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Securitisation 2023

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Ireland: Law & Practice

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IRELAND

Law and Practice

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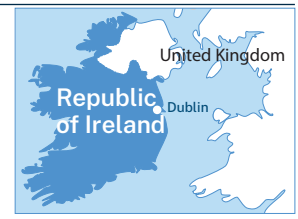

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1. Structurally Embedded Laws of General Application

1.1 Insolvency Laws

Ireland is a leading domicile within Europe for securitisation activity and the leading European jurisdiction by value for securitisation special purpose entities (SPEs). While the legislative regime incorporates a number of supportive taxation measures, no equivalent measures exist in the area of insolvency law. Issuers and originators in Ireland are subject to the general insolvency law and utilise well-established structures to insulate the underlying assets from the balance sheet (and insolvency estate) of the originator. See **1.3 Transfer of Financial Assets**.

While there has been an increase in synthetic securitisations in recent years, an Irish securitisation of receivables is typically structured as a "true sale" via an assignment from the originator directly, or through an intermediary vehicle, to the issuer. True sale transactions are subject to two principal risks in an originator insolvency: recharacterisation of the sale as a secured loan and claw-back on originator insolvency. Both true sale and synthetic securitisations may be impacted by rules on consolidation of assets, avoidance of certain contracts and examination of companies.

Recharacterisation as Secured Loan

True sale

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

Recharacterisation was considered by the High Court in Bank of Ireland v ETeams International Limited [2017] IEHC 393 (subsequently upheld by the Court of Appeal in Bank of Ireland v ETeams (International Ltd) [2019] IECA 145), which endorsed the principles set out in the English cases of Re: George Inglefield [1933] Ch.1, Welsh Development Agency v Export Finance Co. Limited [1992] BCLC 270 and Orion Finance Limited v Crown Financial Management Limited [1996] BCLC 78.

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

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

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

- a seller acting as servicer for, or retaining some credit risk on, sold assets;

- a seller repurchase obligation on breach of asset warranties; and
- extraction of profits for the seller via the waterfall after transaction expenses have been met.

A sale transaction will be upheld unless it is (i) in substance, a security arrangement (for example, the transaction documents do not indicate a sale); or (ii) a sham (for example, the transaction documents do not reflect the parties' intentions).

Consequences of recharacterisation

Subject to the list of "excluded assets" set out in Section 408(1) of the Irish Companies Act 2014 (as amended) (the Companies Act), the particulars of security created by an Irish company must be registered with the Registrar of Companies within 21 days of creation. In practice, this is done at closing to secure priority under the Companies Act which confers priority by time of registration. Failure to register within this timeframe renders the security void as against any liquidator or creditor of the company. It is not the typical practice in Ireland to make precautionary security filings. Consequently, a true sale which is recharacterised as a secured loan would constitute an unregistered security interest of the originator and render the issuer its unsecured creditor as regards the assets.

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

Claw-Back

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

Unfair preference

Any transaction in favour of a creditor of a company which is unable to pay its debts as they become due which occurs during the six months prior to the commencement of the company's winding-up, and with a view to giving that creditor a preference over other creditors, constitutes an unfair preference and is invalid. The transposition of Directive (EU) 2019/1023 (the Restructuring and Insolvency Directive or RID) introduced an exception to this for certain acts carried out in connection with the implementation of a scheme of arrangement under Part 10 of the Companies Act (an SOA), which will not be deemed to constitute unfair preference on the basis of detriment to the general body of creditors of the insolvent company unless there are other reasons for so deeming. Case law indicates that the company must have a dominant intent to prefer one creditor over its other creditors. No question of unfair preference can arise where the originator is able to pay its debts as they become due at the transaction date. An originator therefore certifies its solvency at closing.

The six-month period is extended to two years for transactions in favour of "connected persons" (including directors, shadow directors, de facto directors and "related companies" (as defined in Section 2(1) of the Companies Act)).

Fraudulent disposition

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

Invalidity of floating charge
A floating charge on the property of a company created during the 12 months before the commencement of its winding-up is invalid unless it is proved that the company, immediately after the creation of the charge, was solvent. This is subject to an exception for 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 subsequent to the creation of, and in consideration for, the charge and interest at the appropriate rate. Further, a floating charge created in connection with the implementation of an SOA will not be declared to be invalid on the basis of detriment to the general body of creditors of the insolvent company unless there are other circumstances for so doing. The 12-month period is extended to two years if the chargee is a connected person.

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

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

- any intermingling of businesses;
- involvement of one company in the management of the other;
- conduct towards each other's creditors; and
- responsibility of one company for the circumstances giving rise to the winding-up of the other.

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

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

There is no reported judicial authority in Ireland addressing the circumstances in which a court would exercise these discretions. The use of an orphan SPE and compliance with standard separateness covenants reduces the likelihood of an issuer and an originator being considered related companies.

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

Examinership
Examinership is a protection procedure under the Companies Act to facilitate the survival of Irish companies in financial difficulty. Where an Irish company is, or is likely to be, unable to pay its debts, an examiner may be appointed if the court is satisfied that (i) there is a reasonable prospect of the survival of the company and all or part of its undertaking as a going concern; and (ii) in cases involving a cross-border element, the proposed examiner has sufficient experience to perform the role. Petitions may be presented by the company, its directors, contingent creditors, prospective creditors or members holding at least one tenth of the voting share capital. Non-petition provisions in transaction documents are intended to prevent the presentation of such

petitions in respect of an issuer. However, an argument could be made that such provisions should not be given effect to on the basis that they oust the jurisdiction of, or restrict the right of access to, the courts. This point has not been judicially considered to date.

