securitised exposures pursuant to Article 9(1) of the SR, subject to limited exceptions. An originator which acquires exposures for its own account and subsequently securitises must verify that the original lender complied with this requirement, or where the acquired exposures are NPEs, that sound standards were applied in their selection and pricing. This verification should be undertaken by the originator at the time of acquisition.

Consumer protection

The Irish consumer protection regime was substantively revised by the CRA 2022, which transposed, amongst other things, Directive (EU) 2019/770 (the Digital Content Directive) and Directive (EU) 2019/2161 (the Omnibus Directive). It also amended and extended the Consumer Protection Act 2007, which prohibits its unfair, misleading, aggressive and prohibited commercial practices and applies to all Irish law consumer contracts.

Parts 4 and 6 of the CRA 2022 replaced the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 to 2000. The new measures apply to, amongst other things, contracts for the supply of services to consumers, including loans. The CRA 2022 also extended the UTCC's "grey list" of terms presumed to be unfair and introduced a new "black list" of terms which are always unfair. Contractual terms which are unfair are unenforceable against consumers.

The Consumer Protection Code 2012 specifies how regulated entities must deal with "personal consumers" and "consumers". Regulated entities must know their customers, assess their suitability for products or services and include prescribed information in their terms; and comply with requirements for post-origination ongoing information, complaints resolution and arrears handling.

Mortgage loans are principally governed by the CCA 1995 and the MC Regulations. The CCA 1995 imposes rules on advertising, provision of information and mandatory warnings. The MC Regulations include obligations to verify a borrower's creditworthiness before lending, to explain prescribed information and to act in the borrower's best interests when advising on mortgage loans.

The Code of Conduct on Mortgage Arrears 2013 concerns management of arrears and pre-arrears in respect of a borrower's principal dwelling or sole Irish residential property.

Data protection laws

Personal data of borrowers must be safeguarded as per the GDPR, the DPAs and SI 336/2011 (the Irish ePrivacy Regulations).

As Investor

An institutional investor (as defined in the SR) (other than an originator, sponsor or original lender) is subject, pursuant to SR Article 5, to extensive due diligence requirements prior to investing in a securitisation position and to ongoing monitoring obligations for the duration of its investment. This includes pre-investment verification:

- that the securitisation's underlying exposures were made in accordance with appropriate credit-granting criteria and processes;
- of compliance with the risk retention and (where applicable) transparency requirements of the SR; and
- in the case of NPEs, that sound standards were applied in their selection and pricing.

Ongoing monitoring duties include:

- establishment of appropriate and proportionate written procedures to monitor compliance with the verification and due diligence requirements of SR Article 5;
- stress-testing of cash flows and collateral values of underlying exposures or, where insufficient data is available, of loss assumptions;
- ensuring internal reporting to the investor's management body of material risks arising from the position so that such risks are adequately managed;
- demonstrating to competent authorities a comprehensive understanding of the securitisation position and underlying exposures; and
- implementing written policies and procedures for risk management of such position.

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

4.10 SPEs or Other Entities

See the "Claw-Back" and "Consolidation" sections of **6.1 Insolvency Laws** and the "Form and Structure" section of **6.2 SPEs** for considerations as to the form of SPE. See the second paragraph of **7.1 Transfer Taxes** and **7.2 Taxes on Profit** in relation to use of Section 110 companies.

4.11 Activities Avoided by SPEs or Other Securitisation Entities

Securitisations are structured such that SPE activities are not characterised as banking, writing insurance, carrying on business as a retail credit firm or MiFID II-governed activities.

Banking

Engaging in banking business and acceptance of deposits or other repayable funds from the public requires:

- an appropriate licence or authorisation from the CBI under the Central Bank Act 1971 (as amended) or the European Central Bank under Regulation (EU) 1024/2013, respectively; or
- a passported authorisation/licence.

Failure to hold the appropriate licence or authorisation is an offence punishable by a fine and/or up to five years' imprisonment.

Insurance

An insurance company operating in Ireland must hold an authorisation from the CBI or appropriate authority in its home member state if passporting into Ireland. Provided that certain conditions are met, 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 on an asset portfolio.

