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STRUCTURED FINANCE AND SECURITISATION

Structured finance and securitisation in Ireland: overview

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MARKET AND LEGAL REGIME

1. Please give a brief overview of the securitisation market in your jurisdiction. In particular:

- **How developed is the market and what notable transactions and new structures have emerged recently?**
- **What impact have central bank programmes (if any) had on the securitisation market in your jurisdiction?**
- **Is securitisation particularly concentrated in certain industry sectors?**

Ireland is one of the principal jurisdictions of choice for international originators, arrangers and managers for the establishment of special purpose vehicles for structured finance transactions. Accordingly, the securitisation market in Ireland is highly developed, and is supported by a comprehensive network of professional service providers (including legal, corporate administration and accounting). Securitisation in Ireland is also underpinned by a supportive legal, regulatory and fiscal regime.

The number of securitisation special purpose vehicles (SPVs) in Ireland, as measured by the statistics on financial vehicle corporations (FVC), increased to 906 in Q2 2017 an increase of 26 for the quarter. The value of Irish FVC assets stood at 391.3 billion, as at Q2 2017, down from EUR412 billion at the end of Q1 2017, a decrease of 5%. This compares with Europe as a whole, where euro denominated assets decreased within the same period by EUR11 billion to EUR1,394 billion. However, although Ireland's share of euro area securitisation assets fell slightly from 29.3% in Q1 2017 to 28% in Q2 2017, Ireland remains one of the favoured jurisdictions in the euro zone for the incorporation of FVCs.

The European Central Bank (ECB) announced in Q4 2014 that it would start purchasing securitisation bonds through an ABS purchase programme, to stimulate a perceived lack of growth in the European ABS market. Although the ECB has previously stated that the amount of purchasable ABS could be around EUR400 billion, by August 2016, the ECB has only acquired just over EUR24 billion of ABS as of September 2017. Despite this shortfall, it is too early to make conclusions about the effectiveness of the programme in stimulating the securitisation market in Ireland specifically (and in Europe generally).

The Irish securitisation market is wide ranging with a particular emphasis on:

- Asset-backed securities (ABS).
- Residential mortgage backed securitisations (RMBS).
- Collateralised debt obligations (CDOs).
- Collateralised loan obligations (CLOs).
- Commercial mortgage backed securitisations (CMBS).
- Asset backed commercial paper (ABCP).
- Distressed debt.
- Loan participation notes (LPN).
- Medium-term notes (MTN).
- Repackaging.
- US life settlements.

2. Is there a specific legislative regime within which securitisations in your jurisdiction are carried out? In particular:

- **What are the main laws governing securitisations?**
- **What is the name of the regulatory authority charged with overseeing securitisation practices and participants in your jurisdiction?**

Ireland has a tax regime, governed by section 110 of the Taxes Consolidation Act 1997 (section 110), designed to ensure that special purpose vehicles (SPVs) used to facilitate securitisation transactions, can be established in a tax neutral manner. Section 110 provides for the establishment of an SPV which is entitled to a tax deduction for the interest that it pays. It also provides for the tax deductibility of bad debts.

Only a "qualifying company" can use section 110. A qualifying company is defined as a company:

- Resident for tax purposes in Ireland.
- Which either acquires "qualifying assets" from a person or as a result of an arrangement with another person holds or manages qualifying assets or has entered into a legally enforceable arrangement with another person and that arrangement itself is a qualifying asset.
- Which carries on in Ireland a business consisting of the management and/or holding of qualifying assets.
- Which apart from activities ancillary to that business, carries on no other activities in Ireland.
- In relation to which the market value of qualifying assets on the day it first acquires qualifying assets is at least EUR10 million.
- Which has notified the Irish tax authorities of its status.

There is also a further limitation that a company will not be a qualifying company if it carries on any transaction otherwise than by way of "bargain made at arm's length".

It is only necessary to deliver a notification in the prescribed form to the tax authorities within eight weeks of the qualifying company meeting the requirements outlined in the definition above. No clearance or other form of ruling is required.

The definition of qualifying assets captures a wide class of assets both financial and some non-financial, which includes not only the direct holding of an asset but also the holding of an interest in an asset through a partnership.

Qualifying assets include:

- Shares, bonds and other securities.
- Futures, options, swaps, derivatives and similar instruments.
- Invoices and all types of receivables.
- Obligations evidencing debt (including loans and deposits).
- Leases and loan and lease portfolios.
- Hire purchase contracts.
- Acceptance credits and all other documents of title relating to the movement of goods.
- Bills of exchange, commercial paper, promissory notes and all other kinds of negotiable or transferable instruments.
- Carbon offsets.
- Contracts for insurance and contracts for reinsurance.
- Commodities dealt in on a recognised commodity exchange.
- Plant and machinery.

Note that a section 110 may not hold real estate assets directly.

In addition, where the qualifying assets derive some or all of their value from real estate located in Ireland, particular care must be taken to ensure strict compliance with section 110.

Apart from section 110, the principal pieces of legislation relevant to the Irish securitisation market are:

- Regulation (EU) No. 575/3013 (the CRR) and related regulatory technical standards (RTS), Directive 2011/61/EU on Alternative Investment Fund Managers (AIFM Directive) and Directive 2009/138/EC on the taking up and pursuit of the business of insurance and reinsurance as amended, including by Directive 2014/51/EU (Solvency II) in respect of retention requirements.
- The Irish Prospectus (Directive 2003/71/EC) Regulations 2005 (as amended) and the Transparency Directive (2004/109/EC) Regulations 2007 (for regulated market listed Irish securitisations).
- The Irish European Communities (Markets in Financial Instruments Regulations 2007 (Nos. 1 to 3), which regulates the provision of investment management services to Irish SPVs.
- Regulation (EU) No. 1075/2013 (ECB/2013/40) concerning statistics on the assets and liabilities of financial vehicle corporations engaged in securitisation transactions (FVC Regulation).
- The European Market Infrastructure Regulation (EMIR) for those SPVs that enter into derivative contracts.

Depending on the particular type of securitisation transaction, certain other Irish legislation may also be relevant such as the:

- Central Bank Acts 1942 to 2017.
- Investment Intermediaries Act, 1995 (as amended).
- Consumer Credit Act, 1995 (as amended).
- Irish Companies Act, 2014 (as amended) (Companies Act).

Irish securitisation SPVs are subject to the reporting requirements of the FVC Regulation, but in general, there is no requirement for securitisation SPVs to be authorised by an Irish regulatory body. All FVCs resident in Ireland carrying out securitisation transactions are obliged to report quarterly balance sheets to the Central Bank of Ireland (CBI) (*www.centralbank.ie*), the regulatory authority charged with overseeing statistical reporting under the FVC Regulation. The CBI is also the competent authority for the purposes of EMIR. The CBI has introduced similar quarterly reporting requirements for all Irish domiciled section 110 companies that are not FVCs (see *Question 20*).

REASONS FOR DOING A SECURITISATION

3. What are the main reasons for doing a securitisation in your jurisdiction? How are the reasons for doing a securitisation in your jurisdiction affected by:

- **Accounting practices in your jurisdiction, such as application of the International Financial Reporting Standards (IFRS)?**
- **National or supra-national rules concerning capital adequacy?**
- **Risk retention requirements?**
- **Implementation of the Basel III framework in your jurisdiction?**

Securitisation has traditionally been used for de-recognition of assets from the balance sheet of an originator, although achieving off-balance sheet treatment is increasingly difficult in all jurisdictions, including Ireland.

