MAPLES GROUP

ABS GUIDE FOR IRISH SPVS

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MAPLES GROUP

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Recent Testimonials

"Maples Group is a notable player in the CLO market, recognised for its role as regular counsel to collateral manager clients. The Dublin team is also able to rely on the support and expertise within the wider firm, particularly in understanding both US and European CLO markets. In the repackaging sphere, the firm advises a number of global banks in connection with Irish products.

It is also acknowledged for its expertise in combining DCM and investment fund technologies for global asset and specialist investment managers to create specialist Irish SPV issuer platforms."

"Stephen McLoughlin has become a prominent figure in the Irish structured finance market, including in CLO, RMBS and other securitisation structures."

"Callaghan Kennedy is another key partner in CLOs and other asset-backed securitisations."

- The Legal 500, 2022

"Stephen McLoughlin heads the firm's Dublin finance group. He has notable expertise in structured finance and CLO issuances, acting for many prominent clients. Commentators enthuse: "He is pragmatic, a good team player on transactions and knows his market."

"We work with Stephen McLoughlin and Cal Kennedy. Both are excellent, extremely responsive and know both the technical law and their markets extremely well. They are great fun to deal with and don't take silly points, having an excellent judgement as to what is important on a deal that comes from seeing such a large swathe of their market."

- Chambers Global, 2022

"Extremely professional and responsive; easy to work with on complicated transactions. Always provide straightforward and commercial advice. Sarah Francis and Stephen McLoughlin are terrific - we often need to do very complicated transactions on short notice with aggressive timeframes and I know I can depend upon them to deliver good, commercial advice on sophisticated matters quickly and efficiently."

"Fast feedback and on top of the latest regulation."

- IFLR1000, 2021

Special Purpose Vehicles – Why Ireland?

Special Purpose Vehicles in Ireland

Ireland is the European jurisdiction of choice for establishing special purpose vehicles ("SPVs") for use in conducting structured finance transactions including asset-backed securitisations, CLOs, repacks, and other programme-based issuances, commodities and other financing as well as for establishing or investing in other asset classes (e.g. loan funds, NPL portfolios, market place lending or infrastructure debt) and other investment platforms.

The industry enjoys the support of the Irish Government and tax authorities, as evidenced by successive legislative changes to facilitate structured transactions involving commodities, plant and machinery and Sharia-compliant arrangements.

Industry's voice in Ireland is itself cohesively organised to engage Irish and European authorities on issues of importance through the Irish Debt Securities Association ("IDSA").

Ireland has an extensive tax treaty network with 76 double tax treaties of which 73 are currently in effect. As a result, Ireland provides access to a wide range of jurisdictions and investors.

As a common law jurisdiction, international investors easily relate to the principles of law in Ireland, in particular, in other common law jurisdictions such as the UK, the US, Australia and New Zealand.

The Irish structured finance industry has been in existence for over 25 years and is served by a full range of supporting businesses and experienced service professionals. This includes local banks, auditors, tax advisors, lawyers, corporate administrators, credit servicers and listing advisors, creating high degrees of competition and deep choice of service providers for clients. Increasingly since Brexit, as more financial institutions, ratings agencies and fund managers establish or expand their Irish operations, the talent pool available in Ireland for banking and investment professionals, as well as operational and compliance functions, has also increased significantly.

As a member state of the EU and a member of the OECD, many managers, financial institutions and investors who wish to focus their strategies and investments within those boundaries consider Ireland to be an ideal location to establish operations and investment structures. Locating within the EU provides for long-term certainty of treatment and the robustness of a firm's operational and strategic choices. The global leading position of Ireland for often complementary sectors, such as regulated investment funds and aviation finance, enhances the attractiveness of Ireland as the SPV jurisdiction of choice.

Other reasons underlying Ireland's established and enduring popularity include:

a) An accessible regulatory safe harbour for managers and arrangers providing services to the SPV;
b) Company incorporation within five business days;

c) Fast and efficient listing of debt securities through Euronext Dublin;
d) Effective Irish tax neutrality of SPVs under the section 110 regime;
e) Zero Irish withholding tax on notes interest under the quoted Eurobond exemption;
f) No Irish stamp duty on the issue or transfer of securities issued by SPVs;
g) Currently no VAT on portfolio or investment management services or corporate administration services provided to SPVs structured under the section 110 regime; and
h) No thin capitalisation restrictions.

Establishing an Irish SPV

The most common forms of company structure in Ireland are private limited and public limited companies. In a structured finance transaction, the choice will generally be dictated by the investor audience.

Private limited companies are the most commonly used in structured finance transactions and can be incorporated and fully functioning within five working days. There are two types of private limited company in Ireland: (a) a company limited by shares ("LTD"); and (b) a designated activity company ("DAC"). While there are restrictions on both LTDs and DACs offering securities to the public (this is usually overcome by ensuring the securities in question have a minimum denomination of at least €100,000), the primary difference between a LTD and a DAC is that a LTD is prohibited from having its securities admitted to trading or listed on any market.

As such, the vast majority of Irish SPVs in this sector are incorporated as DACs.

The main features of a DAC are as follows:

a) €1 issued share capital;
b) At least one shareholder;
c) At least two directors (usually both Irish tax resident and provided by an Irish corporate administrator);
d) It has a constitution which comprises a memorandum and articles of association;
e) Its memorandum of association must state the objects for which the company is incorporated; and
f) It may list its securities.

A public limited company may be incorporated in structured finance transactions where non-sophisticated or retail investors are the primary investors or low denomination securities are to be issued (e.g. less than €100,000) (often the case for global repack programmes or ETC issuers). Public limited companies can be established within a few weeks and the key requirements include the following:

a) No minimum denomination of debt securities to be issued;
b) At least one shareholder;
c) At least two directors; and
d) The minimum issued share capital must not be less than €25,000 (of which, at least 25% must be fully paid-up before commencing business).

In order to ensure that the company acting as the issuer for a structured finance transaction remains 'bankruptcy remote', i.e. the company and its assets are not at risk from the insolvency of a parent entity, the company will generally be established as an 'orphan' company. The shares in the company will be held by an Irish-registered share trustee who will declare a trust over the shares in the company for general charitable purposes. Share trustee services can be provided by the fiduciary services division of the Maples Group.

In addition, the SPV will generally require independent Irish-resident directors, company secretarial services and a registered office located in Ireland, all of which can be provided by our fiduciary services division or another corporate services provider. These providers will also offer other good standing services applicable to all Irish SPVs, such as preparing the SPV financial statements, Irish tax compliance filings and statistical portfolio reporting to the Central Bank of Ireland (the "CBI").

While the SPV is not a regulated product or entity per se, other regimes may apply to it depending on its activity (e.g. securitisation regulation reporting if a securitisation, credit servicing for NPLs, EMIR for swaps, AML for primary lending, etc.). Finally, the Irish SPV must file audited financial statements in Ireland for each accounting period, so a separate audit firm must be appointed to the SPV.

Section 110 Regime

Ireland's securitisation or structured finance tax regime, commonly known as the 'section 110 regime' by reference to the relevant provision of the Irish Taxes Consolidation Act 1997, effectively provides for tax neutral Irish special purpose companies. The flexible nature of the regime has led to its use in a range of international finance transactions including repackagings, CDOs and investment platforms.

To benefit from the section 110 tax regime, a company must satisfy a number of conditions:

a) It must be resident in Ireland for tax purposes;
b) It must acquire, hold and / or manage 'qualifying assets' (see below) or have entered into certain arrangements, such as swaps, which themselves constitute qualifying assets. Apart from activities ancillary to such arrangements, it can carry on no other business;
c) The market value of the qualifying assets must be €10 million or more on the date they are first acquired, held or entered into;
d) It must generally enter into all transactions on an arm's length basis although certain exceptions exist for profit-related interest or distributions; and
e) It must make a notification to the Irish Revenue Commissioners setting out certain details in relation to the company and its business, however, no other official notices, rulings or authorisations are required.

The taxable profits of a section 110 company are calculated as if it were a trading entity with the result that the company should be able to deduct funding costs including swap payments and profit-dependent interest. As a result, the taxable profits can be minimised. Any residual profit (e.g. €1,000 per annum) is liable to corporation tax at 25%.

Qualifying Assets

The qualifying assets which a section 110 company could invest in were originally limited to financial assets, such as debt, shares and derivatives. The range of assets has expanded over recent years to include certain partnership interests, specified carbon credits, contracts for insurance and reinsurance (e.g. US life settlements) and, most recently, commodities, plant and machinery and forms of carbon offsets.

As the extensive list of qualifying assets below demonstrates, the section 110 company can be used in almost all structured finance transactions:

a) Shares, bonds and other securities;
b) Futures, options, swaps, derivatives and similar instruments;
c) Invoices and all types of receivables;
d) Obligations evidencing debt (including loans and deposits);
e) leases and loan and lease portfolios (including non-performing loans);
f) Hire purchase contracts;
g) Acceptance credits and all other documents of title relating to the movement of goods;
h) Bills of exchange, commercial paper, promissory notes and all other kinds of negotiable or transferable instruments;
i) Certain carbon offsets;
j) Contracts for insurance and reinsurance;
k) Commodities (defined as tangible assets dealt on a recognised commodity exchange); and
l) Plant and machinery.