An examiner is appointed for a period of 70 days, which can be extended by a further 30 days where the court is satisfied that it is required to enable the examiner to complete their work.

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

There is an automatic stay of action against the company under the protection of the court and, in particular, no action may be taken to realise or enforce any security granted by the company without the consent of the examiner.

A creditor-counterparty to an executory contract with a company is prohibited from withholding the performance of, terminating, accelerating or in any other way modifying such contract solely because of the appointment of, or a petition to appoint, an examiner or interim examiner to such company or to a related company. Furthermore, while a company is under the protection of the court, a creditor-counterparty to an essential executory contract (for the purposes of the RID) cannot withhold performance of, terminate, accelerate or in any other way modify such contract solely for the reason that the company is unable to pays its debts for the purposes of the Companies Act. There has been no reported instance to date of an examiner, or a process adviser under the recently introduced Small Company Administrative Rescue Process or SCARP (similar to examinership for SMEs), being appointed to an entity with the typical characteristics of a typical securitisation SPE.

Credit Institutions

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

1.2 Special Purpose Entities (SPEs)

Form and Structure

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

The form chosen will depend on the type of securities to be issued and whether or not they will be listed. An LTD can issue unlisted notes falling within the "excluded offer" exemption under Regulation (EU) 2017/1129 (the Prospectus Regulation, or PR). A DAC can issue both listed and unlisted notes falling within the excluded offer exemption. Only a PLC may offer securities to the public, other than pursuant to an excluded offer and/or list securities other than debentures. Most securitisations involve the issuance of listed debt securities by a DAC.

The board of directors of the SPE should comprise at least two independent persons. A corporate service provider will usually provide the

SPE's independent directors, company secretary, registered office and various reporting services. The SPE's contractual relations are structured on a non-petition, limited recourse and arm's length basis. Its constitution may also contain restrictions.

Non-consolidation
The transaction documents will seek to minimise the risk of consolidation of assets on originator insolvency by binding the SPE to separateness covenants, requiring it, for example to:

- maintain its own books and records separately from those of any other entity, including the originator;
- act solely in its own corporate name and through its own officers and agents;
- manage its business and daily operations independently and correct any known misunderstanding regarding its separate identity;
- enter into all transactions on an arm's length basis;
- maintain its assets separately from those of any other entity;
- observe all corporate formalities;
- discharge all expenses and liabilities incurred by it out of its own funds, and allocate fairly and reasonably any shared overheads; and
- limit its activities to its securitisation.

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

1.3 Transfer of Financial Assets

Requirements of Valid Transfer – Perfection
An Irish securitisation of receivables is typically structured as a true sale via an assignment from the originator directly, or through an intermediary vehicle, to the issuer. A true sale may also be achieved by declaration of trust, sub-participation or novation. These methods are generally employed only where an assignment is not feasible and are not discussed below.

A valid legal assignment of a debt must be:

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

Assignments not meeting the above requirements take effect in equity only. Both legal and equitable assignments can execute a true sale. Most Irish securitisations employ an equitable assignment (achieved by omitting notification to the underlying obligors). The issuer (or trustee) may, upon the occurrence of certain trigger events – for example, originator insolvency – perfect the assignment by notifying the underlying obligors of the assignment. The originator will typically grant a power of attorney to the issuer and trustee for the purpose of taking such steps.

Additional perfection requirements apply for certain asset classes. In particular, assignments of rights in real property must be registered with the Property Registration Authority in order to take effect as a legal assignment.

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

- its rights are subject to any prior equities that have accrued to the underlying obligor, including rights of set-off;
- an underlying obligor can exercise rights of set-off which accrue after the date of the assignment;
- it cannot sue for the debt in its own name and must join the assignor to any action;

- repayment of the debt to the assignor is a valid discharge of the debt; and
- it ranks behind any third-party bona fide purchaser for value without notice which takes a legal assignment of the assets.

True Sale

See the "Recharacterisation as Secured Loan" section of **1.1 Insolvency Laws**. A legal opinion confirms the effectiveness of the sale; and subject to certain factual assumptions and qualifications, that such sale is not liable to be recharacterised as a secured loan.

1.4 Construction of Bankruptcy-Remote Transactions

If assignment is not possible, an originator may declare a trust over the assets in favour of the SPE. The SPE obtains an equitable interest in the assets. However, unlike an equitable assignment, this interest cannot be elevated to a legal interest by delivery of notice. As such, the SPE will remain subject to the risks set out in the "Requirements of Valid Transfer – Perfection" section in **1.3 Transfer of Financial Assets**.

See also **7. Synthetic Securitisation**.

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

2. Tax Laws and Issues

2.1 Taxes and Tax Avoidance

Stamp Duty

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

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

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

Value Added Tax (VAT)

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

2.2 Taxes on SPEs

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

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

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

However, there is an exception to this requirement in certain circumstances in relation to the payment of profit participating interest.

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

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

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

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

ATAD
Similar to all EU member states, Ireland is required to implement a number of corporation tax measures as a result of the EU Anti-Tax Avoidance Directive (ATAD) – the EU's response to the OECD's Base Erosion and Profit Shifting (BEPS) project of corporation tax reform.