Retail Credit Firms

A person who provides cash loans, a deferred payment or similar financial accommodation directly or indirectly to, or enters into a consumer-hire agreement or hire-purchase agreement with, natural persons (other than professional clients under MiFID II or another regulated financial services provider) must be authorised as a "retail credit firm" under the CBA 1997 (as amended, in particular by the Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Act 2022).

Certain activities are excepted from this regulation, including the purchase loans originated by another party (unless credit is subsequently provided) and the provision of credit on a once-only/occasional basis. The provision of this credit must not involve a representation, or create an impression that the credit would be offered to other persons on the same or substantially similar terms.

Failure to obtain authorisation is an offence punishable by a fine. For regulated entities, the CBI's administrative sanctions regime may also be applied in respect of any breach of the retail credit provisions under the CBA 1997.

MiFID II

An entity which is 'investment firm' and which provides 'investment services' (each, as defined in MiFID II) must be authorised or recognised for such purposes pursuant to MiFID II. Investment services include portfolio management and execution of orders. An SPE will appoint a portfolio or collateral manager to provide these services in relation to its assets as required.

See **3.5 Principal Servicing Provisions** in relation to credit servicing.

4.12 Participation of Government-Sponsored Entities

Irish government-sponsored entities have not yet participated in the securitisation market. Subject to their internal rules, there is no restriction on doing so.

4.13 Entities Investing in Securitisation

The diverse investor base for securitisations includes credit institutions, pension funds, insurance undertakings and investment funds.

In addition to the rules on due diligence (see the "As Investor" section of **4.9 Banks Securitising Financial Assets**) and capital treatment (see the "As Investor" section of **4.6 Treatment of Securitisation in Financial Entities**), entities investing in securitisations are also subject to a ban on resecuritisation of their securitisation positions pursuant to SR Article 8.

Additional rules may be applicable to investors who are regulated.

4.14 Other Principal Laws and Regulations

Schedule 2 Firms

Unregulated entities which perform certain activities listed in Schedule 2 to the CJA 2010 (including commercial lending, factoring and financial leasing) must register as "Schedule 2 firms" with the CBI as competent authority for the AML regime in Ireland.

Registration is not required where:

- the entity is engaged only in trading for its own account or the account of customers

who are members of its group, in certain financial instruments; and
- its annual turnover is less than EUR70,000 and its Schedule 2 activities are below specified thresholds.

A Schedule 2 firm must:

- perform certain AML/know your customer activities as relevant in accordance with robust AML policies and procedures; and
- advise the CBI of any change to its Schedule 2 activities, ownership or corporate information, of any subsequent authorisation or licensing and of any other material matter.

Many Irish SPEs are Schedule 2 firms.

Homogeneity RTS

The simplicity component of the STS designation requires, amongst other things, homogeneity of underlying assets in accordance with the conditions and factors set out in the Homogeneity RTS ((EU) 2019/1851). In November 2023, the Commission adopted final draft amendments to the Homogeneity RTS to extend its scope to synthetic STS deals and align conditions for homogeneity of assets across all STS securitisations. Grandfathering will be available for securities issued and positions created and notified to ESMA before these amendments enter into force. The Homogeneity RTS will enter into force on the twentieth day following publication in the Official Journal of the EU. Publication has not occurred at the time of writing.

EBA Guidelines on STS Criteria

The EBA consulted on draft guidelines in respect of STS criteria for on-balance sheet securitisation in mid-2023. The text consulted on aligns closely to the guidelines for non-ABCP securitisations and provides similar or identical guidance in respect of STS criteria for on-balance sheet deals.

EU Green Bond Regulation (EUGB Regulation)

The EUGB Regulation entered into force on 20 December 2023 and the majority of its provisions apply from 21 December 2023. It prescribes uniform requirements for debt issuers that wish to apply the designation “EuGB” or “European green bond” to their bonds. The designations will only be available for “public” issuances, with derogations for debt issued or guaranteed by sovereigns and public bodies.