The growth in carbon trading activity has seen a surge in interest in the use of section 110 companies as carbon trading or investment platforms. The Irish Government and Irish Revenue Commissioners are keen to expand this area as part of a broader initiative to position Ireland at the centre of 'green' finance initiatives.

The inclusion of commodities reflects their growing importance as an asset class. Although no official list of recognised commodity exchanges was published, the Irish Revenue Commissioners have confirmed that the major commodity exchanges, including the New York Mercantile Exchange (NYMEX), the Chicago Board of Trade (CBOT) and the London Metal Exchange (LME) would qualify.

While a section 110 company may trade its assets on a commodity exchange, it is not required to do so and could merely acquire or hold commodities which are of a kind normally traded on an exchange.

The inclusion of plant and machinery has opened up opportunities for the use of section 110 companies in securitisations and asset finance and aircraft leasing. Securitisations of aircraft, rolling stock or motor vehicles are simplified as the section 110 company can hold the assets directly. Previously, a securitisation of such assets would have necessitated the use of normal trading companies, which increased the complexity of the structure, or section 110 companies which only held receivables.

The broad tax definition of qualifying assets and sophisticated user-friendly nature of the section 110 product offering in Ireland has meant that the section 110 company is often utilised for novel asset classes leading to

first-mover advantage and local Irish expertise as these sectors then grow more popular. An early example was the use of the Irish SPV in conjunction with fund structures, insurance-linked securities, synthetic securitisations and SRT transactions, then later in NPLs as that market emerged and in more recent years in fund finance, risk retention and risk retention finance, marketplace lending and various forms of Fintech-driven origination and receivables products.

Irish Tax

Withholding Tax

a) Irish resident companies must generally operate a 20% withholding tax on all payments of annual interest. In the context of a section 110 company, this obligation is typically eliminated through reliance on the wide range of domestic Irish exemptions, including in the context of securitisation structures, the exemption for payments in respect of 'quoted Eurobonds' and payments to recipients in EU / double tax treaty jurisdictions.

b) A quoted Eurobond is a security issued by a company which carries a right to interest and is quoted on a recognised stock exchange. No Irish withholding tax applies on payments of interest with respect to a quoted Eurobond if a non-Irish paying agent is used, or if the Eurobond is held in a recognised clearing system or appropriate non-resident declarations are made by the beneficial owners. A recognised clearing system includes Euroclear, Clearstream SA, Clearstream AG and The Depository Trust & Clearing Corporation.

c) There is no obligation to withhold if a section 110 company makes a payment of interest to a person resident in a country with which Ireland has a double tax treaty (such as the US) or in an EU member state (other than Ireland). A list of the countries with which Ireland has signed a double tax treaty is set out in Schedule 1. No specific documentary evidence must be received to establish where the beneficial owner is resident but it is usual to obtain a confirmation from the beneficial owners of their status and to ensure that any transferee provides the same level of comfort.

d) Other withholding tax exemptions exist, including for payments of interest on instruments qualifying as commercial paper/wholesale debt instruments.

Stamp Duty

Provided the company falls within the provisions of section 110, there should be no Irish stamp duty on the issue or transfer of securities issued by the section 110 company. Local stamp duty and transfer taxes could apply to the acquisition of assets by the company and these should be considered in each case.

VAT

a) VAT is not chargeable on portfolio or investment management services and corporate administration services provided to a section 110 company.

b) VAT is chargeable at the standard rate when taxable services are received by the company from persons established within Ireland. Where taxable service providers are established outside Ireland (e.g. rating agency services and trustee services (among others)), the section 110 company will be subject to VAT on the reverse charge basis.

c) In general, as a section 110 company is treated as making exempt supplies of financial services for VAT purposes, it will not generally be able to recover VAT payable by it on reverse charge supplies received or on other taxable services supplied to it. However, the company may be able to recover all or a portion of VAT charged to it by reference to the location of its assets or investors.

Tax Deductibility of Interest and Swap Payments

A key element of the tax neutrality of a section 110 company is the ability to deduct interest on profit dependent securities. The provisions of Section 110 TCA include certain restrictions on this deductibility. In general, the restrictions are aimed at cross-border 'double no-tax' structures, where the section 110 company claims a deduction for the payment yet the recipient is not taxed on the income.

Structured correctly, most section 110 companies can ensure that these restrictions do not apply and the vast majority of transactions are unaffected by these provisions. In particular, the limitations are generally disapplied in respect of any payment on quoted Eurobonds and wholesale debt instruments (broadly, securities with a maximum two-year maturity).

Certain changes to the restriction on deductibility rules were introduced from January 2020, where payments on profit participating or results dependent debt instruments are made to 'specified persons'. A noteholder will be a specified person in relation to a section 110 company where the noteholder controls or is under common control with the section 110 company.

A person could be taken to have control of a section 110 company where that person has:

a) 'Significant influence', directly or indirectly, over the section 110 company – this requires the noteholder to have an ability to participate in the financial and operating decisions of the section 110 company; and

b) Holds more than 20% of the shares or profit / results dependent securities issued by the section 110 company.

A full deduction for interest can still be taken where the interest is subject to tax in an EU or double tax treaty jurisdiction or paid to an Irish resident.

There are specific restrictions on the deductibility of interest paid by a section 110 company where the profits are derived from an Irish property business. Advice should be taken where it is intended that the section 110 company will acquire loans, securities or derivatives which are secured on or derive their value from land in Ireland. Internationally focused CLO transactions, loan origination transactions and similar arrangements should not be impacted by these restrictions.

The EU Anti-Tax Avoidance Directives (EU) 2017/952 and 2016/1164 ("ATAD") implement certain measures from the OECD "BEPS" project across the EU Member States. Two measures in ATAD are relevant to section 110 companies.

The interest limitation rule applies in Ireland to accounting periods of 'relevant entities' commencing on or after 1 January 2022. These provisions can restrict the tax deductibility of interest where it exceeds 30% of an entity's EBITDA. However, the provisions are subject to a number of safe harbours and exclusions which reduce the potential impact on section 110 companies.

The 'anti-hybrid' rules, which are aimed at cross border 'hybrid' arrangements involving related parties where there is different tax treatment of an entity or legal instrument. A hybrid arrangement could, in certain cases, result in a loss of the tax deductibility of a payment in Ireland. The rules are effective in Ireland from 1 January 2020. In general, these rules should not negatively impact public securitisation transactions.

Accounting Treatment

A section 110 company is taxed as if it was carrying on a trade and, as such, the tax treatment normally follows the accounting treatment. If profits arise under accounting principles these would normally be subject to corporation tax at 25%. It is, therefore, important that the company's auditors confirm that they will treat payments made by a section 110 company as deductible on an accruals basis so as to produce a tax neutral structure.

Combining QIAIFs and Section 110 Companies

Investors and investment managers commonly use structures which combine an Irish Qualifying Investor Alternative Investment Fund ("QIAIF") with a section 110 company. This is particularly true for platforms focusing on European debt.

In a typical structure, the section 110 company will issue profit dependent debt securities to the QIAIF and utilise the subscription proceeds to acquire 'qualifying' assets. The ordinary shares of the section 110 company would typically be held either by the QIAIF or subject to a charitable trust (as described above). Where a QIAIF holds the shares of the section 110 company, the section 110 company becomes subject to regulation by the CBI as the competent authority in respect of the QIAIF under the Alternative Investment Fund Managers Directive (Directive 2011/61/EU) ("AIFMD").

A section 110 company can also hold interests in a QIAIF with the investors typically holding fixed and floating rate bonds (debt) and profit dependent securities (equity) issued by the section 110 company. This structure is particularly appropriate for the holding of US investments, such as US intellectual property and alternative assets such as US life settlements.

Regulation in Ireland

Save where a section 110 company is wholly-owned by a QIAIF, the vehicle is generally an unregulated. For example, a typical section 110 company is not an alternative investment fund for the purposes of the AIFMD.

However, as noted above, depending on a section 110 company's particular activities, it can become subject to various EU and Irish regulatory regimes generally applicable across EU financial markets and sectors. While they are not regulated by the CBI, section 110 companies are obliged to report quarterly data to the CBI under either Section 18 of the Central Bank Act 1971 or under Regulation EC No 1075/2013 of the European Central Bank (the "FVC Regulation").

The Maples Group helped establish IDSA, whose stated aim is to promote the debt securities industry in Ireland. The Maples Group continues to be an active participant in IDSA and helps shape Irish industry positions on the primary EU and Irish regulations that can impact section 110 companies.

Listing

Euronext Dublin is a global leader in debt listings and has helped Ireland develop as the jurisdiction of choice in Europe for listing debt securities. Euronext Dublin together with the CBI offers a commercial, efficient and technical approach to debt listing which works in tandem with issuer and arranger requirements. The response time for comments on initial submissions to Euronext Dublin / CBI is three business days with a two-business day turnaround for subsequent submissions and same day final approvals.