There are a number of reasons for securitisation in Ireland, including:

- Tax efficiency. The tax treatment afforded by section 110 is a key advantage of using an Irish SPV (whether the underlying securitised assets are situated in Ireland or not).
- An alternative method of funding. For example, in a receivables securitisation the SPV will buy the underlying receivable assets from the originator, therefore generating funds for the originator.
- Optimising the use of capital. This is particularly relevant for securitisations carried out by bank originators. Under capital adequacy rules, banks need to set aside a certain amount of capital against certain of their assets (for example, loans, mortgages and other receivables). If these assets are sold to an SPV and the transaction is properly structured, the assets will no longer constitute the assets of the bank and the bank will not be obliged to set aside capital against them. The SPV is not subject to capital adequacy rules, not being a bank or financial institution, and so only needs to maintain the minimal capital required under the Companies Act.
- Enhancing originator income and return on capital. The originator often receives income in relation to the securitisation by acting as the administrator of the asset portfolio (and possibly, as credit enhancer). The originator will receive fee income for performing this role and so could achieve a higher return on assets or capital then if it held the portfolio of assets directly.
- Capping the originator's credit risk. A securitisation will allow the originator to transfer substantially all of its credit risk to the SPV and the investors in the debt securities it issues (albeit the originator is often exposed to the "first loss" on the transaction).

Under Regulation (EC) 1606/2002 on the application of international accounting standards, the consolidated financial statements of companies with debt or equity securities listed on a regulated EU market (for example, the Main Securities Market of the Irish Stock Exchange) must be prepared in accordance with EU endorsed IFRS. These are issued by the International Accounting

Standards Board, which outlines the accounting requirements for recognition and measurement, impairment, de-recognition and general hedge accounting. Irish SPVs may be subject to the European and domestic legislation around risk retention and securitisations involving Basel III: the Capital Requirements Directive IV and the CRR (and the related Irish legislation, the European Union (Capital Requirements) Regulations 2014 (Numbers 1 and 2)).

The European-wide regime for risk retention is set out in:

- Articles 404 to 410 of the CRR, the associated RTS and implementing technical standards.
- Corresponding provisions in the AIFM Directive.
- Solvency II.

The CRR is directly applicable in Ireland but the European Union (Capital Requirements) (No. 2) Regulations 2014 give effect to a number of technical requirements to ensure the CRR operates effectively in Irish law.

The CRR prohibits an institution, other than when acting as an originator, a sponsor or original lender, from becoming exposed to the credit risk of a securitisation position unless the originator, sponsor or original lender has explicitly disclosed to the institution that it will retain, on an ongoing basis, a material net economic interest which, in any event, must be at least 5%.

Irish financial institutions must maintain a minimum level of capital (essentially equity, reserves and various forms of subordinated debt) against risk-weighted assets (that is, the value of assets taking into account a risk weighting which is based on the likelihood of the asset value being realised).

Under CRD IV, a bank is required to have an initial capital of at least EUR5 million and then to comply with ongoing capital requirements based on risk.

In relation to capital requirements, the CBI has introduced a new countercyclical capital buffer which took effect from January 2016 and applies to all Irish banks. For the first quarter of 2016 this was set at 0% and is reviewed on a quarterly basis (on 1 October 2017, the rate was maintained at 0% for Q4 2017). In addition the CBI has introduced requirements for AIB and Bank of Ireland, Ireland's two largest banks, to hold additional Core Tier 1, to increase their defences against future market shocks. The amount of extra capital will be set at 1.5% of risk-weighted assets and phased in at a rate of 0.5% from July 2019. In November 2016, the CBI announced that similar requirements would apply to PTSB, Ulster Bank and Citibank Holdings Ireland at the lower rate of 0.5% (phased in at a rate a 0.25% from July 2019).

THE SPECIAL PURPOSE VEHICLE (SPV)

Establishing the SPV

4. How is an SPV established in your jurisdiction? Please explain:

- **What form does the SPV usually take and how is it set up?**
- **What is the legal status of the SPV?**
- **How the SPV is usually owned?**
- **Are there any particular regulatory requirements that apply to the SPVs?**

An Irish SPV is usually incorporated under the Companies Act as one of the following:

- A private company limited by shares (LTD).
- A "designated activity company", being a private company limited by shares (DAC).
- A public limited liability company (PLC).

Depending on whether the SPV will be listing notes/debentures, the typical structure under Irish law is now an LTD or a DAC. SPVs are usually set up as orphan companies with their shares being held by a share trustee on charitable trust. Each of the three types of SPV can be incorporated with just a single member.

An LTD has no objects stated in its constitution and can issue unlisted notes/debentures which fall within one of the "excluded offer" exemptions under Directive 2003/71/EC (as amended) to trading (Prospectus Directive), for example, where the debt securities the subject of the offer have a minimum denomination of EUR100,000.

A DAC has specific objects stated in its constitution and can also issue and list notes/debentures which fall within an "excluded offer" under the Prospectus Directive. If the SPV intends to list securities other than notes/debentures (such as shares), or to offer listed or unlisted notes/debentures to the public (that is, outside one of the "excluded offer" exemptions under the Prospectus Directive), it must be established as a PLC.

While an LTD is not required to have an authorised share capital, a DAC must have an authorised share capital (although there is no minimum capitalisation requirement). The minimum capitalisation of a PLC is EUR25,000, of which a quarter must be paid up.

An Irish SPV is a normal Irish company registered with the Companies Registration Office (CRO) and subject to general Irish companies and tax laws.

An Irish SPV is structured to comply with section 110 (ensuring that, in the case of a DAC, its objects allow the SPV to engage in the activities it needs to for securitisation). The Revenue Commissioners must be notified if it is a "qualifying company" for the purposes of section 110 and the CBI is notified that it is a "financial vehicle corporation" for the purposes of the FVC Regulation.

Irish law does not specifically provide for the establishment of special purpose entities for securitisation transactions, see instead our response to *Question 1* for information relating to section 110. Also, depending on the SPV and the particular transaction, there may be various EU directives and regulations, certain domestic legislation and various guidelines, codes of conduct and other rules issued by other market bodies which may apply to the SPV.

5. Is the SPV usually established in your jurisdiction or offshore? If established offshore, in what jurisdiction(s) are SPVs usually established and why? Are there any particular circumstances when it is advantageous to establish the SPV in your jurisdiction?

Typically where the underlying assets being securitised are situated in Ireland, the SPV will be incorporated in Ireland. This is subject to any specific legal, commercial, regulatory, tax or administrative reasons and/or any structural practicalities which could require an SPV to be incorporated outside Ireland.

The SPV is often incorporated in Ireland (as opposed to other jurisdictions) because investors and market participants are familiar with the established legal framework and tax relief in relation to interest available, due to Ireland's double taxation treaty network.

For the global structured finance industry Ireland offers:

- A highly regarded onshore location. Ireland is a member of the EU and Organisation for Economic Co-operation and Development (OECD).
- A trusted and transparent tax regime (section 110).

- An extensive tax treaty regime. Ireland has 73 double taxation treaties with other countries (72 in effect) which offers an Irish resident SPV significant advantages over offshore locations.
- Clear VAT rules. In general, the activities of an Irish SPV which is a "qualifying company" under section 110 are exempt activities for VAT purposes. Management services provided to SPVs are also exempt from VAT in Ireland.
- An exemption from Irish stamp duty. No Irish stamp duty is payable on the issue or transfer of the notes issued by an Irish SPV, provided that the finance raised by the issue of the notes is used in the course of the business of the SPV.
- An efficient listing mechanism. The Irish Stock Exchange has extensive experience in the listing of specialist debt securities, and offers a turnaround time of maximum three working days.
- A common law jurisdiction. The Irish legal system derives from the English legal system.
- An infrastructure of experienced professionals: corporate administrators, lawyers, auditors and other service providers.
- A European passport. Securities issued by an Irish SPV can, once the prospectus has been approved by the CBI, be accepted throughout the EU for public offers and/or admission to trading on regulated markets under the EU Prospectus Directive.
- A public or private limited company structure. A private limited company can be used for most SPV transactions, meaning that the SPV can be incorporated with share capital of just EUR1 and in just five days (as noted above, public limited companies are typically used for "public offers" of securities).