Hybrid mismatch legislation came into effect in Ireland on 1 January 2020. However, a noteholder should not in general be treated as an associated enterprise of a Section 110 company merely as a result of holding notes, meaning that in many cases payments of interest by a Section 110 company should not come within the scope of hybrid mismatch provisions. Reverse hybrid mismatch provisions came into effect on 1 January 2022 but should not impact an SPE structured as a Section 110 company.

An interest limitation rule (ILR) applies in Ireland in respect of accounting periods commencing on or after 1 January 2022. Subject to certain exceptions, the new fixed ratio rule seeks to link a taxpayer's allowable net interest deductions directly to its level of earnings, by limiting the net deduction to 30% of tax-adjusted EBITDA. A restriction only applies if the borrowing costs of a relevant entity (deductible interest equivalent) exceed interest-equivalent taxable revenues by more than 30% of EBITDA or (if greater) the de minimis amount. The de minimis amount is, in respect of an accounting period of 12 months, EUR3 million, and in respect of an accounting period of less than 12 months, EUR3 million reduced pro rata. The "group ratio" and "equity ratio" provisions of the ATAD ILR have also been introduced and the legislation makes, inter alia, the equity ratio provisions available to an entity

which qualifies as a "single company worldwide group". In practice, these provisions may enable certain orphan SPEs to apply the equity ratio and thereby disapply the ILR, irrespective of whether the SPE has exceeding borrowing costs in excess of the higher of 30% of its tax-adjusted EBITDA or EUR3 million.

2.3 Taxes on Transfers Crossing Borders

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

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

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

2.4 Other Taxes

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

The activities of a Section 110 company are often exempt activities for the purposes of Irish VAT. However, if the Section 110 company's investments are located outside of the EU, partial VAT recovery may be available. There are specific exemptions from Irish VAT in relation to investment management and corporate administration services provided to a Section 110 company. With effect from 1 March 2023, a Section 110 company that holds plant and machinery will not qualify for these exemptions. However, legal and audit services provided to a Section 110 company in Ireland will be subject to VAT. To the extent that a Section 110 company receives taxable services from outside of Ireland the company will be obliged to register for VAT and self-account for Irish VAT on those services on the reverse-charge basis at the standard rate (23%).

2.5 Obtaining Legal Opinions

Legal opinions are generally provided by counsel to the issuer in a securitisation. The opinion typically addresses, in an Irish tax context:

- whether the issuer meets the conditions to qualify for the Irish securitisation tax regime;
- whether interest on the relevant debt securities is deductible for Irish tax purposes and can be paid by the issuer free from withholding tax;
- whether stamp duty arises in connection with the entry into of the transaction documents; and

- certain VAT confirmations (eg, that the services of the investment manager and corporate services provider to the issuer are exempt from Irish VAT).

3. Accounting Rules and Issues

3.1 Legal Issues With Securitisation Accounting Rules

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

3.2 Dealing With Legal Issues

No legal advice is provided on accounting matters.

4. Laws and Regulations Specifically Relating to Securitisation

4.1 Specific Disclosure Laws or Regulations

The specific measures relating to securitisation are (each as amended, as applicable):

- Regulation (EU) 2017/2402 (the Securitisation Regulation, or SR) and related technical standards;
- SI 656/2018 (the Irish SR); and
- Regulation (EU) 1075/2013 (the FVC Regulation) and Section 18 of the Central Bank Act 1971 (Section 18 CBA 1971).

Securitisation Regulation

The SR imposes harmonised rules on due diligence, risk retention and disclosure for all securitisations (as defined therein) and provides a framework for simple, transparent and standardised (STS) securitisations. Changes introduced in April 2021 as part of the EU's COVID-19 recovery package (the Recovery Package) provide for the securitisation of non-performing exposures (NPEs) (with certain modifications to the general requirements on due diligence, risk retention and credit granting criteria) and STS on-balance-sheet synthetic securitisation.

SR Article 7 requires the originator, sponsor and SPE to make available detailed information relating to the securitisation to the holders of a securitisation position, national competent authorities (NCAs) and, upon request, potential investors. They may designate one entity amongst themselves – most commonly, the SPE – as responsible for this purpose. Although one entity is primarily responsible to perform this reporting, each of the originator, sponsor and SPE remain jointly responsible to ensure that the reporting requirements of the SR are complied with. The disclosure obligations include making available:

- on a quarterly (or monthly in the case of asset-backed commercial paper programme (ABCP) securitisations) basis, detailed information on the underlying exposures and investor reports;
- all underlying documents relating to the securitisation that are essential for understanding the transaction;
- a detailed transaction summary for "private" deals (ie, where no prospectus is required);
- the STS notification for STS securitisations using the appropriate template specified in Commission Implementing Regulation (EU) 2020/1227 (this measure was amended in

July 2022 by Commission Delegated Regulation (EU) 2022/1301 to include a specific template for notification of STS synthetic securitisations, which had previously been notified using an interim format provided by ESMA);
- without delay, inside information required to be disclosed under Regulation (EU) 596/2014 (the Market Abuse Regulation or MAR); and
- where the MAR does not apply, details of significant events that may materially impact the performance of the securitisation.

Reports on underlying exposures which are residential loans or auto loans or leases must also include information on the environmental performance of the assets financed by the securitisation. By way of derogation, an originator may publish information on the principal adverse impacts of the assets financed on "sustainability factors" (as defined in the Sustainable Finance Disclosures Regulation or SFDR (Regulation (EU) 2019/2088)).The European Supervisory Authorities published for consultation a set of draft regulatory technical standards on the content, methodologies and presentation of this publication in May 2022.