Euronext Dublin operates two markets for listing debt securities, its regulated market and the Global Exchange Market ("GEM"). As a result, the impact of amendments to the European Union's Prospectus Regulations over the last couple of years in Europe, there has been a notable shift towards getting documents approved in Ireland and securities listed here. A key reason for this is that the CBI has taken a measured approach to the amendments. They have avoided being overly prescriptive in their understanding of what is deemed 'easily analysable and comprehensible' for retail debt issuances, which has been a difficulty faced by issuers dealing with some other competent authorities.

GEM is Euronext Dublin's exchange regulated market and it is not subject to the Prospectus Regulation. We have seen numerous programmes migrate to listing their securities in Ireland to retain then optionality and functionality that has been lost to issuers under the amended Prospectus Regulation regime. The greater flexibility offered by GEM regarding disclosure and the fact that it does not impose a requirement for the listing document to be published online has reinforced its popularity. The regulated market and the GEM are in- scope of the Market Abuse Regulation.

The Maples Group listing team have expert knowledge of the relevant processes in Ireland and offer full listing services for issuers of debt securities seeking admission to Euronext Dublin.

Conclusion

Ireland's position as the European hub for SPVs for structured finance transactions has grown rapidly in recent years. Ireland is now at the forefront of structured finance in Europe due to the various benefits it offers including a wide treaty network, established common law system and government support for the industry.

Schedule 1

Ireland's Network of Double Taxation Treaties (as at May 2022)			
Albania	Ethiopia	Luxembourg	Serbia
Armenia	Finland	Macedonia	Singapore
Australia	France	Malaysia	Slovakia
Austria	Georgia	Malta	Slovenia
Bahrain	Germany	Mexico	South Africa
Belarus	Ghana	Moldova	Spain
Belgium	Greece	Montenegro	Sweden
Bosnia Herzegovina	Hong Kong	Morocco	Switzerland
Botswana	Hungary	Netherlands	Thailand
Bulgaria	Iceland	New Zealand	Turkey
Canada	India	Norway	Ukraine
Chile	Israel	Pakistan	United Arab Emirates
China	Italy	Panama	United Kingdom
Croatia	Japan	Poland	United States of America
Cyprus	Kazakhstan	Portugal	Uzbekistan
Czech Republic	Korea (Republic of)	Qatar	Vietnam
Denmark	Kuwait	Romania	Zambia
Egypt	Latvia	Russia	
Estonia	Lithuania	Saudi Arabia	

European CLOs – Irish Experience and Services

The Maples Group Irish legal and fiduciary services teams have extensive experience acting as Irish issuer legal and tax counsel, listing agent and corporate administrator in relation to European CLO 2.0 transactions.

Since the post-financial crisis resurgence of European CLOs in 2013, Ireland has become the issuer jurisdiction of choice and since 2020, nearly all European CLO transactions each year are established in Ireland. In the last decade, the Maples Group has established itself as a key participant in the Irish CLO market having been engaged on approximately 30% of European CLO transactions per annum.

The Maples Group regularly lead on the Irish CLO market response to legal and regulatory developments which impact the CLO market whether arising from Irish or EU legislation, to seek to reach workable solutions often in conjunction with the leading London based arranger and manager counsel.

Our Irish listing team have been the leading listing agent for European and US CLOs on Euronext Dublin since 2006, having acted in respect of approximately 50% of the Global CLO market in recent years. Key contributing factors to this success is a very strong relationship with Euronext Dublin together with the ability to work in a proactive manner to anticipate issues that may arise and ensure a smooth listing process. In addition to arranging the listing, the team assist clients on an ongoing basis in terms of complying with the Euronext Listing Rules and where necessary preparing and coordinating the release of market notices to be published by Euronext Dublin, as required.

By way of example, we have advised on European CLO transactions, including primary issuances, re-financings, resets and re-issues, as well as risk retention financing structures, for the following managers:

- CVC Credit Partners
- HPS
- Capital Four
- Neuberger Berman
- GoldenTree
- Intermediate Capital Group
- Black Diamond
- Guggenheim
- Brigade Capital
- Voya Investment Management
- Invesco
- Bain Capital
- Angelo Gordon
- BlueBay Asset Management
- Fair Oaks Capital
- Palmer Square Capital
- KKR (fiduciary services only)

We are also currently acting in relation to a number of EU, UK and US-based managers in connection with their debut European CLO transactions who are in the process of bringing their transactions to market.

Our Jersey and UK legal and fiduciary services teams are also very active in both EU risk retention structures and most recently on migration of issuers from the Cayman Islands of some recent US CLOs and warehouses which need to be EU risk retention compliant.

In addition to providing Irish issuer legal / tax counsel and listing agent services, our fiduciary services team provides a comprehensive suite of corporate administration services to European CLO issuers, which include:

- Directorship services including provision of Irish resident directors
- Registered office services including non-exclusive telephone, facsimile and postal address in Ireland, a key test in demonstrating permanent establishment, management and control
- Company secretarial services and board support services including coordination of regular board meetings to support the Irish tax residency status, maintenance of statutory books and records, and assistance with the company's statutory filing obligations with the Companies Registration Office
- Shareholder / share trustee services, i.e. provision of a shareholder to hold legal title to the shares in the issuer and a share trustee to hold the beneficial interest of those shares on trust for charitable purposes under the terms of a declaration of trust
- Financial statement assistance including preparation of the annual statutory financial statements (under IFRS or Irish GAAP) and liaising with the auditors
- Day-to-day administration including assistance with the opening and operation of bank accounts, making periodic requests for tax residency certificates from the Irish Revenue and general day-to-day administration services
- CBI / FVC Regulation reporting
- Preparation and filing of Irish Corporation tax and VAT returns as required
- FATCA / CRS services
- Beneficial ownership register services

Key Advantages

Set Up and Running Costs	
Speed	Irish SPVs; public limited company ("PLC") or DAC incorporated in 3-5 business days.
Flexibility	Irish DACs (not PLCs) appropriate for most CLOs. Reduces set up costs as share capital is €1.
Costs	Annual corporate service provider costs circa €25,000 for Irish directors, registered office, share trustee, company secretarial services and other Irish 'good standing' and reporting services. No profit retention or thin cap requirements. Financial statement audit cost is separate.
Regulatory and Tax Regime	
FATCA	The Foreign Account Tax Compliance Act ("FATCA") has been fully implemented into Irish law with detailed guidance and exemptions that are helpful to CLO issuers.
Irish Revenue and the Section 110 Regime	The Irish Revenue is highly responsive to industry regarding Ireland's Section 110 SPV regime and has included helpful technical changes to the regime in recent legislation.
No Tax Rulings Required	Ireland does not generally operate a 'tax rulings' system which can be time consuming and costly. Tax treatment is based on clear and transparent tax legislation.
Double Tax Treaties ("DTTs")	Ireland has signed 77 DTTs with other countries. These can help mitigate or eliminate foreign withholding tax on the underlying loans.
AIFMD	Irish CLO issuers will generally qualify for the Securitisation Special Purpose Entity exemption under AIFMD. Further, the CBI has stated in guidance that it does not consider debt- issuing SPVs to fall within the scope of AIFMD.
CLO Managers Licensing	Safe harbour available for US, UK and other non-EU based collateral managers of Irish CLO issuers from licensing for the purposes of Markets in Financial Instruments Directive ("MiFID") II in Irish law, unlike some continental EU jurisdictions where US collateral managers can be required to comply with local law requirements.

IDSA	IDSA represents the sector's interests nationally and internationally. Maples Group is a founding member of IDSA and sits on its Executive Council.
Common Law Jurisdiction	Ireland is a stable common-law jurisdiction, similar and familiar to the UK and the US.

Euronext Dublin (formerly the Irish Stock Exchange)

Large following due to quick turnaround times on prospectus review, cost effectiveness and well-settled content requirements for relatively complex structures

CLO Listing	Ireland is the EU jurisdiction of choice for listing CLOs.
GEM	In addition to Euronext Dublin's regulated market, Euronext Dublin operates the GEM, a specialist cost effective debt market for professional investors. GEM is regulated by Euronext Dublin. GEM has proven to be a popular choice for a large number of CLO transactions.
Quoted Eurobond Exemption	Securities listed on Euronext Dublin's regulated market or GEM can equally avail of the quoted Eurobond withholding tax exemption.

Irish and European Regulatory Touchpoints – Is your Irish SPV compliant?

Irish special purpose vehicles have long been a popular choice as the issuing vehicles for international structured finance and securitisation transactions on the basis of the neutral tax, pro ease of business and common law regimes in Ireland. The Irish SPV also offers a lower cost, nimble and complementary product option to various strategies such as credit funds. However, while the Irish SPV remains unregulated per se, they may, depending on their activity, be required to comply with various Irish and EU-specific requirements.

Set out below is a short synopsis of a number of the recent regulatory measures which potentially impact on Irish SPVs engaged in structured finance transactions.

The Securitisation Regulation

Regulation EU 2017/2402 (as amended, the "Securitisation Regulation") came into force on 1 January 2019 and applies to new securitisation transactions involving the issue of securities on or after that date. The Securitisation Regulation sets out, among other things, the reporting obligations and contractual duties of the relevant parties in a securitisation including the issuer of the securities as well as the sponsor and / or originator.