Ensuring the SPV is insolvency remote

6. What steps can be taken to make the SPV as insolvency remote as possible in your jurisdiction? In particular:

- **Has the ability to achieve insolvency remoteness been eroded to any extent in recent years?**
- **Will the courts in your jurisdiction give effect to limited recourse and non-petition clauses?**

Typically the SPV is established as a new entity with no operating history and a limited number of known (or potential) creditors. The SPV is also operated as a distinct entity with a separate legal personality to other transaction parties (*see Question 7*). In addition, the SPV is normally an "orphan" vehicle where legal ownership of its shares are vested in a holding company and held on trust for charitable purposes.

The purpose and activities of the SPV are restricted in its constitution and the transaction documentation, to reduce the risk of liabilities being created outside the securitisation. One way this can be effected is by incorporating the SPV as a DAC and controlling the margins of its activities in its objects clause. The SPV will maintain separate books, records, and accounts, and do all such acts to hold itself out as a separate legal entity (for example, not mix its assets with those of another company). The SPV will also have no employees and not engage in any other business other than the particular structured finance transaction.

The transfer of assets from the originator to the SPV is typically effected on a "true-sale" basis, to minimise any risk of them being treated as part of the estate of the originator in any insolvency.

Limited recourse and non-petition provisions are normally included in the transaction documentation, restricting the SPV's liability to creditors to the secured assets of the SPV and restricting the creditors' ability to initiate insolvency proceedings against the SPV.

Although there is little authority in Irish law, it is likely that an Irish court would give effect to limited recourse and non-petition provisions (whether governed by Irish law or the law of another country). In this regard decisions of the English courts are of persuasive authority in Irish proceedings (so while it is not certain that the Irish courts would automatically follow English case law on the enforceability of limited recourse and non-petition clauses, they would seriously consider such case law).

However, an Irish court might (in certain circumstances) consider an insolvency winding-up petition even if it were presented in breach of a non-petition clause. A party may have statutory or constitutional rights to take legal action against the purchaser/another person, which cannot be contractually disapplied, and a court could hold that the non-petition clause was contrary to Irish public policy on the above grounds (ousting of court jurisdiction and/or Irish insolvency laws).

Ensuring the SPV is treated separately from the originator

7. Is there a risk that the courts can treat the assets of the SPV as those of the originator if the originator becomes subject to insolvency proceedings (substantive consolidation)? If so, can this be avoided or minimised?

In an insolvency of an Irish originator and on application by its liquidator, a court could "pierce the corporate veil" and hold that the SPV is in substance part of the originator group, and that its assets should be available to the originator's creditors. In addition, the court could also make an order under either:

- Section 599 of the Companies Act (requiring the SPV to make a contribution to the assets of the originator).
- Section 600 of the Companies Act (that the assets of the originator and the SPV must be pooled).

The risk of the assets of the SPV being dragged into the insolvency proceedings of an originator can be minimised (*see Question 6*) by ensuring:

- There is no agency or nominee relationship between the SPV and the originator.
- The SPV does not give security for the obligations of another company.
- There are no grounds for holding that one company is a shadow director of the other and could be liable for reckless or fraudulent trading if the other company is in liquidation.
- The SPV is an "orphan" vehicle and is not jointly and severally liable with any other company under any relevant tax legislation.
- The underlying securitised assets are sold to the SPV by way of a "true sale".
- The corporate veil is not used for improper or dishonest purposes (such as to conceal criminal activities, deception or evasion of certain SPV obligations).
- The SPV has, and holds itself out as having, a distinct, independent existence and can acquire and hold assets and carry on business in a manner separate to any other party (achieved, among other ways, by the SPV conducting its business in its own name, paying debts out of its own funds and maintaining arm's length relationships with other parties).
- The SPV has independent directors or other management and produces separate (non-consolidated) accounts.
- Limited recourse and non-petition provisions are included in the transaction documents to which the SPV is a party.

THE SECURITIES

Issuing the securities

8. What factors will determine whether to issue the SPV's securities publicly or privately?

Whether securities are issued publicly or privately mainly depends on the objectives of a particular transaction. A combination of public and private offerings could be used as part of the same transaction.

Factors determining whether the SPV's securities are offered publicly or placed privately include:

- The intended market or investors for the securities.
- Timing and cost requirements for completing the issuance.
- Compliance with any increased regulatory and disclosure requirements of a public offering.
- Potential tax implications of issuing securities listed on a regulated exchange.

9. If the securities are publicly issued:

- **Are the securities usually listed on a regulated exchange in your jurisdiction or in another jurisdiction?**
- **If in your jurisdiction, please identify the main documents required to make an application to list debt securities on the main regulated exchange in your jurisdiction. Are there any share capital requirements?**
- **If a particular exchange (domestic or foreign) is usually chosen for listing the securities, please briefly summarise the main reasons for this.**

For securitisations involving an Irish SPV the relevant securities are usually listed on the Irish Stock Exchange plc (the ISE) (*www.ise.ie*), which operates two markets for debt securities, the Main Securities Market (MSM) and the Global Exchange Market (GEM).

For admission to trading on the MSM, the issuer must prepare and submit a listing particulars/prospectus to the CBI and ISE. The prospectus must comply with the Prospectus Directive and the ISE listing rules.

For admission to trading on GEM, the issuer must prepare and submit listing particulars to the ISE. These listing particulars fall outside the requirements of the Prospectus Directive and must only comply with the GEM's Listing Rules.

Only a DAC or a PLC can offer securities to the public in Ireland. A DAC must have an authorised share capital but there is no minimum capitalisation requirement. The minimum capitalisation of a PLC is EUR25,000, of which a quarter must be paid up.

On balance, the GEM is the more popular exchange for listing in Ireland for various reasons, including:

- Guaranteed review times which allow issuers and their advisers to meet their strict deadlines with absolute certainty: three days initial review, and two days thereafter.
- Responsive, "commercial" nature of ISE personnel.
- Competitive and transparent fees.
- Status as a recognised market for the purpose of exemptions from withholding tax.

Securities listed on the GEM are now subject to the European Market Abuse Regulation (MAR) which came into force on 3 July 2016 (prior to that date, securities listed on the GEM were not directly subject to European market abuse legislation).

Constituting the securities

10. If the trust concept is not recognised in your jurisdiction, what document constitutes the securities issued by the SPV and how are the rights in them held?

The concept of a trust is recognised under Irish law. A trust deed usually constitutes the securities issued by the SPV pursuant to which a note/security trustee is appointed in respect of the rights of the holders of the securities.

Usually, the trust deed will contain covenants and other contractual obligations binding on the issuer of the securities. These are then given by the issuer to noteholders directly or, more commonly, to the note trustee to hold the benefit of such rights on trust for the noteholders.

There may also be a physical note certificate (certificated or uncertificated, registered or bearer) which constitutes a contract between the issuer and the holder of the securities, of which rights are enforceable or exercisable to the extent set out in the trust deed.

TRANSFERRING THE RECEIVABLES

Classes of receivables

11. What classes of receivables are usually securitised in your jurisdiction? Are there any new asset classes to have emerged recently or that are expected to emerge in the foreseeable future?