The measure adopts a “green proceeds” approach, with issuance proceeds to be invested prior to maturity in accordance with Article 3 of Regulation (EU) 2020/852 (the Taxonomy Regulation), subject to a degree of flexibility for sectors and activities not currently within the scope for the Taxonomy Regulation.

To reduce the risk of greenwashing, independent external reviewers will assess issuers’ pre-issuance green bond factsheets and post-issuance annual reports on the allocation of proceeds. Issuers will also be required, at least once during the lifetime of the bond, to publish a bond impact report on the environmental impact of the use of the bond proceeds.

Modified requirements apply to securitisations, with the originator being responsible for complying with the majority of obligations specified for issuers, “proceeds” being the funds raised from sale of the underlying assets to the SPE and a sharing of obligations between originators in a multi-originator structure.

CSDR

The CSDR seeks to enhance the safety and efficiency of the settlement system in the EU by regulating central securities depositaries (CSDs) and introducing settlement rules for market operators, including electronic book-entry format for securities admitted to trading or traded on trading venues and settlement discipline.

Proposals to amend the CSDR aim to improve settlement discipline, allow CSDs to provide banking-type ancillary services, simplify passporting and set an end-date for grandfathering of authorisation/recognition of CSDs under their respective national rules.

5. Synthetic Securitisation

5.1 Synthetic Securitisation Regulation and Structure

Synthetic securitisations are permitted in Ireland and are used primarily to transfer the credit risk of exposures held on-balance sheet by credit institutions to third parties. They are also used to arbitrage between a higher spread received on an underlying asset and a lower spread paid on related structured securities. Synthetic securitisation has not been common amongst credit institutions in Ireland in recent years, despite it being a leading jurisdiction for off-balance sheet credit-linked note (CLN) issuers and synthetic securitisations for European banks as evidenced by the increasing number of Irish law-governed securitisations and derivative deals relating to European loan books and esoteric assets in a post-Brexit environment.

Following the inclusion of SRT transactions in the STS regime in April 2021, Ireland has seen additional deal flow and a broader issuer base with numerous debt issuers coming to market throughout 2023. However, the industry is facing significant challenges in the implementation of the Basel III output floor. In short, a bank using internal models will be required to calculate risk weighted assets using the standardised approach and then multiply the amount obtained by 50% from 1 January 2025, increasing over a five-year period to 72.5%. This will lead to higher risk weights for the retained senior tranches. The trilogues for the amending legislation (CRR III and CRD VI) completed in June 2023 and are expected to be adopted by the Parliament and the Council by Q1 2024. See "As Investor" section of **4.6 Treatment of Securitisation in Financial Entities**.

Regulation

Synthetic securitisations are regulated in the same manner as traditional securitisations, as described in **4. Laws and Regulations Specifically Relating to Securitisation**.

See "As Investor" section of **4.6 Treatment of Securitisation in Financial Entities** and **4.11 Activities Avoided by SPEs or Other Securitisation Entities. 4.7 Use of Derivatives** also applies to credit derivatives in synthetic securitisations. EMIR provisions on margining may also apply where the issuer's transactions in OTC derivative contracts exceed EMIR clearing thresholds.

Structures

A synthetic securitisation may be structured to transfer the credit risk of underlying exposures to third-party investors via:

- a direct contractual arrangement between an originator and investors in the form of a:
  - (a) CDS;
  - (b) financial guarantee;
  - (c) insurance policy (where an authorised insurer is investor); or

(d) a combination of these arrangements; or
- the issue by an SPE of CLNs.

In a direct structure, the originator buys credit protection on the underlying exposures directly from investors. Upon the occurrence of certain specified loss-producing credit events (eg, payment default) the investors pay an amount equal to the loss suffered (subject to any de minimis or excess) to the originator. In return, the originator pays a periodic fee to the investors.

In a typical SPE CLN structure, the originator transfers the credit risk on the underlying exposures to an SPE via a CDS or financial guarantee/credit protection deed. The SPE issues CLNs, transferring the credit risk on to third-party investors, and uses the proceeds to fund payments to the originator in respect of credit events under the CDS or guarantee/credit protection deed; and the periodic fee from the originator to pay the CLN coupon.