The Securitisation Regulation marks a significant reform of securitisation regulation in Europe including:

a) Introducing a specific framework for simple, transparent and standardised ("STS") securitisations and asset-backed commercial paper programmes into EU law; and
b) Reforming and harmonising existing rules on due diligence, risk retention, disclosure and credit-granting that will apply uniformly to all securitisations, securitising entities and all types of EU-regulated institutional investors.

The Irish government introduced the European Union (General Framework for Securitisation and Specific Framework for Simple, Transparent and Standardised Securitisation) Regulations 2018 (the "Irish STS Regulations") in order to give effect to certain provisions of the Securitisation Regulation. The Irish STS Regulations also came into force on 1 January 2019.

Some practical points to note in relation to the application of the Securitisation Regulation and the Irish STS Regulations in the market:

a) The Irish issuer SPV is generally designated as the 'reporting entity' to make the required information available pursuant to Article 7 of the Securitisation Regulation. In the CLO context, the collateral manager and the collateral administrator will undertake to provide assistance to the CLO issuer in complying with these obligations. In addition, the collateral administrator, in conjunction with the

collateral administrator (with input from the collateral manager), will draft and distribute the relevant transparency reports to the investors and transaction parties on a CLO; and

b) Pursuant to the Irish STS Regulations, an Irish originator, sponsor or SSPE (being a securitisation special purpose entity) must notify the CBI (as the competent authority in respect of the Securitisation Regulation) of a securitisation not later than 15 working days after the securities of that securitisation have been issued (the "CBI Notice"). The CBI Notice is a short form document and is similar in nature to the UK Financial Conduct Authority's private securitisation notice.

Prospectus Regulation

Prospectus Regulation EU/2017/1129 will apply to that Irish SPVs when making offers to the public of their debt securities or seeking to have such securities admitted to trading on a regulated market. In broad terms, it sets the criteria that an offering prospectus must meet in order for it to be: (a) approved as a prospectus by the CBI (being the competent authority for the Prospectus Regulation in Ireland); and (b) admitted to trading on the regulated market of Euronext Dublin (being the regulated market in Ireland of debt securities). A listing agent in Ireland will assist the Irish SPV and legal counsel in making both the application to the CBI and Euronext Dublin for the prospectus to be approved.

Transparency Directive

The EU Transparency Directive (Directive 2004/109/EC) was introduced to harmonise information requirements applying to entities whose debt securities have been admitted to trading on a regulated market in the EU (such as the Main Market of the Irish Stock Exchange). It requires issuers of debt securities to disclose periodic and ongoing information including, but not limited to, an annual financial report. The annual financial report is required to include:

a) The audited financial statements of the issuer;
b) A management report; and
c) Responsibility statements from the directors or officers of the issuer stating that, to the best of their knowledge, the financial statements were prepared in accordance with the applicable set of accounting standards and give a true and fair view of the assets, liabilities, financial position and profit or loss of the issuer.

In addition, the Directive obliges an issuer of debt securities to ensure that all holders of its debt securities that rank equally to each other are given equal treatment in respect of all the rights attaching to those debt securities.

Market Abuse Regime

If an Irish SPV lists debt securities on an EU regulated market or on an EU multilateral trading facility, it is required to comply with EU regulation (596/2014) on market abuse ("MAR").

The corporate service provider of the Irish SPV will coordinate the compliance of the SPV with MAR. The collateral manager to the Irish SPV will not be required to have much involvement in the ongoing compliance with MAR but will have a general obligation in the transaction documents to assist the Irish SPV as and when required.

The MAR regime is discussed in more detail in further below.

Alternative Investment Fund Managers Directive

AIFMD imposes rules for the authorisation, ongoing operation and transparency of managers of alternative investment funds ("AIFMs") which manage and / or market alternative investment funds ("AIFs"). A key requirement of AIFMD is for each AIF to appoint an AIFM, who is responsible for the AIF complying with AIFMD. In the absence of such an appointment the AIF itself will be required to be authorised as an AIFM.

The wide-ranging definition of an AIF in AIFMD, coupled with the limited scope of the SSPE Exemption (defined below) contained in AIFMD, gave rise to uncertainty at the time of AIFMD's transposition as to whether certain SPVs would be considered AIFs and therefore required to appoint an AIFM or be authorised themselves as AIFMs.

In response to feedback from participants in the European structured finance market, the Central Bank of Ireland ("CBI") issued guidance to the effect that it was of the view that:

a) Entities registered as 'financial vehicle corporations' under Regulation (EC) No. 24/2009 of the European Central Bank (now Regulation (EC) No. 1075/2013) (the "SSPE exemption"); and
b) Other SPVs which do not issue shares or units equating to ownership interests to investors but raise finance through the issue of debt securities, will not be within the scope of AIFMD.

It should be noted, that the CBI has indicated that this is a transitional provision, which remains subject to further clarification from the ESMA, although notwithstanding this statement, the CBI guidance has not been altered since its first publication in November 2013.

It is highly unlikely that a section 110 Irish SPV will not naturally be structured for its intended transaction or strategy to fit into one of those two categories. As noted above, the CBI has in recent years narrowed its definition of an FVC for local CBI registration and reporting purposes, such that some scenarios arise where a SPV may be a securitisation for EU Securitisation Regulation purposes but not an FVC for the CBI AIFMD safe harbour and so limb (ii) above is relied upon instead. In practice, we have only rarely seen this be a distinguishing point that investors consider.

European Market Infrastructure Regulation

The European Market Infrastructure Regulation ("EMIR") establishes rules for mandatory central counterparty clearing in respect of certain standardised OTC derivative contracts, risk mitigation techniques in relation to transactions that are not centrally cleared, and general reporting obligations for counterparties. EMIR impacts all entities established in the EU derivatives market, including Irish SPVs.

Irish SPVs will generally be classified as 'NFCs' for the purposes of EMIR, i.e. non-financial counterparties whose derivative positions do not exceed certain clearing thresholds prescribed by EMIR. In this regard, it is important to consider whether the SPV is consolidated as this may create an EMIR group and which may influence whether the clearing thresholds are breached. While NFCs have the least onerous obligations under EMIR (in particular they are not required to satisfy mandatory clearing requirements), they do have certain risk mitigation obligations and may also be required to report their swaps.

EMIR Reporting

Most swap counterparties to the Irish SPV will be EU-based EMIR Financial Counterparties ("FCs"), and since 18 June 2020 the obligation to report the derivative transaction will rest solely with the FC. Nonetheless, delegated reporting agreements are still commonly entered into between the parties in a continuation of established practice and to contractually regulate the reporting as well as ensure the FC can obtain 'common data' required to be reported. Where the swap is between NFCs or the Irish SPV faces a non-EU counterparty, care should be taken to analyse and agree the satisfaction of the reporting obligation.

EMIR Risk Mitigation Techniques

NFCs are obligated to ensure compliance with certain risk mitigation techniques prescribed by EMIR for derivatives that are not centrally cleared. Significantly, the most onerous (and potentially problematic) risk mitigation technique requirements relating to collateral exchange and daily valuations do not apply to NFCs. The following risk mitigation requirements apply to NFCs:

a) **Portfolio Reconciliation:** Counterparties are required, before entering into a derivative contract, to have reconciliation arrangements in place. For an NFC SPV with less than 100 derivative contracts with its counterparty, the reconciliation must be performed annually. An SPV can delegate the portfolio reconciliation function to a qualified third party but not to the counterparty.

b) **Dispute Resolution Procedures:** Counterparties must have agreed detailed processes and procedures in relation to the identification, recording, monitoring and resolution of disputes regarding their derivative contracts.

c) **Timely Confirmation:** Counterparties must have procedures and systems in place to ensure that transactions are confirmed within the deadline set out in the applicable regulatory technical standards.

d) **Portfolio Compression:** This applies only where an SPV has 500 or more derivative contracts with a counterparty and so is unlikely to apply to most SPVs.

Margining Requirements for OTC Derivatives

Parties are not required to exchange initial or variation margin in respect of uncleared OTC derivatives where one of them is an NFC.

The Securities Financing Transaction Regulation

Where an Irish SPV enters into any repo or securities lending or financing transaction, it will be subject to the Securities Financing Transaction Regulation ("SFTR").

Counterparties to securities financing transactions ("SFTs") are categorised as either a financial counterparty ("FC") or a non-financial counterparty ("NFC"). While the classifications are distant to those applied under EMIR, Irish SPVs would generally be classified as NFCs, i.e. non-financial counterparties. FCs include, among others, MiFID investment firms credit institutions, insurance undertakings and AIFs.

As with EMIR, both parties to a SFT will be required to report to a trade repository and a NFC can delegate reporting obligations.

However, where a FC enters into a SFT with a NFC, the FC will be required to report where the NFC does not exceed the limits of least two of the three following criteria:

a) Balance sheet total of €20,000,000;
b) Net turnover of €40,000,000; or
c) Average number of 250 employees during the relevant financial year.

Data Protection

It might be the case that personal data will be held or controlled by an Irish SPV in accordance with the terms of the transaction documents. If that was the case the Irish SPV might be seen as a data controller for the purposes of Irish and EU data protection law. The relevant transaction documents would then need to be reviewed by a data protection lawyer to understand the data protection obligations of the Irish SPV and to mitigate any unnecessary data protection risk.

In Ireland, there is no registration required if an Irish SPV was a data controller or processor.