For public deals, disclosures must be made via a securitisation repository registered with the European Securities and Markets Authority (ESMA). The means of disclosure for private deals is not currently prescribed. The latest ESMA Q&A on the Securitisation Regulation, published in October 2022, confirms that, in the absence of any instructions or guidance from NCAs, reporting entities can use any arrangements that meet the conditions of the SR. Barring further guidance from the Central Bank of Ireland (the CBI), it is logical to assume that parties reporting to the CBI should use the same channels of communication as are used for CBI Notifications (as defined below).

Amendments to the disclosure regime under SR Article 7 are expected following the publication of the European Commission's Report on the Functioning of the Securitisation Regulation (the SR Report). Reflecting feedback from supervisors and market participants, it has invited ESMA to, amongst other things:

- review the disclosure templates for underlying exposures and to consider whether the information required by those templates is useful and proportionate to investors' needs; and
- prepare a dedicated reporting template for private securitisations which address supervisors' need to gain an overview of the market and of the main features of the private transactions and also simplify the transparency requirements for private deals.

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

In February 2022, ESMA launched its STS register of all traditional securitisations notified to it pursuant to Article 27(1) of the SR using ESMA's new automated notification process. Originators and sponsors of synthetic STS securitisations are required to make STS notifications to ESMA via email until further notice. Details of notified synthetic STS securitisations are published on a separate list maintained by ESMA.

See **4.4 Periodic Reporting**.

Irish SR

Where an originator, sponsor or SPE is located in Ireland, the Irish SR require that party to notify the CBI of a securitisation within 15 working

days of the first issue of securities (the CBI Notification). This notification must include:

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

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

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

4.2 General Disclosure Laws or Regulations

In addition to the specific disclosure regime, regard must be had to the general regime for issue of securities. Key measures include the following (each as amended, as applicable):

- PR and related technical standards;
- EU (Prospectus) Regulations 2019 (the Irish Prospectus Regulations);
- Companies Act 2014;
- MAR;
- Directive 2014/57/EU on criminal sanctions for market abuse;
- SI 349/2016 (the Irish Market Abuse Regulations);
- Directive 2004/109/EC (the Transparency Directive or TD);
- SI 277/2007 (the Irish Transparency Regulations);
- SI 366/2019 (the Market Conduct Rules); and
- SFDR.

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

- is addressed solely to qualified investors;
- is addressed to fewer than 150 natural or legal persons per EU member state, other than qualified investors;
- is addressed to investors who acquire securities for a total consideration of at least EUR100,000 each, for each separate offer;
- denomination per unit amounts to at least EUR100,000;
- has a total consideration in the EU of less than EUR8 million (calculated over a 12-month period); and
- is made by a crowdfunding service provider authorised under the Crowdfunding Regulation ((EU) 2020/1503) and complies with certain thresholds.

A securitisation issuer rarely makes an offer of securities to the public in the true sense. The obligation to publish a prospectus is usually triggered by listing the notes on a regulated market. In such cases, the issuer must comply with the rules on format and content of a prospectus under prospectus law and applicable

stock exchange listing rules (which fall outside the scope of this chapter).

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

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

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

Market Abuse Regime

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

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

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

Transparency Regime

The Irish Transparency Regulations specify minimum requirements for disclosure of periodic financial information and ongoing information by issuers whose securities are admitted to trading on a regulated market. Issuers of retail securities must prepare annual financial reports in the European single electronic format (ESEF) for financial years beginning on or after 1 January 2021 in accordance with the TD and the ESEF Regulation (Commission Delegated Regulation (EU) 2019/815).

SFDR Regime

Since March 2021 (or in certain cases, June 2021) an investment manager falling within the definition of "financial market participant" (FMP) or "financial adviser" for the purposes of the SFDR may be subject to certain disclosure obligations in relation to its environmental, social and governance (ESG) practices. These include, at an institutional level, obligations to detail on its website:

- how it integrates sustainability risks into its investment decisions or advice, as applicable; and
- whether it assesses the principal adverse impacts of its investment decisions or advice, as applicable, on sustainability factors.

Where a financial product is held out as being sustainable, the FMP must, amongst other things:

- address in pre-contractual disclosures to end investors how the relevant ESG characteristics are met; and
- describe on its website the product's ESG characteristics or sustainable investment objective and details of how this is assessed and monitored by the FMP.

Additional product-level obligations under the SFDR will enter into force during 2023. Regulatory technical standards (Commission Delegated Regulation (EU) 2022/1288), specifying the form and content of disclosures required by the SFDR, will apply from 1 January 2023.

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

European Single Access Point

The European Commission in November 2021 published a proposal for the establishment of a "European single access point" (ESAP) as part of its Capital Markets Union Action Plan. It is intended that the ESAP will be a centralised access point for information on capital markets, financial services and sustainability to improve visibility of data for cross-border investment and enhance EU capital markets integration. Any information that is required to be made public pursuant to specified EU laws, including the PR, the TD and MAR, will be required to be submitted to a designated collection body for the ESAP. The ESAP is expected to be operational by 2024.