A synthetic structure may be funded, where the investor makes an upfront payment in the amount of the credit protection (eg, CLN issuance); or unfunded, where no upfront payment is made and the originator is exposed to the credit risk of the investor (eg, insurance policy).

See “Insurance” section of **4.11 Activities Avoided by SPEs or Other Securitisation Entities**.

6. Structurally Embedded Laws of General Application

6.1 Insolvency Laws

Issuers and originators in Ireland are subject to the general insolvency law, which incorporates the Preventative Restructuring Directive ((EU) 2019/1023) (PRD). In addition, well-established structures insulate the underlying assets from the balance sheet (and insolvency) of the originator. See **6.3 Transfer of Financial Assets**.

While there has been an increase in synthetic securitisations in recent years, Irish securitisations of receivables are typically structured as “true sales”. True sale transactions are subject to two principal risks in originator insolvency:

- recharacterisation of the sale as a secured loan; and
- claw-back.

Both true sale and synthetic securitisations may be impacted by rules on consolidation of assets, avoidance of certain contracts and examination of companies.

Recharacterisation as Secured Loan

True sale

A purported true sale may in certain circumstances be recharacterised by an Irish court as a secured loan. In determining the legal nature of a transaction, a court considers its substance as a whole, including economic features and the parties’ intentions; and irrespective of any labels.

Recharacterisation was considered by the High Court in Bank of Ireland v ETeams International Limited [2017] IEHC 393 (subsequently upheld by the Court of Appeal in Bank of Ireland v ETeams (International Ltd) [2019] IECA 145), which 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 and Orion Finance Limited v Crown Financial Management Limited [1996] BCLC 78.

Re: George Inglefield prescribed three indicia distinguishing a sale from a security transaction.

- A security provider is entitled, until the security has been enforced, to recover its secured asset by repaying the sum secured; whereas a seller is not entitled to recover sold assets by returning the purchase price.
- If a secured party realises secured assets for an amount less than the sum secured, the security provider is liable for the shortfall; whereas a purchaser bears any loss suffered upon a resale.
- If a secured party realises secured assets for an amount greater than the sum secured, it must account to the security provider; whereas a purchaser is not required to account to the seller for any profit made upon a resale.

None of the above is necessarily inconsistent with a sale; a transaction may be a sale notwithstanding that it bears all three features. The following are generally considered as being consistent with a sale:

- a seller acting as servicer for, or retaining some credit risk on, sold assets;
- a seller repurchase obligation on breach of asset warranties; and
- extraction of profits for the seller via the waterfall after transaction expenses have been met.

A sale transaction will be upheld unless it is:

- in substance, a security arrangement (eg, transaction documents do not indicate a sale); or
- a sham (eg, transaction documents do not reflect the parties' intentions).

Consequences of recharacterisation
As noted in **3.3 Principal Perfection Provisions**, a security interest created by an Irish company will generally be void unless registered within 21 days of creation. It is not typical in Ireland to make precautionary security filings. Consequently, a true sale which is recharacterised as a secured loan would constitute an unregistered security interest of the originator and render the issuer its unsecured creditor as regards the assets.

The issuer would rank pari passu with other unsecured creditors and behind the claims of secured and preferential creditors and insolvency-related costs and fees.

Claw-Back
Several provisions of Irish company law entitle a liquidator to seek to set aside pre-insolvency transfers.

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 its winding-up, and with a view to giving that creditor a preference over other creditors, constitutes an unfair preference and is invalid. This is subject to an exception for certain acts carried out in connection with a scheme of arrangement (SOA) under Part 10 of the Companies Act, which will not be deemed to constitute unfair preference on the basis of detriment to the general body of creditors unless there are other reasons for so deeming. Case law indicates that the company must have a dominant intent to prefer one creditor over its other creditors.

An originator certifies its solvency at closing, preventing any question of unfair preference arising as regards the securitisation.

The six-month period is extended to two years for transactions in favour of "connected per-

sons" (defined in Section 2(1) of the Companies Act)).