AML - Irish Schedule 2 Regime

If an Irish SPV originates loans, it will likely be required to register with the CBI for anti-money laundering purposes (known as the Schedule 2 regime) and be required to have the necessary AML policies and procedures in place, as well as conduct KYC on its borrowers.

Corporate service providers in Ireland assist with the above registration and implementation of the AML policies and procedures. For example, the corporate service provider would implement an AML policy for the Irish SPV, as well as provide the services of a money laundering reporting officer to ensure compliance with the relevant AML legislation.

Satisfying KYC on the loan portfolio requires an operational discussion. If compliant with the EU's Anti-Money Laundering Directive, a reliance arrangement can be put in place with the relevant servicer whereby the SPV is allowed to rely on the servicer's own local KYC. This depends on the status and AML

supervision of the service provider and the equivalence of the home and host country KYC standards. If this is not permissible, KYC compliant with the Irish SPV's Irish obligations must be obtained on an outsourced basis (whether with the servicer or the corporate services provider).

Credit Servicing

Irish consumer protection legislation contains important provisions for purchasers of Irish loans acquired from, or originated by, regulated lenders (and most recently, other forms of consumer credit such as hire-purchase and point of sale lending are now also subject to this regime). In brief, authorisation is required for ownership and servicing of such loans to Irish individuals or SMEs.

Subject to certain qualifying securitisation exemptions, if an Irish SPV acquires the legal title of Irish loans acquired from, or originated by, regulated lenders it needs to either:

a) Appoint an entity which is already regulated as a credit servicing firm; or
b) Obtain a credit servicing firm licence itself.

Such an appointment or licence needs to be obtained prior to the acquisition of the legal title. The concept of ownership also extends to 'management and control' types of influence and decision-making outside of day-to-day servicing, so careful consideration needs to be given to rights often granted to the equity in loan portfolio or origination transactions.

The Irish position will need to be amended in due course to take account of the EU's Directive on NPLs and credit servicing though it remains to be seen to what degree Ireland will gold-plate its transposition of same to retain the current domestic position in effect or only adopt a minimum harmonisation position which would serve to reduce the scope of the current regime.

Irish Credit Reporting

The Credit Reporting Act 2013 (as amended, the "CRA") applies to certain forms of credit provided by an Irish-established lender where the debtor is resident in Ireland, or where the credit agreement is governed by Irish law. The CRA requires that in-scope lenders provide the CBI with basic information on all credit arrangements exceeding €500, which are within the scope of the CRA.

If an Irish SPV provides credit to a debtor in Ireland or be party to a credit agreement governed by Irish law, it needs to register with the CBI's credit reporting register and then provide the CBI with monthly data on the loan. Most corporate service providers are providing this service on behalf of the Irish SPV. The reporting is generally of quite static data albeit there are some trigger based events i.e. defaults and early repayments under the loan agreement.

There is also a requirement on lenders to perform a credit check in advance and in respect of any credit over €500.

In terms of sanctions, there are offences and penalties arising for entities deliberately providing false information to the register. Finally, there are some *de minimis* charges applied by the registry itself.

FVC vs SPV Reporting

Irish-resident securitisation vehicles (such as a CLO issuer) are obliged to report quarterly data to the CBI under the FVC Regulation (Regulation ECB/2013/40). An FVC is defined as an entity whose principal activity meets both of the following criteria:

a) It carries out securitisation transactions and its structure is intended to isolate the payment obligations of the undertaking from those of the originator, or the insurance or reinsurance undertaking (in the case of insurance-linked securitisations); and

b) It issues debt securities, other debt instruments, securitisation fund units, and / or financial derivatives and / or legally or economically owns assets underlying the issue of these financing instruments that are offered for sale to the public or sold on the basis of private placements.

The CBI has recently issued local Irish guidance interpreting the FVC-level definition.

If not qualifying as an FVC under the CBI guidance, Irish incorporated Section 110 companies are obliged to report quarterly data to the CBI under Section 18 of the Central Bank Act 1971. The corporate service providers in Ireland will usually facilitate of the registration of the Irish SPV with the CBI, as well as complete the periodic reporting on the its behalf, whether the SPV is treated as an FVC or otherwise. In practice, there is little difference between the two regimes.

LEI

Legal entity identifiers ("LEI") are usually obtained by the corporate service providers of Irish SPVs. The LEI numbers are used for a variety of things including KYC checks by deal counterparties as well as the unique identifier code for securitisations pursuant to the Securitisation Regulation.

Irish Implementation of the Securitisation Regulation - European Market Update

The European Union (General Framework for Securitisation and Specific Framework for Simple, Transparent and Standardised Securitisation) Regulations 2018 (as amended, the "Irish Regulations") to give further effect to Regulation (EU) 2017/2042 ("Securitisation Regulation"), came into force on 1 January 2019 and apply to all in-scope securitisation transactions.

Who is your competent authority?

The CBI has been appointed as the competent authority for securitisations for Irish institutional investors, originators, sponsors, original lenders and securitisation special purpose entities ("SSPEs").

Notice of Securitisation

An Irish originator, sponsor and SSPE (where applicable) each must notify the CBI of a securitisation not later than 15 working days after the first issue of securities of that securitisation ("CBI Notice"). The CBI Notice shall specify the Securitisation Regulation classification of the person making the notification and include the following information:

- The ISIN (international securities identification number) of the securitisation; and
- The name, registered office, corporate status and LEI (legal entity identifier) of each of the originator, sponsor and SSPE in respect of the securitisation, as well as identifying the designated reporting entity under the Article 7 transparency and disclosure requirements of the Securitisation Regulation.

Method of Filing

SSPEs which qualify as financial vehicle corporations ("FVCs"), pursuant to Regulation ECB/2013/40 (the "FVC Regulation"), should file the CBI Notice through the same channel used for complying with reporting obligations under the FVC Regulation. An Irish corporate services provider ("CSP") is normally engaged by an Irish SSPE to complete FVC reporting and so will be familiar with how this works in practice.

Irish-regulated originators and sponsors should use pre-existing channels of communication with their Irish competent authority to complete the notification.

Most SSPEs will be FVCs, but for those that are not (e.g. if more than 50% of their activity is loan origination or they are majority-funded by their sponsor or do not issue notes) or for any non-regulated Irish originators, the CBI Notice should be sent to securitisation@centralbank.ie.

Responsibility for Filing

Where the SSPE in a securitisation is an Irish entity (e.g. for a European CLO, CMBS or marketplace securitisation or any Irish asset backed deal), the transaction documentation will usually specify that the SSPE is responsible for completing the CBI Notice. The CSP or Irish counsel will generally complete the filing for the SSPE in practice.

Given the Irish Regulations suggest each relevant person must make a notification, where the originator or sponsor in the securitisation is also an Irish entity and absent further CBI guidance, each such person should also complete a CBI Notice.

Access to Article 7 Information / Ongoing Reporting

As of the date of this update, the CBI has not issued any guidance on whether or how it is to receive or access the information to be made available under Article 7 of the Securitisation Regulation. Furthermore, it has not prescribed any methods for ongoing filings to be made in respect of event-based reporting (as the UK Financial Conduct Authority has for private securitisations). In respect of cross-border transactions that may have retainers and SSPEs domiciled in different countries (e.g. a UK retainer and an Irish SPV in a CLO), the transaction documents should be flexible enough to meet the different supervisory regimes and expectations applicable to each.

While we do not anticipate the CBI imposing additional Irish reporting requirements, transaction documentation should allow any Irish SSPEs, originators or sponsors to direct the designated reporting entity (or its agent) to make available the relevant reportable information in such manner as the CBI may require in future.

Supervisory Powers

The CBI has wide powers to supervise and enforce compliance with the Securitisation Regulation and the Irish Regulations in respect of regulated and non-regulated firms (e.g. SSPEs and certain originators). These include a general power to issue directions to market participants to compel or cease various actions in order to ensure the integrity of financial markets or enhance investor confidence.

Where negligent or intentional contraventions of the Securitisation Regulation or the Irish Regulations are suspected in respect of a non-regulated firm, the CBI may appoint an assessor to investigate and make determinations. In this regard, each SSPE should seek reasonable assistance covenants from relevant deal counterparties in the transaction documents to enable it to comply with its obligations in such a scenario. Similarly, the costs of an SSPE in complying with its obligations under the Irish Regulations should be provided for in the transaction documents as appropriate.

In respect of regulated Irish firms (including Irish institutional investors), the CBI's existing powers of supervision and enforcement have been extended to include compliance with the Securitisation Regulation.

Sanctions and Offences

The administrative sanctions that can be imposed by the CBI under the Irish Regulations track the sanctions set out in Article 32(2) of the Securitisation Regulation. Ireland has not sought to 'gold-plate' the Securitisation Regulation as part of the implementation process.

The Irish Regulations do not create any criminal offences for breaches of the Securitisation Regulation itself. However, there are 'failure to cooperate' and 'false / misleading information provision' types of offences in respect of any CBI exercises of its prescribed powers (e.g. a failure to comply, without reasonable excuse, with a request from a relevant CBI officer). For more information, regulated and non-regulated firms should consult counsel dealing with any CBI request made pursuant to the Irish Regulations.