CSDR

The Central Securities Depositaries Regulation or CSDR (Regulation (EU) No 909/2014) seeks to enhance the safety and efficiency of the settlement system in the EU by regulating central securities depositaries (CSDs) and introducing settlement rules for market operators, including electronic book-entry format for securities admitted to trading or traded on trading venues and settlement discipline. It incorporates a number of transparency provisions, including obligations for CSDs to have transparency in their pricing, participation criteria and complaints resolution procedures. Although not mandated by the CSDR, ESMA publishes quarterly, in respect of the preceding quarter, information on cash penalties for settlement fails on trading venues with the highest turnover for bonds. This is intended to be a transparent source of information available to CSDs for the purpose of calculating cash penalties for subsequent settlement fails.

4.3 Credit Risk Retention

The SR requires that an originator, sponsor, original lender, or in the case of an NPE securitisation only and subject to certain conditions, the servicer (the retainer) holds, on an ongoing basis, a material net economic interest of not less than 5% in the securitisation for the duration of the transaction. This is satisfied where the retainer holds the following.

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

- The first 5% loss exposure on each securitised asset.

The 5% retention requirement for NPE securitisations shall be calculated by reference to the discounted purchase price of the NPEs as determined in accordance with the SR rather than their nominal value.

The retained interest may not be subject to risk-mitigation techniques. In addition, investors must, prior to investing, verify compliance with the risk retention requirement.

The European Banking Authority (the EBA), in April 2022, published final draft regulatory technical standards specifying the requirements for originators, sponsors, original lenders and servicers relating to risk retention pursuant to SR Article 6(7). This measure when adopted will replace Commission Delegated Regulation (EU) No 625/2014 and address, amongst other things, application of the risk retention requirement to NPE traditional securitisations and the impact of fees on the retained net economic interest.

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

- administrative fines for corporates of up to 10% of annual turnover;
- bans from participating in the management of any originator, sponsor or SPE; and
- temporary withdrawal of authorisation from the entity responsible for confirming compliance with STS requirements.

Sanctions may be imposed on regulated financial service providers under the Central Bank Act 1942 (as amended) for contraventions of the Irish SR. Criminal liability may also attach to relevant parties.

4.4 Periodic Reporting

Periodic reporting is required under a number of measures detailed below. Financial reporting is required under Irish company law but falls outside this chapter's scope.

Securitisation Regulation
The SR imposes two quarterly (and monthly in the case of ABCP securitisations) reporting obligations. Firstly, issuers must provide information on underlying exposures. Secondly, issuers must provide an investor report containing:

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

Technical standards issued under SR Article 7 entered into force on 23 September 2020 and specify the precise information required (Commission Delegated Regulation 2020/1224) and templates to be used (Commission Delegated Regulation 2020/1225) for this purpose. The information must be made available simultaneously and at the latest one month after the due date for the payment of interest.

See also **4.1 Specific Disclosure Laws or Regulations** and the "European Single Access Point" section of **4.2 General Disclosure Laws or Regulations**.

In relation to sanctions, see the "Sanctions" section of **4.3 Credit Risk Retention**.

FVC Regulation and Section 18 CBA 1971

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

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

Many Irish SPEs are FVCs. Since 2015, the CBI has extended reporting obligations to non-FVC SPEs (via Section 18 CBA 1971) which must provide quarterly balance sheets and annual profit and loss data.

Credit Reporting Act

Ireland maintains a centralised system that collects and securely stores information about certain in-scope credit arrangements including loans, mortgages, hire purchase agreements originated in the State (the Central Credit Register or CCR). The Credit Reporting Act 2013 and related regulations and CBI guidance requires that in-scope lenders (including SPEs that acquire loan portfolios):

- register with the CBI as a "credit information provider" and engage in a testing process to ensure that its systems (or its agent's) are compatible with those of the CCR;
- categorise customers and verify the identity of any applicants, borrowers and guarantor(s);
- carry out pre-credit checks on the borrower(s) and, in due course, guarantors before any monies are advanced and keep a record of same; and
- provide monthly detailed and ongoing information on the performance of certain loans to the CBI (this information is used to generate individual credit reports on the borrower which they and, in certain circumstances, lenders can access).

A person who provides false information to the CBI or uses information accessed from the CCR for a non-permitted purpose (including any director, manager or officer who consented or connived in the offence) may be liable to a fine (of unspecified amount) and/or up to five years imprisonment. In addition, for regulated entities, the CBI's administrative sanctions regime can apply to the breach of any requirement under the Credit Reporting Act 2013 Act which are significant.

Schedule 2 Firms

The principal measure addressing anti-money laundering (AML) and counter-terrorist financing (CTF) in Ireland is the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (the 2010 Act). The 2010 Act was amended in 2018 to transpose certain provisions of AMLD4 (Directive (EU) 2015/849). The amendments included a requirement for unregulated entities which perform certain activities listed in Schedule 2 to the 2010 Act – including commercial lending, factoring and financial leasing – to register with the CBI as "Schedule 2 firms" (in addition to any existing FVC/Non-FVC SPE or CCR registration mentioned above) as the competent authority for monitoring and supervising compliance with the AML regime. Two exemptions exist

from the obligation to register: (i) where the entity is engaged only in trading for its own account or the account of customers who are members of its group, in certain financial instruments; and (ii) where the entity's annual turnover is less than EUR70,000 and its Schedule 2 activities are below a specified thresholds. Many Irish SPVs are Schedule 2 firms.

Schedule 2 firms are required to perform certain AML/know your customer activities as relevant in accordance with robust AML policies and procedures. In addition, since November 2021, such firms must submit to the CBI on at least an annual basis a standard form CBI Risk Evaluation Questionnaire (REQ) via the CBI's online reporting system. The purpose of the REQ is to allow the CBI to conduct analysis of risk in the financial services sector.