A broad range of assets originated or located in Ireland have been and habitually are securitised, including:

- Residential mortgages.
- Commercial mortgages.
- Loan agreements/CLOs/CDOs.
- Leases.
- Trade receivables.
- Credit cards.
- Car finance.
- Hire purchase.

Despite the fact that most European securitisations performed well throughout the financial downturn, in the immediate aftermath of the credit crisis the breadth and volume of new securitisations involving Irish originators declined substantially in Ireland, as elsewhere. As the economy has begun to recover, many new issuances were either retained by Irish originators or deposited as collateral with the CBI to gain access to CBI liquidity schemes. While public issuance still remains low compared to pre-crisis levels a number of Irish banks have issued new RMBS transactions over the last 12 months which, due to low interest rates and declining unemployment, are performing well (for example, permanent TSB and KBC Ireland have in the past year issued EUR1.088 billion and EUR1.071 billion respectively of residential mortgage backed securities).

There has also been a move away from more esoteric asset classes and structures in favour of traditional assets and structures (such as RMBS, credit cards and auto receivables). This is due to:

- The availability of government subsidised wholesale funding.

- Increasing regulatory capital charges for holding ABS investments (risk retention).
- Unpredictability and reservations around the impact of future, even tighter regulatory measures affecting the securitisation market.

Transferring receivables from the originator to the SPV

12. How are receivables usually transferred from the originator to the SPV? Is perfection of the transfer subject to giving notice of sale to the obligor or subject to any other steps?

In Ireland receivables are most commonly sold by way of legal (or equitable) assignment. Other methods more rarely used include a declaration of trust over the receivables (or over the proceeds of the receivables), a sub-participation or a novation. An outright sale of receivables can be described as a "sale", a "transfer" or an "assignment", although "assignment" often indicates a transfer of the rights in respect of the receivables (and not the obligations), while a "transfer" often indicates a transfer of both rights and obligations by way of novation. The phrase "security assignment" is often used to distinguish a transfer by way of security from an outright assignment.

A sale of receivables by way of an outright legal assignment is perfected by the delivery of notice in writing of the sale to the underlying obligor(s). The provision of notice does not itself result in the transfer becoming a legal (as opposed to an equitable) assignment as certain other formalities are also required, namely:

- The assignment must be in writing under the hand of the assignor.
- It must be of the whole of the debt.
- It must be absolute and not by way of charge.

If the assignment does not fulfil all these requirements, it will likely take effect as an equitable assignment. A subsequent assignment effected by the seller which fully complies with the above formalities will take priority if notified to the obligor before the date on which the original (equitable) assignment is notified to the obligor.

A novation of receivables (that is, of both the rights and obligations in respect of the receivables) requires the written consent of the obligor, the seller and the purchaser.

13. Are there any types of receivables that it is not possible or not practical to securitise in your jurisdiction (for example, future receivables)?

Subject to certain exceptional categories of receivables set apart mainly on public policy grounds, it is possible to transfer almost any type of receivable, including future receivables, provided that the receivables can be described with sufficient specificity to be distinguished from the remainder of the seller's estate at the moment of transfer.

An assignment for value of an identifiable receivable, which does not exist at the time of the receivables purchase agreement but which will be clearly ascertainable in the future, is treated as an agreement to assign, which gives rise to an equitable assignment of the receivable as soon as it comes into existence.

Where a receivables purchase agreement provides that no further action is required by the seller for the receivables (including receivables arising in the future) to be transferred, the agreement will generally continue to be effective to transfer the receivables, even after the initiation of insolvency proceedings. However, either party could exercise a contractual right to terminate and, in certain circumstances, a liquidator may be able to disclaim (and thereby terminate) an ongoing receivables purchase agreement if it were proven to be an unprofitable contract.

Where the agreement requires further action from the seller, the insolvency official may choose not to take that action and, in that situation, the buyer's remedy is likely to be limited to an unsecured claim in an insolvency proceeding. It is also possible to restrict a specific assignment of receivables of any asset class by imposing contractual restrictions on their transfer.

14. How is any security attached to the receivables transferred to the SPV? What are the perfection requirements?

Security for a receivable can typically be assigned in the same manner as the receivable itself, but it will depend on how the security is constituted. The perfection of a transfer of some types of security may require additional formalities such as registration or payment of a fee. For example, with respect to mortgages over real property, as well as giving notice to the underlying obligor, certain other formalities (such as registration of the transfer with the Irish Land Registry and all other documentation associated with such registration) must be complied with to effect a full legal security assignment.

Prohibitions or restrictions on transfer

15. Are there any prohibitions or restrictions on transferring the receivables, for example, in relation to consumer data?

Contractual restrictions

The most common prohibitions or restrictions on transferring receivables are those of a contractual nature. Where a contract does not specify (that is, is silent as to) assignability, the contract and the receivables under it are freely assignable. However, contractual restrictions on transfer by one method (such as assignment) may permit transfer by another (such as novation or by declaring a trust). Whether a particular form of transfer is restricted will be a question of the construction of the relevant contract.

Restrictions on assignments or transfers are generally enforceable. In very limited circumstances (such as on the death of an individual or in certain limited statutory transfers), assignment can take place by operation of law, overriding an express contractual provision prohibiting assignment.

If an assignment is made in breach of a contractual prohibition, although ineffective between the underlying obligor and the seller, the assignment may still be effective between the seller and buyer, if it complies with governing law and explicit terms of the receivables purchase agreement.

If the seller can establish that the obligor has accepted the assignment through its conduct or by waiver (for example, by explicit course of dealing) the obligor may be estopped from denying the assignment, even where there is a contractual prohibition on assignment.

Legislative restrictions

Mortgage loans and their related mortgages can be transferred by way of assignment. To effect a full legal (rather than just equitable) assignment, the transfer must be registered at the Land Registry or the Registry of Deeds (depending on whether the underlying Irish situate land is registered or unregistered). Most residential mortgage-backed securitisation transactions are structured as an equitable assignment of mortgage loans and their related mortgages, to avoid the need to provide the underlying mortgagors with notice of the assignment or to register the transfer. Under the Central Bank of Ireland's Code of Conduct on the Transfer of

Mortgages, a loan secured by a mortgage of residential property cannot be transferred without the written consent of the borrower (the relevant consent is usually provided for in the mortgage origination documentation).

In respect of consumer loans, a consumer must be provided with notice of any transfer by the creditor of its loan, except where the original creditor continues to service the credit (*section 20(2) European Communities (Consumer Credit Agreements) Regulations, 2010*). Where part of a "regulated business" is transferred by a "regulated entity" (including a transfer of consumer loans) at least two months' notice must be provided to affected consumers if the transfer is to another regulated entity (and one month if it is not) (*Provision 3.11, Consumer Protection Code (2012)*).

Avoiding the transfer being re-characterised

16. Is there a risk that a transfer of title to the receivables will be re-characterised as a secured loan? If so:

- **Can this risk be avoided or minimised?**
- **Are true sale legal opinions typically delivered in your jurisdiction or does it depend on the asset type and/or provenance of the securitised asset?**

If a transaction is expressed to be an outright sale and the sale agreement (and other documents) purports to effect an outright sale, but this does not reflect the actual agreement between the parties, the purported sale could be recharacterised as a secured loan. Irrespective of the label given to a transaction by the parties, the court will look at its substance (including the particular economic characteristics of the transaction) and examine whether it creates rights and obligations consistent with a sale.