Invalidity of floating charge

Subject to limited exceptions, a floating charge on the property of a company created during the 12 months before the commencement of its winding-up is invalid unless it is proved that the company, immediately after the creation of the charge, was solvent. A floating charge created in connection with an SOA will not be declared to be invalid on the basis of detriment to the general body of creditors unless there are other reasons for so doing. The 12-month period is extended to two years if the chargee is a connected person.

Disclaimer of Onerous Contracts

A liquidator may, with leave of the court, at any time within 12 months of the commencement of the liquidation, disclaim any property of a company being wound up which consists of unprofitable contracts or any property that is unsellable or not readily saleable.

Consolidation

Irish courts have a limited jurisdiction to consolidate assets where satisfied that it is just and equitable to do so.

An Irish court may order that two or more "related companies", which are being wound up, are treated as one company and wound up accordingly. In deciding whether to so order, it must consider:

- 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.

An Irish court may also order the related company to contribute to the whole or part of the provable debts in the winding-up. The court must consider, as regards the related company, amongst other things:

- its involvement in the management of, and conduct towards creditors of, the company being wound up; and
- the likely effect of a contribution order on its own creditors.

There is no reported judicial authority in Ireland addressing the circumstances in which a court would exercise these discretions. The use of an orphan SPE and compliance with separateness covenants reduces the likelihood of an issuer or originator being made subject to such orders.

Examinership

Examinership is a protection procedure under the Companies Act to facilitate the survival of Irish companies in financial difficulty.

The court can appoint an examiner on petition by the company, its directors, contingent creditors, prospective creditors or members holding at least 10% of the voting share capital where the 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; and
- in cases involving a cross-border element, the proposed examiner has sufficient experience to perform the role.

Non-petition provisions in transaction documents seek to prevent this as regards an issuer.

During the period of protection, the examiner formulates proposals to assist the survival of the company or the whole or part of its undertaking as a going concern. The court can approve the proposals when at least one class of creditor, which would receive a payment on liquidation, has accepted them and the court is satisfied, amongst other things, that the proposals are fair and equitable to members or creditors who do not support them and whose interests would be impaired by their implementation.

An examiner is appointed for 70 days, which can be extended to 100 days to enable the examiner to complete their work. The protection period could be longer if the court's approval of a compromise/SOA were to be appealed, but cannot exceed 12 months.

There is an automatic stay of action against a company under examinership. Further, a creditor-counterparty is prohibited from withholding performance of, terminating, accelerating or modifying:

- an executory contract solely because of the appointment of, or a petition to appoint, an examiner or interim examiner to such company; or
- an essential executory contract (for the purposes of the PRD) solely because the company is unable to pays its debts for the purposes of the Companies Act.

Credit Institutions

Where an insolvent originator is a bank, Irish and EU rules on resolution and recovery and the Central Bank Acts 1942 to 2018 are also relevant.

6.2 SPEs

Form and Structure

An Irish SPE is structured as a bankruptcy-remote orphan company and formed as a private limited company (an LTD), a designated activity company (a DAC) or a public limited company (a PLC). Its issued share capital is held on trust by a professional trustee for charitable purposes.

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 the PR. A DAC can issue both listed and unlisted notes falling within the excluded offer exemption. Only a PLC may offer securities to the public, other than pursuant to an excluded offer and/or list securities other than debentures. Most securitisations involve the issuance of listed debt securities by a DAC.

The board of directors of the SPE should comprise at least two independent persons. A CSP will usually provide the SPE's independent directors, company secretary, registered office and various reporting services. Ideally, a minimum of four board meetings should be held per year in Ireland, with the majority of the directors being physically present. The SPE's contractual relations are structured on a non-petition, limited recourse and arm's length basis. Its constitution may also contain restrictions.

Non-consolidation

SPV separateness clauses, such as follow, are used to minimise the risk of consolidation on originator insolvency:

- maintain its books, records and assets separately from those of any other entity;
- act solely in its own corporate name and through its own officers/agents;

- manage its business and daily operations independently and correct any known misunderstanding regarding its separate identity;
- enter into all transactions on an arm's length basis;
- observe all corporate formalities;
- discharge all expenses and liabilities incurred by it out of its own funds, and allocate fairly and reasonably any shared overheads; and
- limit its activities to securitisation.