4.5 Activities of Rating Agencies

Regulation (EU) 1060/2009 (as amended) (the CRA Regulation) and related regulatory technical standards established a regulatory framework for credit rating agencies (CRAs) in the EU with the aim of reducing reliance on external credit ratings, in particular by EU financial institutions and within EU law. It requires, amongst other things, that CRAs:

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

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

Additional requirements apply to rating securitisations: issuers must seek ratings for each tranche from at least two CRAs and consider appointing a CRA with less than 10% of the total market share. Issuer directors typically consider and note this at a board meeting.

Since July 2021, CRAs have also been required to make every effort to comply with ESMA's Guidelines on Internal Controls for Credit Rating Agencies. These guidelines outline non-binding principles on CRAs' internal control systems to support compliance with CRA Regulation requirements in relation to internal controls.

EMSA may impose fines upon CRAs in respect of negligent or intentional infringement of provisions of the CRA Regulation identified in Annex III thereto (an "Annex III infringement"). The maximum fine imposable is EUR750,000. Periodic penalty payments may be imposed in respect of continuing infringements or to secure compliance with particular information and investigation obligations. In addition, the CRA incorporates a civil liability framework through which investors and issuers may claim damages from a CRA in respect of damage caused by an Annex III infringement.

4.6 Treatment of Securitisation in Financial Entities

The prudential treatment of a securitisation position is principally determined for credit institutions and investment firms under Regulation (EU) 575/2013 as amended (the CRR) and for insurers and reinsurers under Directive 2009/138/EC (Solvency II). This response focuses on credit institutions and investment firms.

As Originator

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

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

An originator of a synthetic securitisation, which is a credit institution or an investment firm which satisfies the above requirements, may reduce its RWEAs and ELAs in respect of securitised exposures in accordance with CRR Articles 251 and 252.

In either case, the NCA may refuse preferential treatment if it considers that it not justified on the basis of the credit risk being effectively transferred; but may allow the treatment where the originator demonstrates that the reduction in own-funds requirements achieved by the securitisation is justified by a commensurate transfer of credit risk to third parties.

As Investor

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

Since 30 April 2020, positions held in STS securitisations meeting the requirements in Article 13 of the Commission Delegated Regulation 2015/61 (as amended) qualify as Level 2B high quality liquid assets (L2BHQLAs) under the CRR. This classification was previously available to all qualifying securitisations. However, non-STS deals that previously qualified as L2BHQLA were not grandfathered. L2BHQLAs can comprise a maximum of 15% of a credit institution's liquidity buffer.

See also **4.3 Credit Risk Retention**.

The European Commission issued a call for advice to the European Supervisory Agencies (ESAs) on the prudential treatment of securitisation for banks and insurance companies in October 2021. The ESAs' consultation is ongoing at the time of writing (January 2023).

4.7 Use of Derivatives

The principal rules on derivatives are contained in:

- Regulation (EU) 648/2012 (EMIR) (as amended in particular, by Regulation (EU) 2019/834 (EMIR Refit) and Regulation (EU) 2019/2099 (EMIR 2.2)) and related technical standards;
- EU (European Markets Infrastructure) Regulations 2014 (the Irish EMIR Regulations);
- Regulation (EU) 2015/2365 on securities financing transactions (the SFTR); and
- EU (Securities Financing Transactions) Regulations 2017 (the Irish SFTR Regulations).

EMIR Regime
The EMIR regime imposes obligations on parties to derivative contracts, according to whether they are "financial counterparties" (FCs), such as investment firms and credit institutions or "non-financial counterparties" (NFCs) or their third-country equivalents.

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

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

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

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

Enforcement
The Irish EMIR Regulations empower the CBI to:

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

Criminal liability may also attach.

SFTR Regime
Since January 2021, an SPE constituting an NFC under the SFTR may be subject to additional trade reporting obligations in respect of its securities financing transactions (broadly, transactions deploying assets for funding, liquidity and collateral management and execution of investment strategies) not falling within the scope of EMIR.

Enforcement
Sanctions available to the CBI under the relevant Irish SFTR Regulations include:

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

4.8 Investor Protection
Investors are afforded protection under the following regulations.

- SR disclosure requirements allow investors to diligence and monitor securitisations;
- PR disclosure requirements aim to provide "necessary information which is material to an investor" for making investments;

- the MAR aims to prevent insider dealing and market manipulation; and
- the Irish Transparency Regulations provide minimum standards for disclosure of information concerning issuers of securities admitted to trading on regulated markets.

Investor protection will be further enhanced by centralised access to capital markets information when the ESAP becomes operational.

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

4.9 Banks Securitising Financial Assets

As Originator

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

Article 9(1) of the SR

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

Consumer Protection

Mortgage loans are principally governed by the Consumer Credit Act 1995 (the CCA) and the EU (Consumer Mortgage Credit Agreements) Regulations 2016 (the MC Regulations). The CCA imposes rules on advertising, provision of information and mandatory warnings. The MC Regulations include obligations to verify a borrower's creditworthiness before lending, to explain prescribed information and to act in the borrower's best interests when advising on mortgage loans.

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

The Consumer Protection Act 2007 (as amended and extended in particular by the Consumer Rights Act 2022 (the CRA 2022)) prohibits unfair, misleading, aggressive and prohibited commercial practices and applies to all Irish law consumer contracts.