English case law (for example, *Re: George Inglefield, [1933] Ch. 1*, as considered and applied by the English Court of Appeal in *Welsh Development Agency v. Export Finance Co Ltd, [1992] BCC 270*) has established a number of key questions which must be considered when determining whether a transaction is a sale rather than a secured loan:

- Is the transaction a "sham" (that is, do the transaction documents accurately reflect the intention of the parties, or is there some other agreement or agreements that constitute the real transaction between the parties)?
- Does the seller have the right to reacquire the receivables?
- Does the purchaser have to account for any profit made by it on the sale of the receivables?
- Is the seller required to compensate the purchaser if it ultimately realises the acquired receivables for an amount less than the amount paid?

The principles set out in the above English case law were recently confirmed by the Irish High Court in *Bank of Ireland v. Eteams International Ltd [2017] IEHC 393*.

Although it will depend on the particular circumstances, the fact that the seller remains as servicer/collection agent of the receivables post-sale, or retains some degree of credit risk in respect of the receivables post-sale, is not considered to be inconsistent with the transfer being treated as a sale (rather than a secured loan). There is no Irish case law on the point, but a right of repurchase/redemption for the seller would likely be inconsistent with the transaction being one of true sale. However, if the seller has only a right to ask the purchaser to sell the receivables back, such an arrangement might not be inconsistent with a true sale.

If the sale is re-characterised as a secured loan, the assets "sold" will remain on the seller's balance sheet and the loan will be shown as a liability of the seller. In addition, as it is not the practice in Ireland to make "back-up" security filings, the security may not have been registered and may be void in an insolvency of the seller for lack of registration.

In addition to re-characterisation, depending on the particular circumstances, sale transactions could also be open to challenge under certain provisions of the Companies Act such as section 608 (improper transfers of company assets) and section 604 (fraudulent preferences) (*see Question 17*).

"True sale" opinions are typically provided where the underlying assets are located in Ireland and the relevant transfer agreement is governed under Irish law.

Ensuring the transfer cannot be unwound if the originator becomes insolvent

17. Can the originator (or a liquidator or other insolvency officer of the originator) unwind the transaction at a later date? If yes, on what grounds can this be done and what is the timescale for doing so? Can this risk be avoided or minimised?

On application of a liquidator, creditor or contributory of a company which is being wound up, if property of the company was disposed of (including by way of charge, security assignment or mortgage) and the effect was to "perpetrate a fraud" on the company, its creditors or members, the High Court can, if it deems it just and equitable, order any person who appears to have "use, control or possession" of the property or the proceeds of the sale or development of it to deliver it or pay a sum in respect of it to the liquidator (*section 608, Companies Act*).

Receivers and examiners can also apply to the court to challenge the transfer of assets under section 443 and section 557 respectively of the Companies Act.

In deciding whether it is just and equitable to make an order under section 608, the High Court must have regard to the rights of persons who have bona fide and for value acquired an interest in the property that is the subject of the application.

Any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company, which is unable to pay its debts as they become due in favour of any creditor, with a view to giving the creditor (or any surety or guarantor for the debt due to the creditor) a preference over the other creditors, within six months of the commencement of a winding up of the company, is invalid (section 604, Companies Act). While section 604 has not been considered by the Irish courts, case law relevant to its statutory predecessor (section 286 of the Companies Act, 1963) indicates that a dominant intent of the entity concerned to prefer a creditor over its other creditors is necessary for section 286 to apply (*Corran Construction Co Ltd v. Bank of Ireland (1976-7) ILRM 175, Station Motors Ltd v. Allied Irish Banks p.l.c. (1985) 2 IR 756*). Further, section 286 only applies if at the time of the conveyance, mortgage or other relevant act, the company was unable to pay its debts as they become due. Where the conveyance, mortgage or other act is in favour of a "connected person", the six-month period is extended to two years.

The circumstances envisaged by sections 608 and 604 of the Companies Act can be avoided by ensuring the transaction is at arm's length, for fair value, and not designed to prefer one creditor over another.

Floating charges on the property of a company created within 12 months before the commencement of the winding up of that company are invalid, unless the company was solvent immediately after creation of the charge (except to the extent of monies actually advanced or paid or the actual price or value of goods or services sold or supplied to the company at the time of, or subsequently to, creation of the charge, together with interest on that amount at the rate of 5% per year) (*section 597, Companies Act*). Where the floating charge is created in favour of a "connected person", the 12-month period is extended to two years. This may affect any floating security granted in connection with a securitisation.

Establishing the applicable law

18. Are choice of law clauses in contracts usually recognised and enforced in your jurisdiction? If yes, is a particular law usually chosen to govern the transaction documents? Are there any circumstances when local law will override a choice of law?

Under Irish law any contract entered into on or after 17 December 2009 is subject to Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I) (contracts entered into before 17 December 2009 are subject to the Contractual Obligations (Applicable Law) Act, 1991, under which the Rome Convention was enacted in Ireland). As such, if there is an express choice of law it should be recognised and enforced by the Irish courts under Rome I or the Rome Convention.

English law is generally the governing law for securitisation transaction documents where an Irish SPV is the issuer. Where the originator is an Irish bank or company, Irish law might be used but that is less common. The law governing the receivable itself or the jurisdiction in which the underlying obligors are situate is often chosen as the law governing the receivable purchase agreement and the lex situs may be chosen as the governing law for creation of any security over an asset (either of which may not be Irish law).

SECURITY AND RISK

Creating security

19. Please briefly list the main types of security that can be taken over the various assets of the SPV in your jurisdiction, and the requirements to perfect such security.

Security can be granted over all assets of an Irish SPV and is most commonly taken over receivables, contracts and bank accounts by way of a legal (or equitable) assignment or a charge over book debts.

Assets assigned by way of security will create a mortgage over the relevant assets, either legal (if the requirements referred to in Question 12 are followed) or (in the absence of those requirements) equitable. Before perfection of an equitable mortgage by notice to the obligor, the assignee's security is subject to prior equities (such as rights of set-off and other defences), and ranks behind a later assignment (where the later assignee has no notice of the earlier assignment and has itself given notice to the obligor). In addition, the obligor is able to discharge its debt by continuing to pay the assignor.

Alternatively, a fixed or floating charge can be granted over the SPV's assets. In comparison to a mortgage (which is a transfer of title together with a condition for re-assignment on redemption), a charge is a mere encumbrance on the assets, giving the chargee a preferential right to payment out of the relevant charged assets in priority to other creditors of the relevant company.

A fixed charge is typically granted over specific assets and attaches to those assets on creation of the fixed charge. In comparison, a floating charge is normally granted over a class of assets (both present and future) which, prior to the occurrence of a "crystallisation event", can continue to be managed in the ordinary course of the chargor's business. On the occurrence of a crystallisation event, the floating charge will attach to the particular class of the chargor's assets, effectively becoming a fixed charge over those assets. However, following the enactment of the Companies (Accounting) Act 2017, a charge created as a floating charge (whether or not it has crystallised), will not have priority over preferential creditors. The chargee's degree of control over the receivable is the determining factor in distinguishing a fixed from floating charge (and in that regard the Irish courts look at the substance of the security created, rather than how it is described or named).

In terms of perfection, if an Irish company grants security over certain types of assets (including receivables constituting book debts) (that is, it creates a "registrable charge" for the purposes of the Companies Act), it must register short particulars of the security created with the Irish Registrar of Companies within 21 days of its creation.

