Chambers AND PARTNERS

CHAMBERS GLOBAL PRACTICE GUIDES

Securitisation 2023

Definitive global law guides offering comparative analysis from top-ranked lawyers

Ireland: Trends & Developments

Turlough Galvin, Vincent McConnon, Alan Bunbury, Michelle Holligan, Jen Preston and Laura Walsh
Matheson LLP

practiceguides.chambers.com

Trends and Developments

Contributed by:
Turlough Galvin, Vincent McConnon, Alan Bunbury, Michelle Holligan, Jen Preston and Laura Walsh
Matheson LLP **see p.8**

Introduction

In 2022, whilst the securitisation market across the European Union experienced the headwinds of economic change it also bore witness to further regulatory evolution. This article will explore some of the main legal and regulatory developments impacting the securitisation market in Ireland over the last year. As a hub for securitisation activity in the EU, the legal framework in Ireland tracks both EU and domestic Irish legislation. Both the impact of new and proposed EU laws and regulations on Irish issuers of securitisation debt, and changes in Irish law which will be of interest to market participants generally are considered below.

Central Securities Depository Regulation

The Central Securities Depositories Regulation (CSDR) was introduced in 2014 to harmonise how transferable securities, and proprietary interests in them, are represented over their life cycles, both at issuance and in secondary market trading. Article 3 of the CSDR aims to increase the safety of settlement and efficiency of transactions concerning in-scope securities by requiring them to be recorded in book-entry form by way of:

- immobilisation – the act of concentrating the location of physical/"certificated" securities in a central securities depositary (CSD) in a way that enables subsequent transfers to be made by book entry; or
- dematerialisation – the act of registering securities solely in electronic book-entry records.

From 1 January 2023, Irish issuers of certain transferable securities that are traded, or admitted to trading, on EEA trading venues will be required to represent new issuances in book-entry form. Following this first phase, issuers will have until 1 January 2025 to convert legacy in-scope securities still existing in certificated form into book-entry form.

The move to book-entry securities is intended to centralise the ownership record and improve traceability in respect of transferable securities. Compliance with Article 3 will be a central focus of Irish issuers of listed securities which are not issued through the clearing systems in 2023. Increased engagement with CSDs and registrars is anticipated as market participants seek practical and efficient solutions for compliance with Article 3. Though it is likely that efforts will concentrate initially on new issuances of securities, it is expected that market participants will subsequently turn their attention to the significant task of making legacy securities Article 3-compliant in advance of the 2025 deadline.

Report on Functioning of Securitisation Regulation

On 10 October 2022, the European Commission published its report on the functioning of the EU securitisation regulation (the "Securitisation Regulation"). This review, which was mandated pursuant to Article 46 of the Securitisation Regulation, was originally due to be published by 1 January 2022, but was delayed by the COVID-19 pandemic among other things.

Contributed by: Turlough Galvin, Vincent McConnon, Alan Bunbury, Michelle Holligan, Jen Preston and Laura Walsh, **Matheson LLP**

The review was not accompanied by a proposal for a legislative amendment to the Securitisation Regulation and concluded that the current framework is overall fit for purpose. However, the European Commission acknowledged that there was room for "fine-tuning" and issued certain clarifications and recommendations, such as the following.

Article 7 reporting templates

The European Commission invited the European Securities and Markets Authority (ESMA) to review the currently published Article 7 reporting templates, with a view to addressing possible technical difficulties in completing certain fields, removing possibly unnecessary fields and generally aligning the templates more closely with investors' needs. It also invited ESMA to draw up a dedicated reporting template for use in private securitisation transactions, with a view to simplifying the transparency requirements for such transactions.

Jurisdictional scope

The European Commission said that EU institutional investors' due diligence obligations under Article 5 of the Securitisation Regulation require them to verify that a securitisation complies with the transparency requirements under Article 7, even where such securitisations are issued outside the EU.

Sustainable securitisations

The European Commission suggested that the European Parliament, in its ongoing negotiations over the EU Green Bond Standard (GBS), as discussed below, should seek to ensure that the GBS is suitable for use by securitisations, echoing an earlier report by the European Banking Authority.

The publication of the review has generated much discussion within the European securitisation industry and the progress of the proposals will be followed closely by the market in 2023 and beyond. As Irish issuers often fulfil the role of the designated reporting entity in a securitisation, the proposals for more appropriate reporting templates for private securitisations will be welcomed.