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

Parts 4 and 6 of the CRA 2022 replaced the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 to 2000. The new measures apply to, amongst other things, contracts for the supply of services to consum-

ers, including loans. The CRA 2022 extended the UTCC's "grey list" of terms presumed to be unfair and introduced a new "black list" of terms which are always unfair. Contractual terms which are unfair are unenforceable against consumers.

Data Protection Laws

Personal data of borrowers must be safeguarded as per the GDPR ((EU) 2016/679), the Irish Data Protection Acts 1988 to 2018 and SI 336/2011 (the Irish ePrivacy Regulations).

As Investor

An institutional investor (as defined in the SR) (other than an originator, sponsor or original lender) is subject, pursuant to Article 5 of the SR, to extensive due diligence requirements prior to investing in a securitisation position and to on-going monitoring obligations for the duration of its investment. This includes pre-investment verification (i) that the securitisation's underlying exposures were made in accordance with appropriate credit-granting criteria and processes; (ii) of compliance with the risk retention and (where applicable) transparency requirements of the SR; and (iii) in the case of NPEs, that sound standards were applied in their selection and pricing. It must also conduct a due diligence assessment which enables it to assess the risks involved in holding the position.

Ongoing monitoring obligations include (i) establishment of appropriate and proportionate written procedures to monitor compliance with the verification and due diligence requirements of Article 5 of the SR; (ii) stress-testing of cash flows and collateral values of underlying exposures or, where insufficient data is available, of loss assumptions; (iii) ensuring internal reporting to the investor's management body of material risks arising from the position so that such risks are adequately managed; and (iv) demonstrating to competent authorities, upon request, a comprehensive understanding of the securitisation position and underlying exposures and that it has implemented written policies and procedures for risk management of the securitisation position and for recording the verifications and due diligence required by Article 5 of the SR.

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

4.10 SPEs or Other Entities

See **1.2 Special Purpose Entities**, **2.2 Taxes on SPEs** and **5.5 Principal Servicing Provisions**.

4.11 Activities Avoided by SPEs or Other Securitisation Entities

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

Banking

Engaging in banking business or acceptance of deposits or other repayable funds from the public requires (i) an appropriate licence or authorisation from the CBI under the Central Bank Act 1971 (as amended) or the European Central Bank under Regulation (EU) 1024/2013 (the SSM Regulation), respectively; or (ii) a passported authorisation/licence. Failure to hold the appropriate licence or authorisation is an offence punishable by a fine of up to EUR64,000 and/or up to five years' imprisonment.

Insurance

An insurance company operating in Ireland must hold an authorisation from the CBI or appropriate authority in its home member state if passporting into Ireland. Provided that certain conditions are met, a synthetic securitisation may be structured using a credit derivative under which

credit protection is provided by an SPE to an originator or third party (a beneficiary) in respect of losses occurring on an asset portfolio.

Retail Credit Firms

A person who provides cash loans, a deferred payment or similar financial accommodation directly or indirectly to, or enters into a consumer-hire agreement or hire-purchase agreement with, natural persons (other than professional clients under Directive 2014/65/EU (MiFID II) or another regulated financial services provider) is regulated as a "retail credit firm" under the Central Bank Act 1997 (as amended, and in particular by the Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Act 2022) (the CBA 1997).

Certain activities are excepted from this regulation, including the purchase loans originated by another party (unless credit is subsequently provided) and the provision of credit on a once-only/occasional basis. The provision of this credit must not involve a representation, or create an impression that the credit would be offered to other persons on the same or substantially similar terms. Contravention of this requirement is an offence punishable by fines of up to EUR100,000.

See also **5.5 Principal Servicing Provisions**.

4.12 Material Forms of Credit Enhancement

The type and level of credit enhancement in a securitisation is typically driven by rating requirements. Commonly utilised forms include:

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

Credit enhancement from the originator must be on arm's length commercial terms – see the "Claw-Back" section of **1.1 Insolvency Laws**.

4.13 Participation of Government-Sponsored Entities

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

4.14 Entities Investing in Securitisation

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

5. Documentation

5.1 Bankruptcy-Remote Transfers

A bankruptcy-remote transfer is generally effected by a transfer agreement between the issuer, the originator and, in order to obtain the benefit of the contract only, the trustee. Key provisions include:

- agreement to sell and purchase;
- conditions precedent;
- declaration of trust by the originator, for the benefit of the issuer and the trustee, over any proceeds deriving from the asset portfolio which are at any time held by it after the transfer date;

- originator warranties in relation to corporate status, solvency and the asset portfolio;
- where the transfer is effected by equitable assignment – see **1.3 Transfer of Financial Assets** – the circumstances in which the issuer can perfect its title; and
- non-petition/limited recourse.

5.2 Principal Warranties

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

The issuer will also provide representations and warranties as to corporate status, capacity and authority to enter into the securitisation, licensing and solvency and also for the purposes of granting security over the asset portfolio, that it is the beneficial owner of the asset portfolio.

5.3 Principal Perfection Provisions

See **1.3 Transfer of Financial Assets**.

5.4 Principal Covenants

Issuer covenants include covenants to comply with the transaction documents and to join in any action necessary to preserve the portfolio assets, as well as standard separateness covenants (see the "Non-consolidation" section of Section **1.2 Special Purpose Entities (SPEs)**). It will also typically covenant and agree to fulfil the reporting requirement under Article 7 of the SR (if designated for that purpose), to make the CBI Notification and register security in accordance with the Irish Companies Act. Originator (and servicer) covenants include compliance with applicable laws and maintenance of authorisations. Breach of covenant will constitute a breach of the transaction documents which may trigger an event of default.