For a mortgage over Irish situated real property, to effect a full legal (rather than just equitable) assignment, the transfer must be registered at the Land Registry or the Registry of Deeds (depending on whether the land is registered or unregistered). The European Communities (Financial Collateral Arrangements) Regulation 2004 (as amended) and the European Communities (Financial Collateral Arrangements) Regulations 2010 (as amended) provide that security over "financial collateral" (cash, financial instruments and credit claims) that is a "security financial collateral arrangement", although it is a registrable security interest under the Companies Act, does not need to be registered with the Registrar of Companies. However, it is still customary to register these charges in order to protect against the possibility of a court finding that the relevant security interests do not constitute a "security financial collateral arrangement".

Failure to register a registrable security interest within 21 days of its creation will result in that security interest being void as against the liquidator and any creditors of the company that created the registrable charge. However, an unregistered charge is still valid against the chargor, provided the chargor is not in liquidation. It is important to ensure the registration of the charge under the Companies Act takes place as soon as possible following the entry into the relevant charge, as the priority of charges is linked to the date of receipt by the Registrar of Companies of the particulars of the charge, rather than the date of creation of the charge.

20. How is the security granted by the SPV held for the investors? If the trust concept is recognised, are there any particular requirements for setting up a trust (for example, the security trustee providing some form of consideration)? Are foreign trusts recognised in your jurisdiction?

Typically security is granted by the SPV in favour of a security trustee who holds it expressly on trust for the benefit of itself (as security trustee), the noteholders and the other secured parties in the transaction. A security trust deed is typically used to vest the security in the security trustee and constitute the trust in favour of the investors.

Irish law requires the following "certainties" to create a valid trust:

- Certainty of intention. This is usually clearly shown by use of trust language in the security trust deed.
- Certainty of subject matter. A trust is not valid unless it is clear what property forms part of the trust (in the context of a securitisation, this is the security over the underlying assets and the associated rights under the transaction documents).
- Certainty of objects. The objects, or beneficiaries of the trust (that is, the noteholders and other secured parties), must be clearly identified.

The trust must also be for a lawful purpose and must be created by a person (here, the SPV) competent to create a trust. The trust property must also consist of rights which can be subject to a trust. As the benefit of contractual rights can be the subject of a trust under Irish law, rights under security documents and other transaction documents satisfy this requirement.

Unlike the UK, Ireland is not a signatory to the Hague Convention on the Law Applicable to Trusts and on their Recognition 1985. However, Irish cases involving trusts and conflicts of laws invoke similar principles, in particular the premise that the intention of the settlor of the trust should determine the proper law of the trust (*In re Cloncurry's Estate [1932] IR 687; Revenue Commissioners v Pelly [1940] IR 122*). It is therefore most likely that the Irish courts would recognise the choice of a foreign law as the governing law under a trust involving a trustee, if it were specified as such. The relevant Irish cases involve the recognition of English law trusts which are very similar to Irish trusts. There do not appear to be any Irish cases on recognition of trusts in other jurisdictions where the concept of a "trust" is markedly different from Irish and English trusts.

Credit enhancement

21. What methods of credit enhancement are commonly used in your jurisdiction? Are there any variations or specific issues that apply to the credit enhancement techniques set out in the Guide to a standard securitisation (Guide)?

The methods of credit enhancement set out in the Guide are used in Ireland. The method of credit enhancement chosen may be dictated by EU risk retention regime factors (*see Question 3*).

Risk management and liquidity support

22. What methods of liquidity support or cash reservation are commonly used in your jurisdiction? Are there any variations or specific issues that apply to the provision of liquidity support as set out in the Guide?

Liquidity facilities provided by third parties are less common in securitisations in Ireland than they were before the credit crisis. This is due to a number of factors including:

- A lack of liquidity in the market generally.
- The reduction in some financial institutions' ratings (Moody's downgraded Irish banks' debt below investment grade in 2011).
- The introduction of tighter capital rules under the CRR in relation to the provision of liquidity facilities (see *Question 3*).

Cash reserve funds (whereby excess cash in the securitisation is held to cover liquidity issues) are now typically used. In addition to the two methods of establishing a cash reserve fund mentioned in the Guide (paying amounts received from the issuance proceeds of securities into a reserve fund rather than paying them to the originator, and retaining amounts on an ongoing basis that the issuer receives from underlying assets that exceed amounts required to pay the securities), a reserve fund can also be established under a subordinated loan from the originator or other third party to the SPV, and losses can be allocated to the classes of notes in reverse sequential order.

Generally in Irish securitisations, payments made into these accounts usually rank ahead of payments of interest on subordinated notes but behind interest payments on senior notes.

CASH FLOW IN THE STRUCTURE

Distribution of funds

23. Please explain any variations to the cash flow index accompanying Diagram 9 of the Guide that apply in your jurisdiction. In particular, will the courts in your jurisdiction give effect to "flip clauses" (that is, clauses that allow for termination payments to swap counterparties who are in default under the swap agreement, to be paid further down the cash flow waterfall than would otherwise have been the case)?

Like most jurisdictions the cash flow and payment mechanics in an Irish securitisation are usually governed by a priority of payments (also known as a payment "waterfall"), which will be set out in the transaction documentation. The cash flow index accompanying Diagram 9 of the Guide sets out a template priority of payments which reflects what we would normally see on transactions. Ultimately however, the payment priorities for a given securitisation transaction are negotiated on a case-by-case basis, with the order of payment being influenced by various factors, including:

- Tax considerations.
- Jurisdiction requirements (for example a certain profit amount should be retained by an Irish issuer to ensure a transaction is entered into on an arm's length basis).
- Rating agency requirements.
- The relevant negotiating position of the various transaction parties.

Common variations include:

- Separate payment priorities governing interest and principal proceeds, as well as for payments before and following enforcement.
- Payment items in the payment priorities may depend on the occurrence (or non-occurrence) of trigger events (for example, whether different classes or sub-classes of secured creditors are paid pro rata or sequentially).
- Various methods of profit extraction may apply at different levels of the payment priorities and an originator may extract (often capped or fixed) fee income near the top of the payment priorities for acting in the capacity of servicer or manager, and/or it may receive a subordinated (fixed or equity-like) return towards the bottom of the payment priorities (*see also Question 24*).
- An item in the payment priorities may be used to pay liquidity support providers or to fund (or top-up) one or more cash reserves (*see also Question 22*).

As referred to in the cash flow index accompanying the Guide, a flip clause is a contractual provision that provides for certain payment rights of a creditor to be conditional on whether an event of default (including an event of default triggered by the commencement of insolvency or bankruptcy proceedings) has occurred with respect to that creditor. The effectiveness of flip clauses has been the subject of judicial decisions in both the English and US courts but not the courts of Ireland. Generally, the decisions of English courts are of persuasive authority, but are not binding, in the Irish courts.

With regard to Irish law governed priorities of payment, as a general matter the courts of Ireland seek to give effect to contractual provisions that sophisticated commercial parties have agreed, except where to do so is contrary to applicable law.

Where the priority of payments is governed by a law other than the laws of Ireland and the Irish courts have cause to consider its efficacy under that foreign law, it is likely that the Irish courts will apply the foreign governing law to determine whether the priority of payments was effective.

Profit extraction

24. What methods of profit extraction are commonly used in your jurisdiction? Are there any variations or specific issues that apply to the profit extraction techniques set out in the Guide?

In Ireland all of the methods of profit extraction specified in the Guide are commonly used, particularly the SPV making loan payments on subordinated loans provided by the originator. In addition, in an Irish context, we would often see the originator holding a majority of the junior class of notes and being paid interest.

The type of profit extraction used in any given securitisation transaction will depend on a number of factors, including:

- The nature of the assets in the pool.
- The type of credit enhancement used.
- Rating agency and timing considerations.
- Accounting and regulatory capital treatment which may be applied.