Conclusion

The Irish Regulations and CBI guidance to date represent a sensible Irish implementation of the Securitisation Regulation and further underline Ireland's leading position as a hub for European securitisations.

EU Market Abuse Regime for Irish SPVs with Irish-Listed Debt

EU regulation (596/2014) on market abuse ("MAR") and EU directive (2014/57/EU) on criminal sanctions for market abuse ("CSMAD") came into force in EU Member States (including Ireland) on 3 July 2016.

MAR and CSMAD repeals and replaces the current EU market abuse regime and, as well as modifying the current regime, will also extend the regime, currently applicable to issuers of debt securities listed on EU regulated markets, to issuers of debt securities listed on EU multilateral trading facilities, such as the GEM operated by Euronext Dublin in Ireland (together, the "Issuers").

This briefing summarises the key obligations of the new regime and recommended next steps. We also include a glossary of key terminology.

Key Obligations

The MAR regime continues to require:

a) Disclosure of inside information;
b) Preparation of insider lists; and
c) Reporting of certain transactions of persons within the Issuer discharging managerial responsibilities and persons closely associated with them ("PDMRs");

and prohibit:

a) Engaging or attempting to engage in, or recommending or inducing another person to engage in, insider dealing;
b) Market manipulation (attempted market manipulation is also now prohibited); and
c) Unlawfully disclosing inside information.

The new regime also imposes additional obligations relating to:

a) Delaying disclosure of inside information;
b) Form and content of insider lists; and
c) Restricted dealing periods for PDMRs.

Requirement to Disclose Inside Information

MAR requires issuers to inform the public as soon as possible of inside information. Disclosure must be made in a manner which enables a prompt and complete assessment by the public of the information, may

not be combined with marketing information and must be posted and maintained on the issuer's website for at least five years.

An issuer may delay disclosure of inside information if:

a) Immediate, disclosure is likely to prejudice the Issuer's legitimate interests;
b) The delay is not likely to mislead the public; and
c) The issuer can ensure the confidentiality of the information.

Where an issuer delays disclosure of inside information, MAR now requires such issuer to inform the relevant competent authority in writing of the delayed disclosure and, if required by the relevant Member State, to provide the relevant competent authority with a written explanation of how the conditions for delay were satisfied, in each case immediately after public disclosure.

Next Steps

Issuers should establish policies and procedures:

a) To assess whether information is inside information and whether this should be disclosed or delayed;
b) For immediate disclosure of inside information in the required manner;
c) Where disclosure has been delayed, to ensure the required conditions are met and monitored and that records documenting the delay are maintained; and
d) For notification to the relevant competent authority once delayed disclosure takes place.

Prohibited Activities under MAR

Prohibition of Insider Dealing

MAR prohibits engaging, or attempting to engage in, recommending or inducing another person to engage in, insider dealing.

Insider dealing arises where a person acquires or disposes of financial instruments on the basis of inside information relating to such financial instruments.

Prohibition of Unlawful Disclosure of Inside Information

MAR prohibits the unlawful disclosure of inside information.

Unlawful disclosure occurs where a person possesses inside information and discloses this to someone else, except in the normal course of employment, a profession or duties.

Prohibition of Market Manipulation

MAR prohibits market manipulation and attempted market manipulation. Market manipulation includes behaviour which:

a) Gives, or is likely to give, false or misleading signals of the supply, demand or price of a financial instrument; or
b) Secures, or is likely to secure, the price of a financial instrument at an abnormal or artificial level, unless such behaviour has been carried out for legitimate reasons and conforms with an 'accepted market practice' under MAR.

Requirement to Maintain Insider Lists

MAR requires issuers or any person acting on their behalf or on their account to maintain lists, in the form required by MAR, of all people who have access to inside information and who work for them as employees or in another capacity that provides access to inside information, such as advisers, accountants and credit rating agencies. The issuer remains fully responsible for insider lists prepared on its behalf.

Issuers, or any person acting on their behalf or on their account, must also ensure that each person on an insider list acknowledges in writing their legal and regulatory duties and the sanctions for breach of obligations, in each case under MAR.

Next Steps

Issuers should establish policies and procedures to ensure:

a) Insider lists are prepared and maintained where required;
b) Form and content requirements are followed; and
c) Persons on insider lists have acknowledged their obligations and the sanctions for non-compliance.

Restrictions on PDMR Transactions

MAR requires PDMRs to promptly (within three business days of the relevant transaction) notify the issuer and the relevant competent authority of transactions for their own account involving shares and debt instruments of the Issuer (and derivatives and other financial instruments linked to these). Pledging or lending of financial instruments and trading by a portfolio manager on a PDMR's behalf will also constitute transactions for these purposes. These notifications will only be required when the aggregate value of such transactions by a PDMR amounts to (without netting) €5,000 or €20,000, depending on the EU Member State. Upon receipt of such notification, issuers must promptly (within three business days of the relevant transaction) publically disclose the relevant transactions. In a significant change from the current regime, save in limited circumstances, PDMRs are restricted under MAR from conducting transactions during the 30 calendar days before the announcement of an interim financial report or year-end report.

Next Steps

Issuers should establish policies and procedures to ensure:

a) A list of all PDMRs is prepared and maintained;
b) Its PDMRs are notified in writing of these obligations; and
c) Required notifications and public disclosures adhere to the form and content requirements of MAR.

Civil and Criminal Sanctions Under MAR and CSMAD

MAR sets out minimum administrative sanctions in respect of breaches of the new market abuse regime. These include 'cease and desist' orders, the return of profits gained or losses avoided as a result of the breach, public censure, fines, withdrawal or suspension of an investment firm's authorisations and temporary bans of PDMRs within an investment firm, or of any other natural person, from exercising management functions or dealing for their own account. CSMAD requires EU Member States to implement 'effective, proportionate and dissuasive' criminal sanctions for the most serious insider dealing and market manipulation offences.

Summary

While MAR obligations fall directly on issuers, in the CLO sector Issuers will look to their collateral managers to assist the issuers with their MAR compliance, including in relation to the maintenance and preparation of insider lists within the manager when required and subjecting the manager to an 'all reasonable MAR assistance' obligation in the collateral management agreement.

Key Terminology

"Inside information" is information that:

a) Is precise;
b) Has not been made public;
c) Relates directly or indirectly to the Issuer or its financial instruments; and
d) If made public, would be likely to have a significant effect on the price of those financial instruments or on the price of related derivative financial instruments.

MAR also provides the following guidance in relation to determining whether information constitutes inside information:

a) The "reasonable investor" test applies - would a reasonable investor be likely to use the relevant information as part of its investment decision;
b) Information will be of a "precise" nature if it indicates:
   (i) a set of circumstances which exist or which may reasonably be expected to exist; or

(ii) an event which has occurred or which may reasonably be expected to occur, where the information is specific enough to draw a conclusion as to the possible effect on the relevant price; and

c) An intermediate step in a protracted process will be inside information if, by itself, it satisfies the criteria of inside information.

"Persons discharging managerial responsibilities" means a person within an issuer who is a:

a) Member of the administrative, management or supervisory body; or
b) Senior executive who is not a member of such bodies, who has regular access to inside information relating directly or indirectly to the issuer and the power to take managerial decisions affecting the future developments and business prospects of the issuer.

"Persons closely associated" means a:

a) Spouse or a partner considered to be equivalent to a spouse;
b) Dependent child;
c) Relative who has shared the same household for at least one year on the date of the relevant transaction; or
d) Legal person, trust or partnership, the managerial responsibilities of which are discharged by a person discharging managerial responsibilities or by a person referred to in point (a), (b) or (c) above, which is directly or indirectly controlled by such a person, which is set up for the benefit of such a person, or the economic interests of which are substantially equivalent to those of such a person.

"Financial instrument" is as defined in Directive 2014/65/EU on markets in financial instruments.

Non-EU Managers – Understanding the Provision of Portfolio Management and Investment Advice Services in Ireland

As more US managers have entered the European market over recent years, and since UK managers have become third-country firms following the completion of the Brexit process, we have seen two models emerge – either the existing non-EU regulated manager is appointed directly to manage the Irish SPV with the manager relying on the Irish safe harbour described below or where needed, a new regulated European entity is established for this purpose.

While the choice of business model will be informed by many factors, it is important for US managers to understand the European regulatory framework for the provision of manager services to European issuers and we have summarised the key points below.

Non-MiFID Services

It is vital to understand first that MiFID (and a local Irish law, the Investment Intermediaries Act, 1995 (as amended)) applies to the provision of portfolio arrangement and investment advice to an Irish SPV only where the SPV's portfolio will include relevant MiFID financial instruments (e.g. bonds, derivatives, etc. – see the Appendix for full list). Importantly, loans alone do not trigger these licensing regimes. So many credit strategies do not require the manager to be licensed to provide relevant services to the SPV.

MiFID Services - The Non-EU Manager Model

MiFID II[1], which has applied since 3 January 2018, provides for the first time an EU framework for non-EU (or 'third country') firms to provide MiFID portfolio management services within the EU on a cross-border basis (also known as a 'third country passport'), provided that certain conditions are fulfilled. To date, this passport regime has not yet been initiated by European authorities.