Non-issuer transaction parties will be bound by limited recourse and non-petition provisions in respect of the issuer.

6.3 Transfer of Financial Assets

Requirements of Valid Transfer – Perfection

An Irish securitisation of receivables is typically structured as a true sale via 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. These methods are generally employed only where an assignment is not feasible and are not discussed below.

A valid legal assignment of a debt must be:

- absolute;
- in writing and signed by the assignor;
- for the entire amount of the debt; and
- expressly notified in writing to the debtor.

Assignments not meeting the above requirements take effect in equity only. Both legal and equitable assignments can execute a true sale. Most Irish securitisations use equitable assignments (achieved by omitting notification to the obligors). The issuer (or trustee) may, upon the occurrence of certain trigger events (eg, originator insolvency) perfect the assignment by notifying the obligors.

Additional perfection requirements apply for certain asset classes.

Prior to perfection, an equitable assignee is exposed to the following risks:

- its rights are subject to any prior equities that have accrued to the underlying obligor, including rights of set-off;
- an underlying obligor can exercise rights of set-off which accrue after the date of the assignment;
- it must join the assignor to any action concerning the debt;
- repayment of the debt to the assignor constitutes a valid discharge; and
- it ranks behind any third-party bona fide purchaser for value without notice which takes a legal assignment.

True Sale

See "Recharacterisation as Secured Loan" section of **6.1 Insolvency Laws**. A legal opinion confirms the effectiveness of the sale; and subject to certain factual assumptions and qualifications, that such sale is not liable to be recharacterised as a secured loan.

6.4 Construction of Bankruptcy-Remote Transactions

If assignment is not possible, an originator may declare a trust over the assets in favour of the SPE. The SPE obtains an equitable interest in the assets and remains subject to the risks set out in the "Requirements of Valid Transfer – Perfection" section in **6.3 Transfer of Financial Assets**.

See also **5. Synthetic Securitisation**.

A trust is validly constituted where there is certainty as to the intention to create the trust, the subject matter and the beneficiaries. A legal

opinion will confirm that the trust satisfies these requirements subject to certain factual assumptions.

6.5 Bankruptcy-Remote SPE

The securitisation documents set out the order of priority in which the issuer's financial obligations – taxes, fees and expenses, note principal and interest etc – are to be paid. Securitisation notes are issued on a non-petition/limited recourse basis and securitisation counterparties will agree to be bound by equivalent provisions under the securitisation documents to which they are party.

See:

- **3.1 Bankruptcy-Remote Transfer of Financial Assets**;
- "Consolidation" section of **6.1 Insolvency Laws**; and
- **6.2 SPEs**.

7. Tax Laws and Issues

7.1 Transfer Taxes

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 situated 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. However, a number of exemptions from 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 and does not relate to Irish real estate or shares in an Irish company. 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 (meaning debenture stock, bonds or funded debt, or any capital raised by a company which has the character of borrowed money as defined) is exempt from stamp duty on transfer/sale. 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, swap agreements, forward agreements, financial futures agreements and options (each as defined). Specific exemptions also apply in the 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 take advantage of the Irish securitisation tax regime set out in Section 110 of the TCA 1997 (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.

Value Added Tax (VAT)

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

7.2 Taxes on Profit

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 take advantage 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 generally 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 is a "day-one test". 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 (except in relation to the payment of profit participating interest).

Exceptions to Anti-avoidance Rules

Deductions for profit participating interest are disallowed under Section 110 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 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 **7.3 Withholding Taxes**) 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.

ATAD

Similar to all EU member states, Ireland implemented a number of corporation tax measures as a result of the EU Anti-Tax Avoidance Directive (ATAD).

Hybrid mismatch legislation came into effect in Ireland 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 came into effect on 1 January 2022 but should not impact an SPE structured as a Section 110 company.