THE ROLE OF THE RATING AGENCIES

25. What is the sovereign rating of your jurisdiction? What factors impact on this and are there any specific factors in your jurisdiction that affect the rating of the securities issued by the SPV (for example, legal certainty or political issues)? How are such risks usually managed?

As of September 2017, based on its government bond rating, the sovereign rating of Ireland is A2 by Moody's, A by Fitch and A+ by Standard & Poor's. Ireland's sovereign rating has improved since the credit crisis, mainly due to improved fiscal performance, higher state asset sales, and robust economic performance. These factors have combined to lead to a quicker decline in net general government debt than previously forecast by the rating agencies.

Factors impacting the sovereign rating of Ireland differ between rating agencies, but have a grounding in the financial, political and macroeconomic strengths of the sovereign nation. Examples of relevant factors include:

- The presence of risk mitigants (both in terms of risks facing the financial sector and of its political risk).
- Credibility, effectiveness and coherence of policies and prospects.
- Gross domestic product.
- Economic growth forecasts.
- The level and structure of government borrowing.
- The structure and sustainability of fiscal financing.
- Performance relative to budgets (including improved fiscal surplus).
- The current account balance.
- The external liquidity and investment position.

In relation to specific securitisations having a connection with Ireland, rating agencies are concerned about a variety of risks associated with the structure of the securities issued by the SPV, including:

- Asset isolation. Whether, and to what extent, the SPV's assets have been legally isolated by a true sale, so that the credit risk of a specific pool of assets has been effectively de-linked from the credit risk of the originator.
- Asset quality. The pool of assets will be modelled to give an expected loss/impairment, which will then be stress tested under different scenarios.
- Credit enhancement. Whether the securitisation benefits from sufficient credit enhancement to withstand default and protect bondholders from losses under various stress tested scenarios.
- Counterparty analysis. The level of dependence on, and credit quality of, entities providing services to the SPV, as this represents credit risk outside the securitised assets.
- Originator/servicer/manager quality. The ability of the servicer or manager of the portfolio.
- Legal structure and documentation. The ability of the parties to enforce the transaction documents related to the securities issuance without any material restrictions, and the insolvency risk to enforcement.

These generic concerns (the emphasis on which differs between different rating agencies) may be augmented by more specific asset class or structure/product considerations.

The risks identified by the relevant rating agencies are usually managed by structuring the securitisation in a manner which complies with the rating agencies' applicable rating criteria and methodology, to achieve the desired rating for the securities. As part of this process, the rating agencies involved in rating a transaction will conduct their own diligence and review of:

- The legal and commercial structure of the transaction.
- The data underlying the assets to be securitised.
- The transaction parties (such as hedge counterparties and liquidity or other providers of credit or services to the securities issuer, including the administrative and other operations of any manager/originator and/or servicer).
- The specific legal documentation.

It is usual for legal comfort to be given by way of (among other things):

- Legal opinions covering the main perceived legal risks in the structure under each relevant jurisdiction.
- Representations, warranties, covenants and undertakings of the various transaction parties (including most particularly the securities issuer) in the transaction documents.

TAX ISSUES

26. What tax issues arise in securitisations in your jurisdiction? In particular:

- **What transfer taxes may apply to the transfer of the receivables? Please give the applicable tax rates and explain how transfer taxes are usually dealt with.**
- **Is withholding tax payable in certain circumstances? Please give the applicable tax rates and explain how withholding taxes are usually dealt with.**
- **Are there any other tax issues that apply to securitisations in your jurisdiction?**
- **Does your jurisdiction's government have an inter-governmental agreement in place with the US in relation to FATCA compliance, and will this benefit locally-domiciled SPVs?**

An agreement for the sale of, or an instrument effecting the sale of, debt having an Irish legal situs may be chargeable to Irish stamp duty absent an exemption. An instrument effecting the transfer of debt having a non-Irish situs may also be chargeable to Irish stamp duty, absent an exemption, if it is executed in Ireland or if it relates to something done or to be done in Ireland. There are certain exemptions from Irish stamp duty that may be relevant, such as the debt factoring exemption or loan capital exemption. A transfer by way of novation should not give rise to stamp duty. Ireland also applies VAT on the sale of goods and services. The standard rate of VAT is 23%. A purchaser will be required to register and account, on a reverse charge basis, for Irish VAT at the rate of 23% on the receipt by it of certain services from persons established outside Ireland. These services include legal, accounting, consultancy and rating agency services, and also financial services to the extent that those financial services are not exempt from Irish VAT. The sale of receivables should be exempt from VAT. The services of a collection agent are normally treated as exempt.

It is usually possible to structure a securitisation (especially when using a section 110 SPV) so that payments on receivables are not subject to Irish withholding tax. There is a general obligation to withhold tax from any payment of yearly interest made by an Irish company. The rate of withholding is currently 20%. Therefore, in principle, if the debtor is an Irish person and the receivable has a maturity of more than one year a withholding obligation will arise absent an exemption under domestic law applying. Interest paid by Irish debtors to a section 110 SPV should come within an exemption from interest withholding tax.

Exemptions also exist for interest payments made by a section 110 SPV. There is an exemption for interest paid by a section 110 SPV to a person who is resident for the purpose of tax in an EU member state (other than Ireland) or in a country with which Ireland has a double tax treaty (except where that person is a company, where the interest is paid to the company in connection with a trade or a business which is carried on in Ireland by the company through a branch or agency).

There is also an exemption for interest paid on a quoted Eurobond, where either:

- The person by or through whom the payment is made is not in Ireland, that is, non-Irish paying agent.
- The payment is made by or through a person in Ireland, and either:
  - the quoted Eurobond is held in a recognised clearing system (Euroclear and Clearstream SA are so recognised); or
  - the person who is a beneficial owner of the quoted Eurobond and who is beneficially entitled to the interest is not resident in Ireland and has made a declaration to this effect.

For this purpose a quoted Eurobond means a security which is all of the following:

- Issued by a company.
- Quoted on a recognised stock exchange.
- Carries a right to interest.

In a sale of trade receivables, a deferred purchase price should not be recharacterised in whole, or in part, as interest. It should be considered to be a payment made for the acquisition of the receivables, and not a payment of interest. Likewise, a sale of receivables at a discount should not of itself result in amounts subsequently paid on the receivables being treated as annual interest subject to withholding tax.

In December 2012, Ireland concluded an Intergovernmental Agreement with the United States to Improve International Tax Compliance and Implement FATCA. This Agreement provides for the reciprocal exchange of information with the US in relation to accounts held in Irish reporting financial institutions by US persons, and accounts held in US financial institutions by Irish residents. For this exchange of information to take place, Irish reporting financial institutions must report to Revenue (*www.revenue.ie/en/index.html*) details of such accounts held by them by 30 June each year.

Section 110 SPVs are generally considered to be Irish reporting financial institutions for FATCA and OECD common reporting standards purposes. Such SPVs are also generally considered to be reporting financial institutions for the purposes of OECD Common Reporting Standard which was introduced in January 2016.

RECENT DEVELOPMENTS AFFECTING SECURITISATIONS

27. Please give brief details of any legal developments in your jurisdiction (arising from case law, statute or otherwise) that have had, or are likely to have, a significant impact on securitisation practices, structures or participants.

The legal developments arising from regulation affecting the securitisation market generally (see *Practice note: Securitisation: regulatory framework and reforms*) are relevant to securitisations in Ireland.

While there has been a small number of securitisation-based legal proceedings in Ireland in recent years, little of this is likely to impact significantly on securitisation practices in Ireland generally. Several borrowers, keen to reduce or terminate altogether any obligations on their underlying loans, have alleged that the securitisation of their loans affects their duty to repay or undermines enforcement measures taken against them by their respective lenders.