Preventive Restructuring Regulation

The European Union (Preventive Restructuring) Regulations 2022 were signed into law on 27 July 2022, transposing the EU Preventive Restructuring Regulation into Irish law. The effect of the new regulations is to introduce certain changes to the Irish examinership process – for example, by introducing certain new protections for impaired classes of creditors upon an application to court to sanction a scheme of arrangement and by carving employees' claims out of the automatic moratorium that is imposed on enforcement actions during examinership.

Creditors subject to a stay on the enforcement of their claims are also prevented by the regulations from withholding performance, terminating, accelerating or otherwise modifying "essential executory contracts" (ie, contracts where the parties still have obligations at the time of the stay that are necessary for the continued operation of the business) solely because an examiner/interim examiner has been appointed and/or the company is unable to pay its debts. Similarly, the company must still comply with its obligations under those contracts during the stay. This restriction may also prevent counterparties from exercising netting and set-off rights under, for example, the International Swaps and Derivatives Association (ISDA) Master Agreements.

Contributed by: Turlough Galvin, Vincent McConnon, Alan Bunbury, Michelle Holligan, Jen Preston and Laura Walsh, **Matheson LLP**

Whilst limited recourse and non-petition provisions (commonplace in contractual arrangements with Irish issuers) should limit the relevance of the examinership process to Irish special purpose vehicles themselves, the changes will be relevant to Irish issuers (and other market participants) wishing to commence or participate in the examinership process in respect of underlying debtors.

COVID-19 Measures

The Irish government responded to the COVID-19 pandemic by implementing the Companies (Miscellaneous Provisions) (COVID-19) Act 2020 (the "COVID Act") which introduced temporary amendments to the Companies Act 2014, particularly in the area of insolvency and restructuring.

Some of the measures impacting insolvency and restructuring included:

- easing of legal requirements in respect of convening and conducting annual general meetings and general meetings, allowing 240,000 companies and 950 industrial and provident societies in Ireland to hold such meetings online or in a hybrid capacity;
- an extension for an interim period of the debt thresholds for the commencement of a winding up by the court from EUR10,000 for an individual debt and EUR20,000 for aggregate debts to EUR50,000 in both cases; and
- a power for the courts to extend the maximum period in which an examiner can present a report to the court by 50 days (to 150 days) in "exceptional circumstances".

The interim period for the COVID Act was extended for the fourth time in April 2022, following government approval. All measures were to remain in place until 31 December 2022, having first come into effect on 21 August 2020.

Two particular measures – the ability of companies and co-operatives to hold annual, general and creditor meetings virtually and increases to debt thresholds (each as outlined above) – were further extended in December 2022 and will remain in place until 31 December 2023.

EU Capital Markets Union

On 7 December 2022, the European Commission published a series of proposed measures to further develop the EU's Capital Markets Union. Proposals include measures:

- to make clearing services more attractive and resilient in the EU, through targeted amendments to a range of financial regulatory frameworks (including the European Market Infrastructure Regulation, which governs the use of derivatives in the EU);
- to harmonise certain corporate insolvency rules, making them more efficient and helping to promote cross-border investment; and
- to introduce a new Listing Act which aims to alleviate the administrative burden for companies of all sizes and, in particular, SMEs so that they can better access public funding by listing on stock exchanges.

The proposals, which are still at an early stage, will potentially be of relevance to a broad range of corporates and financial market participants doing business in and from Ireland, including users of derivatives, issuers of listed securities and corporates considering the use of the European capital markets to raise financing. The proposals will arguably be of particular relevance to Ireland given its central role for EU securitisation transactions.

Contributed by: Turlough Galvin, Vincent McConnon, Alan Bunbury, Michelle Holligan, Jen Preston and Laura Walsh, **Matheson LLP**

Credit Servicing – EU and Ireland

On 28 December 2021, the proposed EU directive on credit servicers and credit purchasers (the "Credit Servicing Directive") entered into force. EU member states must transpose the Credit Servicing Directive into national law by the end of 2023.

The Credit Servicing Directive applies only to non-performing loans (NPLs) issued by a credit institution established in the EU. Credit servicers in scope must obtain an authorisation in their home EU member state and will then have the right to provide those services in other EU member states. In-scope credit purchasers will not need to be regulated under the Credit Servicing Directive and will not be subject to any additional requirements for the purchase of NPLs, other than as provided for by the national legislation transposing the Credit Servicing Directive or by applicable consumer protection law, contract law, civil law or criminal law.

In Ireland, the Consumer Protection (Regulation of Credit Servicing Firms) Act 2018 (CSA 2018) became law on 21 January 2019. The CSA 2018 amended the definition of "credit servicing" in Part V of the Central Bank Act 1997 (as amended) (CBA 1997) so that certain specified activities would thereafter constitute "credit servicing".