In order to qualify for the passport, a non-EU firm is required to be:

a) Authorised in the third country where its head office is established[2] to provide portfolio management services that are regulated under MiFID II:

[1] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

[2] As opposed to its jurisdiction of incorporation. For example, a Cayman Islands incorporated manager whose registered office may be in the Cayman Islands but whose head or principal office is in New York, ought to be considered a US-situated manager for the third country passport regime.

(i) in respect of which country the European Commission ("EC") has adopted an equivalency decision; and
(ii) where the European Securities and Markets Authority ("ESMA) has established cooperation arrangements with the relevant competent authorities; and

b) Registered with ESMA to do so.

The passport is only available in respect of services provided to certain sophisticated clients, known in MiFID II as eligible counterparties and per se professional clients (of which, the typical Irish SPV such as a CLO issuer is the latter) ("Eligible Clients"). It is not possible to guarantee or predict the timing of any EC equivalency decision or the establishment of cooperation arrangements or registration by ESMA.

Irish Safe Harbour

However, MiFID II provides certain transitional measures so that third country firms may continue to provide MiFID portfolio management services in the EU on a cross-border basis in accordance with the relevant national regimes: (i) until the time of any EC equivalency decision; and (ii) following any EC equivalency decision, for a maximum of three years. If, for example, a US firm is providing collateral manager services to an Irish CLO issuer, then in the absence of an EC equivalency decision in respect of the US, the Irish rules continue to apply.

In the example of Ireland, the Irish MiFID II Regulations[3] contain a safe harbour that is readily accessible to non-EU regulated managers providing services to Irish Eligible Clients. A similar safe harbour was available under the Irish regulations in respect of the previous MiFID regime.

In summary, a non-EU manager (by reference to its head or registered office) does not need to be authorised under MiFID II solely to provide investment services in Ireland to a qualifying Irish SPV, provided the manager has not established a branch in Ireland, is subject to authorisation and supervision in its country of establishment (as a manager) and the non-EU country in which the manager is established itself remains an IOSCO Multilateral MOU signatory (on international regulatory cooperation) and is not on the FATF blacklist.

MiFID Services - The EU Manager Model

If the manager seeks to establish a subsidiary in Europe, that entity will be required to be regulated under MiFID II, as locally implemented in the country of establishment.

Although MiFID II aims to harmonise EU regimes further, the authorisation requirements in each EU country will still vary somewhat depending on the approach to implementation of MiFID II into the local law of each European member state. Generally speaking, however, in order to gain a MiFID II licence resources will need to be committed such that the decision making and control decisions of the licensed entity and its operations will be considered to be undertaken in the relevant member state.

[3] S.I No. 375 of 2017 the European Union (Market in Financial Instruments) Regulations 2017.

Particularly since Brexit, increasing numbers of non-EU managers have been establishing their EU operations in Ireland and we continue to work with a number of US and UK managers to establish an Irish MiFID authorised manager entity and our experience with the CBI has been very positive to date. The choice of Ireland as a base is natural given the global popularity of the Irish regulated investment fund product and the resulting long-established and deeply experienced and resourced financial services industry sector.

Application Procedure

Subject to qualifying for any applicable exemptions, an investment firm will require authorisation under Regulation 5 of the MiFID Regulations[4] to:

a) provide one or more investment services in Ireland; and
b) in respect of one or more financial instruments[5].

The authorisation process involves an application to the Central Bank. The key steps in the process are as follows:

a) An initial submission to the CBI of a Key Facts Document (KFD);
b) A preliminary meeting with the CBI to discuss the applicant's business objectives and how these fit within the MiFID regime;
c) Submission of a complete application form including:
   (i) a detailed programme of operations;
   (ii) individual questionnaires for each pre-approved control function ("PCF") holder;
   (iii) financial projections; and
   (iv) ownership details, a group structure chart and accounts of all entities in the group; and
d) Review of the application by the CBI and final decision.

Once authorised in one EU member state, an investment firm can 'passport' its services (by way of establishing a branch or through the freedom of services) into other EU member states.

Outsourcing Considerations and Key Roles

To establish a MiFID entity the 'head office' / 'principal place of business' or 'the mind and management' of the applicant must be located in Ireland.

Therefore, an applicant will require senior management presence in Ireland to ensure that full authority and effective control of the applicant's core functions (such as financial control, legal and compliance and risk management) rests there with an expectation of at least three locally-based full time employees (depending on the nature, scale and complexity of the investment firm's business).

[4] The European Communities (Markets in Financial Instruments) Regulations 2017 (S. I. No. 375 of 2017).
[5] See list of investment services and financial instruments as set out in the MiFID Regulations in Appendix 1.

An Irish authorised MiFID firm may delegate some of its activities to entities in other jurisdictions, subject to the MiFID Regulations and the MiFID II Delegated Regulation[6].

Regulation 23(1) (h) of the MiFID Regulations states that an investment firm must ensure that any outsourcing of important operational functions will not materially impair the quality of its internal control and ability of the CBI to monitor the investment firm's compliance with its MiFID obligations (with due diligence requirements and minimum contractual terms to be agreed prescribed by the MiFID II Delegated Regulation). The Central Bank's assessment of whether an applicant that is outsourcing important functions retains the necessary substance and control is subjective, based on the specific circumstances of each applicant.

The CBI expects that a firm must be able to demonstrate that it has necessary expertise to supervise the outsourced functions effectively.

Conditions for Authorisation

These are as follows:

a) **Capacity to Provide Investment Services:** The applicant's constitutional documents must give it sufficient capacity to conduct investment services.
b) **Minimum Capital:** The applicant must have sufficient capital in line with the Capital Requirements Directive.
c) **Directors / Managers:** The CBI must be satisfied as to the probity and competence of the directors and senior management of the applicant. Detailed online individual questionnaires must be completed.
d) **Qualifying Shareholders:** Full details of the suitability of each qualifying shareholder needs to be provided, including group structure charts, details of all regulated entities in group, accounts for all entities in ownership chain and evidence showing ownership of each entity in that chain.
e) **Structure, Skill, Staffing:** The CBI must be satisfied as to the organisational structure and management skills of the applicant and that adequate levels of staff and expertise will be employed to carry out its proposed activities.
f) **Ongoing Organisational Requirements and Conduct of Business Requirements:** The MiFID Regulations apply high-level organisational and conduct of business standards to all investment firms.

Timing

The CBI has six months from the date it receives a complete application to provide its decision (which can be extended by another six months). The CBI will determine if an application is complete or not within ten working days of receipt. The entire process can take approximately six to nine months.

[6] Commission Delegated Regulation (EU) 2017/565 supplementing MiFID II as regards organisational and operating conditions for investment firms and defined terms.

Our Role

The Maples Group provides legal advice, regulatory guidance and practical support to investment firms regulated under the MiFID regime, particularly in the context of firms seeking authorisation in the structured finance and securitisation sectors where our transaction advisory teams in Dublin are consistently recognised as market leaders.

Our regulatory advisory teams can provide full support on MiFID authorisation projects for new investment firms setting up in Ireland (including associated support from other practice areas including corporate, tax, property and employment).

We can carry out policies and procedures reviews and upgrades to meet MiFID organisational requirements and conduct of business rules. We regularly liaise with the CBI on cross-border passport applications and EU branch establishments.

We also provide support on areas such as anti-money laundering, business continuity planning and automated compliance monitoring.

Appendix

Investment Services (as contained in Schedule 1, Part 1 of the MiFID Regulations)

1	The reception and transmission of orders in relation to oneor more financial instruments.
2	Execution of orders on behalf of clients.
3	Dealing on own account, meaning the activity of trading against proprietary capital resulting in the conclusion oftransactions in one or more financial instruments.
4	Portfolio management.
5	Investment advice.
6	Underwriting of financial instruments or placing of financialinstruments on a firm commitment basis.
7	Placing of financial instruments without a firm commitment basis.
8	Operation of multilateral trading facilities.
9	Operation of organised trading facilities.

Note – Schedule 1, Part 2 sets out Ancillary Services.

Financial Instruments (as contained in Schedule 1, Part 3 of the MiFID Regulations)

1	Transferable securities.
2	Money market instruments.
3	Units in collective investment undertakings.
4	Options, futures, swaps, forward rate agreements and anyother derivative contracts relating to securities, currencies,interest rates or yields, emission allowances or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash.
5	Options, futures, swaps, forwards and any other derivativecontracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event.
6	Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market, a MTF, or an OTF, except for wholesale energyproducts traded on an OTF that must be physically settled.
7	Options, futures, swaps, forwards and any other derivativecontracts relating to commodities, that can be physically settled not otherwise mentioned in paragraph 6 of this Part and not being for commercial purposes, which have the characteristics of other derivative financial instruments.
8	Derivative instruments for the transfer of credit risk.
9	Financial contracts for differences.
10	Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event, as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Part, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, an OTF or an MTF.
11	Emission allowances consisting of any units recognised for compliance with the requirements of Directive 2003/87/EC.

ESG - Sustainable Securitisation Report

One of the amendments to the EU Securitisation Regulation[7], which came into force in April 2021, required the European Banking Authority ("EBA") to publish a report on developing a sustainable securitisation framework to integrate sustainability-related transparency requirements into the EU Securitisation Regulation. The EBA published this report, developing a Framework for Sustainable Securitisation, on 2 March 2022 (the "Report").