This issue has been dealt with in a number of Irish High Court decisions including *Freeman v. Bank of Scotland [2014] IEHC 284, Kearney v. KBC Bank Ireland PLC and Others [2014] IEHC 260,* and *Harrold v. Nua Mortgages Ltd. [2015] IEHC 15*.

In *Freeman v Bank of Scotland* the High Court held that securitisation of loans did not alter the obligations of the underlying borrowers to repay those loans, and that the bank which had loaned the monies was entitled to appoint a receiver despite the securitisation. The court held that if the securitisation was properly effected it did not in any way alter the plaintiffs' obligations to Bank of Scotland, which had stepped into the shoes of Bank of Scotland Ireland following the transfer of all of Bank of Scotland Ireland's assets and liabilities.

Among the issues raised by the plaintiff investor/developer/borrower against KBC in *Kearney v KBC* was that KBC did not retain the entitlement to enforce the loans following the securitisation of the loans, and that KBC acted in breach of the Central Bank Asset Securitisation code in failing to obtain the consent of the plaintiff to the securitisation of the loans. In dismissing both claims, the judge repeated the decision in *Freeman v Bank of Scotland* that the defendant bank retains the legal title to the loans in a securitisation and that the bank is clearly entitled to enforce those loans. Equally in both *Harrold v Nua Mortgages Ltd* and *Danske Bank A/S (Trading as Danske Bank) v Gerardine Scanlan,* the High Court struck out claims for damages against mortgage lenders for alleged excessive securitisation.

As noted above, the "true sale" principles set out in the English cases of *Re: George Inglefield* and *Welsh Development Agency* have been confirmed by the Irish High Court in *Bank of Ireland v. Eteams International Ltd [2017] IEHC 393*.

OTHER SECURITISATION STRUCTURES

28. What other structures, including synthetic securitisations, are sometimes used in your jurisdiction?

Other securitisation structures detailed in the Guide (such as master trusts and programmatic securitisation structures) are used in Ireland. However, following the financial crisis there has been a move (driven by investor demand and increased regulation of the securitisation industry) towards the simpler, more traditional and more transparent securitisation structures.

Synthetic securitisations have traditionally not been common in Ireland.

REFORM

29. Please summarise any reform proposals and state whether they are likely to come into force and, if so, when. For example, what structuring trends do you foresee and will they be driven mainly by regulatory changes, risk management, new credit rating methodology, economic necessity, tax or other factors?

Companies classified as FVCs have an obligation to register with the CBI and provide certain information in respect of their business activities on a quarterly and annual basis. Most FVCs have elected into the section 110 tax regime. However, many section 110 companies are not FVCs for the purposes of the FVC Regulation.

In light of this the CBI has introduced reporting requirements for all Irish incorporated section 110 companies which are not FVCs, so that all section 110 companies will now be obliged to file quarterly and annual statistical returns with the CBI. The reporting regime is very similar to that currently applicable to FVCs. The CBI is also considering whether to include non-Irish incorporated section 110 companies in the reporting regime.

Part V of the Central Bank Act 1997 (the 1997 CBA) has also been amended by the Consumer Protection (Regulation of Credit Servicing) Act 2015 (the 2015 Act) (enacted on 8 July 2015) to provide for a regulatory regime in respect of firms involved in credit servicing which was previously outside the CBI's regulatory remit. "Credit servicing firms" typically manage or administer credit agreements such as mortgage loans or other loans on behalf of unregulated entities (such as section 110 SPVs).

The 2015 Act ensures that borrowers whose loans are sold to unregulated third parties will continue to enjoy the regulatory protections they had prior to the sale, including the protections provided by the CBI's statutory Codes of Conduct. Previously, once their loans were sold by the Irish banks to SPVs (who engaged unregulated service providers to manage the loan book), the borrowers lost these protections.

Under the 1997 CBA a person who meets the definition of a Credit Servicing Firm is required to obtain authorisation from the CBI to provide these services. As a result, all firms who either currently operate in this area or intend to operate in this area should ascertain if they fall within the scope of the definition of a Credit Servicing Firm and require authorisation by the CBI.

On 3 July 2016, a legal regime, consisting of a single and directly effective EU-wide Market Abuse Regulation (MAR) and a new supporting Market Abuse Directive (known as CSMAD) and Irish implementing regulations (the European Union (Market Abuse) Regulations 2016) came into force in Ireland and replaced existing Irish laws and regulations governing "market abuse" (consisting of insider dealing, market manipulation, and the unlawful disclosure of inside information). The new EU-wide MAR regime not only affected all Irish PLCs whose shares or debt securities are admitted to trading on the MSM of the ISE but also, for the first time, applied to companies listed on junior securities markets in EU member states including the ISE's Enterprise Securities Market and GEM. MAR will set out the revised market abuse framework, while CSMAD will set out minimum rules for the criminal sanctions that member states must impose for breaches of the new framework.

There have also been recent amendments to legislation relating to SME lending pursuant to the Central Bank (Supervision and Enforcement) Act 2013 (Section 48) (Lending To Small And Medium-Sized Enterprises) Regulations 2015 which may affect FVCs lending to small and medium-sized borrowers.

Britain's vote to leave the EU taken on 23 June 2016 is also likely to impact on securitisations in Ireland but not for some time yet. For originators, sponsors and investors in Ireland until a decision is taken on how and when Britain will leave the EU we are unlikely to see any major impact. From an Irish perspective as the country will be considered the only common law English speaking country within the EU it should retain its position as a principal jurisdiction of choice for structured finance transactions.

One consideration for Irish FVCs investing in the UK is that following Brexit any UK situate assets which might be acquired are unlikely to qualify as "eligible collateral" for the ECB frameworks.

30. Has the nature and extent of global, regional and domestic reforms had a positive or negative affect on revitalising securitisation in your jurisdiction?

In the immediate aftermath of the financial crisis an almost unprecedented programme of financial reforms affecting the securitisation market (globally, regionally as well as in domestic markets such as Ireland) were proposed which have now been, or are being, implemented.

The European Commission and the ECB (and, in Ireland specifically, the Central Bank of Ireland) have recently acknowledged that one effect of this reform agenda has been to penalise higher quality and safer securitised products when compared to other similar forms of financing, with a correspondingly negative effect on the securitisation industry in Europe generally, including in Ireland. In July 2017, the EU reached a provisional agreement on the proposed draft securitisation regulation which seeks to reform and revitalise European securitisation, with the reforms to be introduced in 2019. The reforms seek to further encourage market-based debt funding as an alternative to bank-based debt funding. However, concerns have been raised by the industry that the reforms may restrict the types of loans which can be securitised, preventing banks from securitising certain existing portfolios, and potentially slowing the rebirth of the EU securitisation market.

There have been positive developments for the securitisation industry in recent years, with a number of central banks and policy makers acknowledging that securitisation can play a key role in unlocking capital resources and financing economic growth. However, these growing public calls for a revival of the European securitisation market will need to be matched by a corresponding co-ordinated and sensibly calibrated attitude from policy makers to regulating the securitisation industry, if those aims are to be achieved.

ONLINE RESOURCES

Irish Statute Book

W *www.irishstatutebook.ie*

Description. An official website produced by the Office of the Attorney General, containing Irish legislation.

Irish Debt Securities Association (IDSA)

W *www.idsa.ie*

Description. Official website of IDSA, an industry organisation for global structured finance, debt securities and the specialist securities industries.

Courts Service of Ireland

W *http://courts.ie*

Description. The official website of the Courts Service of Ireland, containing Irish court judgments.

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