These activities include:

- holding legal title to credit (which would include mortgage loans);
- determining the overall strategy for the management and administration of a portfolio of credit agreements; and
- maintaining control over key decisions relating to such portfolio of credit agreements.

The impact of the Credit Servicing Directive on the existing credit servicing regulatory framework in Ireland (described above) remains somewhat unclear on matters such as:

- whether legal title holders or persons who hold strategic control over Irish consumer NPLs and Irish SME NPLs originated by regulated entities will continue to be required to be authorised to carry on the business of a credit servicing firm;
- whether Ireland will seek to continue to apply the existing credit servicing regulatory framework to performing loans;
- whether Ireland will seek to continue to apply the existing credit servicing regulatory framework to loan transfers completed before the transposition deadline for the Credit Servicing Directive; and
- how the requirements of the Credit Servicing Directive will be implemented within the existing broader credit servicing regulatory framework in Ireland.

Expansion of credit servicing to other forms of consumer finance

In April 2022, the Irish government made several further changes to the CBA 1997 with the enactment of the Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Act 2022 (CSA 2022). Most of the parliamentary discussion of the CSA 2022 during its evolution focused on the proposed regulation of providers of personal contract plan (PCP) finance and "buy now, pay later" finance to natural persons (ie, non-corporate borrowers) in Ireland. However, its application is likely to affect a broader section of finance providers and servicers operating in the Irish market.

Summary of the CSA 2022:

- the CSA 2022 requires all existing and future non-bank providers of auto finance (and other providers of consumer-hire, hire-purchase and buy now, pay later finance to natural persons in Ireland) to seek specific authorisation from the Central Bank of Ireland (CBI) as a retail credit firm;
- existing finance providers falling into the above-mentioned categories can seek temporary transitional authorisation status by applying for authorisation within three months of the coming into operation of the CSA 2022;
- the CSA 2022 requires all existing and future servicers of, legal title holders of and persons who hold strategic control over consumer-hire, hire-purchase and buy now, pay later products to seek specific authorisation from the CBI as a credit servicing firm (unless exempted from the requirement to do so);
- existing servicers of, legal title holders of and persons who hold strategic control over consumer-hire, hire-purchase and buy now, pay later products can seek temporary transitional authorisation status by applying for authorisation within three months of the coming into operation of the CSA 2022;
- all hire-purchase agreements will have to contain a statement of the relevant APR or may be unenforceable; and
- any credit servicing firms that may provide finance "indirectly" to natural persons in Ireland should seek regulatory advice.

EU Green Bond Standard – A Mandatory Standard?

As one of the EU's green finance initiatives, the European Commission proposed a voluntary EU green bond standard (GBS) under a proposed regulation on European green bonds (the "GB Regulation") in July 2021. In December 2021, the rapporteur of the GB Regulation at the European Parliament published proposed amendments which fundamentally changed the original proposed regulation, including:

- a proposal that by December 2023 the European Commission should report to the European Parliament and European Council on the practicalities of making the European green bond label mandatory for bonds marketed as environmentally sustainable between 2025 and 2028; and
- a proposal to introduce mandatory requirements for sustainable bonds and their issuers.

The European Council's proposed text of the GB Regulation released in April 2022 raised some concerns amongst issuers by including a requirement for a binding clause in the terms of any green bond to comply in all material respects with the GBS which could result in something outside the control of the issuer becoming an event of default.

The International Capital Market Association (ICMA) has flagged that if such proposals are implemented then this could prove impractical and result in onerous obligations for issuers. In ICMA's view, the mandatory requirements are largely superfluous and duplicate entity-level requirements that are or will be covered by other EU sustainable finance legislation. ICMA instead supports progress towards a consensus on a voluntary standard for the European green bond label.

As discussions around the final text are ongoing, issuers of green and sustainable bonds are not required to meet such requirements under the GB Regulation.

In whatever shape it takes, the GB Regulation will be an important development in the EU sustainable finance market. The developments will be watched particularly closely by existing and prospective Irish issuers of green bonds.

Anti-money Laundering – Irish Beneficial Ownership Register

In a landmark judgment dated 22 November 2022, the European Court of Justice (ECJ) held that a provision of the 5th EU Anti-Money Laundering Directive that guaranteed public access to registers containing information around "beneficial" or real owners of companies incorporated in EU member states is no longer valid as it constitutes a serious interference with fundamental privacy and personal data protection rights of EU citizens.