An interest limitation rule (ILR) came into effect in Ireland in respect of accounting periods commencing on or after 1 January 2022. Subject to certain exceptions, the fixed ratio rule links a taxpayer's allowable net interest deductions directly to its level of earnings, by limiting the net deduction to 30% of tax-adjusted EBITDA. A restriction only applies if the borrowing costs of a relevant entity exceed interest-equivalent taxable revenues by more than 30% of EBITDA or (if greater) the de minimis amount of EUR 3 million in respect of an accounting period of 12 months. In practice, an orphan SPE which qualifies as a "single company worldwide group" can apply the "equity ratio" provision and thereby disapply the ILR, irrespective of whether the SPE has exceeding borrowing costs in excess of the higher of 30% of its tax-adjusted EBITDA or EUR3 million.

Minimum Tax Directive

On 22 December 2021, the Commission published a proposal for a directive to implement the OECD's draft Global Anti-Base Erosion Model Rules (the "GloBE Rules") in the EU (the "Minimum Tax Directive"). The Minimum Tax Directive introduces a minimum effective tax rate of 15% for MNE groups and large-scale domestic groups which have annual consolidated revenues of at least EUR750 million, operating in the EU's internal market and beyond. The Minimum Tax Directive contains an income inclusion rule (IIR) and an undertaxed profit rule (UTPR), which allow for the collection of an additional amount of top-up tax if the effective tax rate on income of an in-scope group is under 15%. The Minimum Tax Directive also contemplates jurisdictions introducing their own domestic minimum top-up tax, in which case any top-up tax can be collected by that jurisdiction.

Similar to all EU member states, Ireland is transposing the Minimum Tax Directive into domestic legislation with the rules becoming effective for accounting periods commencing on or after 31 December 2023, with the exception of the UTPR, which will apply for tax years commencing on or after 31 December 2024.

If an SPE is regarded as part of an MNE group (or large-scale domestic group) which has consolidated revenues of more than EUR 750 million a year in at least two out of the previous four years, it may be within the scope of the Minimum Tax Directive. A "group" is defined for the purposes of the Minimum Tax Directive as a collection of entities which are related through ownership or control as defined by the acceptable financial accounting standard for the preparation of consolidated financial statements by the ultimate parent entity, including any entity that may have been excluded from the consolidated financial

statements of the ultimate parent entity solely based on its small size, on materiality grounds or on the grounds that it is held for sale. A number of entities are excluded altogether from the application of the Pillar Two legislation.

7.3 Withholding Taxes

Irish withholding tax applies at the rate of 20% to payments of yearly interest which have an Irish source and are made to Irish resident persons or non-Irish resident persons.

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 the "Exceptions to Anti-avoidance Rules" section of **7.2 Taxes on Profit**). 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).

Outbound Payments

From 1 January 2024, new taxation measures will apply in respect of outbound payments. Outbound payments for these purposes include payments of interest, royalties and distributions. The measures only apply to transactions between entities that are associated. The measures apply to outbound payments to jurisdictions on the EU list of non-cooperative jurisdictions, as well as to payments to "no-tax", and "zero-tax" jurisdictions. Where applicable, withholding tax at the standard rate applicable to a payment of interest, dividends or royalties as appropriate will apply.

It is not expected that the measures should apply to payments by an Irish company such as an SPE to non-associated entities.

7.4 Other Taxes

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. Since 1 March 2023, a Section 110 company that holds plant and machinery does not qualify for these exemptions. 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 standard rate (23%).

7.5 Obtaining Legal Opinions

Legal opinions are generally provided by counsel to the issuer in a securitisation. 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 CSP to the issuer are exempt from Irish VAT).

8. Accounting Rules and Issues

8.1 Legal Issues with Securitisation Accounting Rules

The accounting analysis is undertaken by accountancy professionals. Key considerations are balance sheet treatment of the securitised assets and consolidation for accounting purposes of the SPE into the originator's group. Securitised assets may be considered on-balance sheet for accounting purposes and off-balance sheet at law.

8.2 Dealing with Legal Issues

No legal advice is provided on accounting matters.