5.5 Principal Servicing Provisions

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

Where the originator acts as servicer, the servicing agreement requires the servicer to administer the portfolio assets in the same manner as equivalent assets on its balance sheet.

An entity which engages in "the business of a credit servicing firm" for the purposes of the CBA 1997 is required to be authorised by the CBI. The scope of the credit servicing regime has been expanded a number of times, most recently in May 2022, and now applies in respect of credit agreements, consumer-hire agreements and hire purchase agreements with (i) natural persons within Ireland (including agreements with sole traders and partnerships composed of natural persons), and/or (ii) SMEs.

"Credit servicing" in relation to an in-scope agreement now involves, in summary:

- holding legal title to the rights of the creditor or owner (as applicable) under such an agreement;
- managing or administering such an agreement (eg, collecting payments, handling complaints, determining the overall strategy for the management and administration of

a portfolio of agreements, or maintaining control over key decisions relating to such portfolio); or
- communicating with the counterparty in relation to its management or administration.

The term "credit agreement" captures deferred payments (eg, "buy now, pay later" arrangements) as well as cash loans and similar accommodation.

There are exemptions from the requirement to obtain authorisation for traditional securitisations and traditional NPE securitisations; however, their availability should be analysed on a case-by-case basis.

Further amendments to the credit servicing regime are likely when the Irish government transposes the NPL Directive ((EU) 2021/2167).

5.6 Principal Defaults

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

5.7 Principal Indemnities

The issuer usually provides full indemnities to the trustee, agents and managers/arrangers in respect of losses and costs incurred in the performance of their roles. In addition, prior to a trustee taking action in relation to the transaction, it may require indemnification from the holders of the securities.

6. Roles and Responsibilities of the Parties

6.1 Issuers

The role and responsibilities of an issuer will depend on the nature of the transaction. See **1.2 Special Purpose Entities** and **4. Laws and Regulations Specifically Relating to Securitisation**.

6.2 Sponsors

The sponsor, often an originator, typically initiates and structures the securitisation. It, either directly or through an affiliate, will have originated or acquired the asset portfolio and will often act as servicer. The sponsor may be a credit institution, a large corporate or a fund. See also **4.3 Credit Risk Retention**.

6.3 Underwriters and Placement Agents

Underwriters and placement agents (also known as arrangers/managers) are typically investment banks. Where the originator is itself a bank, it may act as placement agent. At least two arrangers participate in most securitisations. They structure the transaction, market, and in some cases, underwrite the notes.

6.4 Servicers

The servicer is responsible for the day-to-day administration of the assets. It is often the originator/an affiliate. However, specialist servicing companies are becoming more commonplace. See **4.3 Credit Risk Retention** and **5.5 Principal Servicing Provisions**.

6.5 Investors

Investors are usually sophisticated market participants and include financial institutions, private equity investors and funds. An investor may have responsibilities under the terms of the

notes or by virtue of being a regulated entity. See also **4.3 Credit Risk Retention**.

6.6 Trustees

The trustee role is performed by professional trustee companies. The trustee holds the benefit of the issuer's covenant to pay and other contractual undertakings on behalf of the holders of the securities and the benefit of the transaction security for the secured parties. It will represent the holders of the securities vis-à-vis the issuer.

7. Synthetic Securitisation

7.1 Synthetic Securitisation Regulation and Structure

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

Following the inclusion of significant risk transfer (SRT) transactions in the STS regime in April 2021, Ireland has seen additional deal flow and a broader issuer base with numerous debt issuers coming to market throughout 2022. However, at the time of writing (January 2023), the industry is facing significant challenges in terms of the implementation of the output floor for deals backed by corporate and SME exposures. In short, a bank using internal models will be required to calculate risk weighted assets using the standardised approach and then multiply the amount obtained by 72.5%. The output floor will, unless industry successfully lobbies for change, be introduced from 1 January 2025 over a five-year period and could make synthetic securitisations commercially unviable as it will effectively lead to higher risk weights for the retained senior tranches.

Regulation

Synthetic securitisations are regulated in the same manner as traditional securitisations. The requirements set out in **4. Laws and Regulations Specifically Relating to Securitisation** apply equally to synthetic securitisations.

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

Structures

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

- a direct contractual arrangement between an originator and investors in the form of a credit default swap (CDS) or financial guarantee; or
- the issue by an SPE of CLNs.

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

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

A synthetic structure may be funded, where the investor makes an upfront payment in the amount of the credit protection, for example, a CLN issuance or a collateralised financial guarantee; or unfunded, where no upfront payment is made and the originator is exposed to the credit risk of the investor, for example an uncollateralised financial guarantee/CDS.

See the "Insurance" section of **4.11 Activities Avoided by SPEs or Other Securitisation Entities**.

8. Specific Asset Types

8.1 Common Financial Assets

A wide range of asset classes have been securitised by Irish SPEs: residential mortgages, commercial mortgages, loan agreements, aircraft lease rentals, trade, credit card and hire purchase receivables. Changes introduced to the SR as part of the Recovery Package now facilitate the securitisation of non-performing loans.

8.2 Common Structures

The structure of a securitisation is generally determined by desired regulatory capital treatment or investor requirements rather than underlying asset class.

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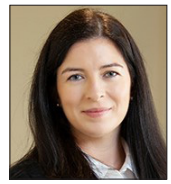

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