The ECJ recognised that seeking to prevent money laundering and terrorist financing by creating an environment less likely to be used for such purposes was an objective of general interest capable of justifying even serious interferences of such fundamental rights and that the general public's access to beneficial ownership information is appropriate for meeting such objective. However, the ECJ held that such interference was neither limited to what is strictly necessary nor proportionate to the objective pursued.

The ECJ said the fact that it may be difficult to provide a detailed definition of the circumstances and conditions under which such a legitimate interest exists is no reason to provide for general public access. It remains to be seen how EU legislators will deal with this decision. However, in response, and similar to its EU counterparts, the Registrar of Beneficial Ownership of Companies has restricted access to search the Irish Beneficial Ownership Register to "Designated Persons" and "Competent Authorities" only, with very limited information being available to other parties and no general public access to the register being permitted.

In the meantime, Irish issuers should continue, as normal, to:

- comply with the obligation to gather beneficial ownership information;
- establish and maintain an internal beneficial ownership register; and
- file their beneficial ownership details in the Irish Beneficial Ownership Register.

Contributed by: Turlough Galvin, Vincent McConnon, Alan Bunbury, Michelle Holligan, Jen Preston and Laura Walsh, **Matheson LLP**

Matheson LLP (Matheson) was established in 1825 in Dublin, Ireland and with offices in Cork, London, New York, Palo Alto and San Francisco, more than 800 people work across Matheson's six offices, including 120 partners and tax principals and over 540 legal, tax and digital services professionals. Matheson services the legal needs of internationally focused companies and financial institutions doing business in and from Ireland. Clients include over half of the world's 50 largest banks, seven of the world's ten largest asset managers, seven of the top ten global technology brands and the firm has advised the majority of Fortune 100 companies.

Authors

Turlough Galvin is the co-head of the Finance and Capital Markets department at Matheson. Prior to this, Turlough was head of the firm's Tax department for more than ten years. He advises international corporations, investment banks and financial institutions doing business in and from Ireland. He specialises in all forms of structured finance, securitisation, financial services tax, fund finance, loan portfolio and debt capital markets advice. He also provides strategic advice to the financial services industry in relation to disputes arising from structured finance arrangements and tax litigation issues.

Vincent McConnon is a partner in the Finance and Capital Markets department at Matheson. Vincent's experience covers a range of structured finance work, including, substantial experience in various types of asset-backed securitisations, covered bonds, corporate bond issuances, collateralised loan obligation transactions, green bonds, project and infrastructure finance, loan portfolio disposals, noteholder consent solicitations, MTN programmes, securitisation terminations and other forms of structured finance products. Vincent previously worked in the securitisation practice of a Magic Circle law firm in London for several years.

Contributed by: Turlough Galvin, Vincent McConnon, Alan Bunbury, Michelle Holligan, Jen Preston and Laura Walsh, **Matheson LLP**

Alan Bunbury is a partner in the Finance and Capital Markets department at Matheson and advises on all aspects of structured finance, derivatives and netting. Alan commonly advises issuers, investment banks, trustees and asset managers in relation to securitisations, collateralised loan obligations, mortgage-backed securities, repackagings and asset-backed commercial paper programmes, among others. Alan also has extensive experience advising market participants including investment funds, asset managers and investment banks on derivatives, repurchase agreements, securities lending agreements and prime brokerage arrangements.

Michelle Holligan is a senior associate in the Finance and Capital Markets department at Matheson. Michelle advises several leading international investment banks, asset managers, arrangers, private equity firms, issuers and financial services providers on all aspects of securitisation, debt capital markets and structured finance transactions. Michelle regularly advises on the establishment of Irish investment vehicles for the purposes of acquiring and/or originating a range of financial assets across Europe and the USA.

Jen Preston is an associate in the Tax department at Matheson. Jen advises financial institutions, insurance companies, international investment banks, investment managers and institutional and private-equity investors on all aspects of financial services tax in Ireland, including: securitisation, debt capital markets, cross-border financing, securities transactions, leasing and asset financing. Jen has recently worked with a number of large financial institutions to restructure their business following Brexit.

Laura Walsh is an associate in the Tax department at Matheson. Laura advises international investment banks, Irish financial institutions, insurance companies, investment managers and institutional investors on all Irish tax aspects of financial services activity in Ireland, including securities transactions, debt capital markets, cross-border financing, asset financing and derivatives transactions.

Matheson LLP

70 Sir John Rogerson's Quay
Dublin 2
Ireland

Tel: +353 1 232 2000
Email: dublin@matheson.com
Web: www.matheson.com

Matheson

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com