In terms of the overall state of the EU sustainable securitisation market, the Report concludes its development to date (compared to the US and Chinese markets) has been hampered by a lack of available sustainable assets and the absence of a definition, standards, and data to foster transparency and credibility in the market.

The Report particularly focuses on: (i) how the EU green bond standard ("GBS") can be applied to securitisations; (ii) the relevance of a dedicated framework for sustainable securitisation at this time; and (iii) the nature and content of sustainability-related disclosures for securitisation products.

EU GBS Regulation Applicability to Securitisations

One of the key areas that the EBA explores in the Report is the application of the EU GBS. As further described in our client update last year[8], the European Commission proposed the EU GBS regulation[9] to make the EU's financial system more sustainable by creating a voluntary 'gold standard' for green bonds. The focus of the EU GBS is to ensure that funds raised by the underlying bond are exclusively allocated to finance economic activities that are either environmentally sustainable projects or contribute to the transformation of activities to become environmentally sustainable.

The EBA recommends that the EU GBS should also apply to securitisation in order to ensure a level playing field across all types of green bond instruments. The Report recognises, however, that certain adjustments to the EU GBS will be necessary to make it appropriate for securitisation. Two such adjustments are:

a) The EU GBS requirements (including the use of proceeds, disclosures and sanctions) apply in the first instance to the bond issuer. However, in the securitisation context the Report recognises this should be switched to apply at the originator level. This would also allow a green securitisation to have non-green assets, so long as the use of proceeds by the originator qualifies.

This is an important accommodation while the supply of green assets is built up in the real economy; and

[7] Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012

[8] https://maples.com/en/knowledge-centre/2021/7/european-commission-proposed-green-bond-standard

[9] 2021/0191 COD.

b) The reporting of the EU GBS disclosure framework should be adjusted to make it compatible with Article 7 of the Securitisation Regulation.

Dedicated Framework for Sustainable Securitisation

Given the EBA's recommendations with regard to the EU GBS, it is unsurprising that the Report finds that it is not appropriate to establish a specific framework for green securitisation at this time. The EBA's view is that it is premature to establish a dedicated framework in addition to the EU GBS when the EU GBS has not been adopted yet. The EBA also specifies that the EU green securitisation market is still at an early stage of development. Therefore, it is too early to develop a dedicated framework and indeed it might create risks by not being suited to the demands of investors and issuers. The Report envisages that a dedicated framework might become relevant in the future once more green assets are available and the market has developed.

Sustainability-Related Disclosures for Securitisation

The Report concludes by re-emphasising that investors need to be able to perform due diligence and issuers / originators need to be able to provide clear and transparent disclosure of ESG factors in order for the sustainable securitisation market to grow. The EBA advises that no additional investor ESG due diligence requirements are necessary for securitisation specifically. However, the Report does make several other recommendations, including that the application of principal adverse impact disclosures should be extended to Non-STS Securitisations.

Next Steps and Implications for CLOs

Based on the Report and the EBA's recommendations, the European Commission will submit its own report to the European Parliament and the EU Council on creating a sustainable securitisation framework. The publication of the EBA report is a welcome development, and both the Report and the anticipated report from the European Commission will generate further momentum in the growing EU sustainable securitisation market.

The implications for CLOs of extending the EU GBS rather than introducing a dedicated framework for sustainable securitisation remain to be seen. While the proposed adjustments to the EU GBS to accommodate securitisation generally are very welcome, they may not fit secondary market securitisation activity such as CLOs given the issuance proceeds do not flow to a single asset-level originator.

However, the CLO product has already made material progress towards sustainable securitisation objectives driven by both investor appetite and manager policy, initially by the adoption of ESG negative screening and latterly by the positive application of ESG manager methodology / scoring. We anticipate some EU MiFID managers may in 2022 print the first Article 8 Sustainable Finance Disclosure Regulation compliant CLOs. Further, as the ESG asset supply increases over time CLOs will in turn naturally access sustainable securitisation frameworks and labels.

European Commission Proposed Green Bond Standard

On 6 July 2021, the European Commission proposed a new Regulation on a voluntary European Green Bond Standard ("EU GBS"). The proposed Regulation aims to make the EU's financial system more sustainable by creating a gold standard for green bonds that can be compared to, and potentially aligned with, other market standards.

The EU GBS will be open to all issuers of green bonds, including both private, public and sovereign issuers, and includes issuers located outside of the EU. The proposed framework will create a high-quality voluntary standard for how companies and public authorities can use green bonds to raise funds on capital markets to finance investments.

Green Bonds at European Level

In recent years, the markets have already demonstrated that there is a strong investor demand for green bonds, which are used to finance climate-mitigating investments in sectors such as energy production and distribution, resource-efficient housing, and low-carbon transport infrastructure.

It is hoped that because the EU has established itself as a global leader in the area (with 51% of global issuance in 2020 from EU companies and public bodies) that the introduction of the EU GBS will generate further momentum in sustainable finance for the EU financial sector from across international markets. Despite the recent steady growth in the market, current green bond issuance in the EU still only represents 2.6% of total EU bond issuance, so there remains a significant opportunity for growth.

Key Features of the EU GBS

a) **Inclusive:** It will be open to all EU and non-EU issuers, including corporates, sovereigns, financial institutions, and issuers of covered bonds and asset-backed securities. Specifically, limited flexibility will be provided for sovereign issuers.

b) **Voluntary:** It will be a voluntary standard setting out uniform requirements for any bond issuers that wish to call their bond a 'European green bond' or 'EuGB'.

c) **Aligned with the EU Taxonomy:** The standard requires that issuers must allocate 100% of the issue proceeds to economic activities that meet the EU Taxonomy Regulation EU/2020/852 ("Taxonomy Regulation") requirements by the time the bond matures. It sets out environmental objectives,

screening criteria and performance thresholds for economic activities[10]. An activity will be considered compliant if:

(i) it contributes substantially to one or more of the environmental objectives;
(ii) does no significant harm to other environmental objectives; and
(iii) complies with social and governance safeguards.

d) **Supporting Issuers in Transition:** European green bonds can be used to fund long-term projects (of up to 10 years) that are engaged in an economic activity aligned with the Taxonomy Regulation's environmental objectives.

e) **External Review**: European green bonds will be subject to external review to ensure that the bonds are compliant with the proposed EU GBS requirements, in particular the taxonomy-alignment of the funded projects. External reviewers will be registered with the European Securities and Markets Authority and will need to meet the conditions for registration on an ongoing basis.

f) **Grandfathering:** In the event of a change in the EU Taxonomy Technical Screening Criteria (TSC) under the Taxonomy Regulation after a bond issuance, issuers can continue to qualify under pre-existing criteria for a further five years.

Transparency Requirements

In order to enhance investor confidence and protections, and to reduce greenwashing risks, the EU GBS subjects issuers to significant reporting standards. In particular, private issuers will be subject to the following requirements:

a) Before issuing the bond, issuers will be required to publish a 'green bond fact sheet' setting out the definitive funding goals and environmental objectives of the bond. This fact sheet will be subject to a 'pre-issuance review' by a registered external reviewer to ensure that the bond meets the EU GBS requirements.

b) Once the bond has been issued, issuers will be required to publish annual reports showing how the issue proceeds of the bond have been allocated to EU taxonomy-aligned projects.

c) Once all of the bond proceeds have been allocated (which must happen prior to the final maturity of the bond), the issuer will be required to obtain a 'post-issuance review'. For certain issuers (such as some financial institutions), this will be an annual requirement.

d) There will also be a requirement to publish at least one report on the overall environmental impact of the bond.

[10] It sets out six environmental objectives and sets performance thresholds (technical screening data) for economic activities. An activity will be considered compliant with the EU taxonomy if it contributes substantially to one or more of the environmental objectives or enables other activities to make a substantial contribution to one or more of them; does no significant harm to other environmental objectives ("DNSH"); and complies with social and governance safeguards.

Transitioning to Sustainability

European green bonds are well-suited for supporting any kind of issuer in their transition towards greater alignment of their economic activities with the Taxonomy Regulation.

This proposal is part of the broader EU agenda on sustainable finance. The focus of the standard is making sure that the funds raised by the bond are allocated to environmentally sustainable investments. There are three main ways in which European green bonds can be used by companies to support their sustainability transition:

a) **Funding Long-Term Projects:** Issuers may use European green bonds to fund multi-year taxonomy-alignment projects, such as converting a production facility to reduce its emissions and meet the taxonomy thresholds. The condition is that the transformation results in an EU taxonomy-aligned project.

b) **Transition Towards Taxonomy-Alignment:** A company could issue a European green bond to acquire or construct an EU taxonomy-aligned asset, such as a new energy efficient building. In this way, the company is gradually increasing its share of taxonomy-aligned assets.

c) **Transition Activities:** The EU Taxonomy sets out criteria for 'transition activities', such as cement and steel manufacturing.

Holistic Approach

European green bonds are designed to be compatible with existing market standards for green bonds. However, the EU GBS goes further by requiring full alignment of funded projects with the Taxonomy Regulation and by establishing a regime for the registration and supervision of external reviewers.

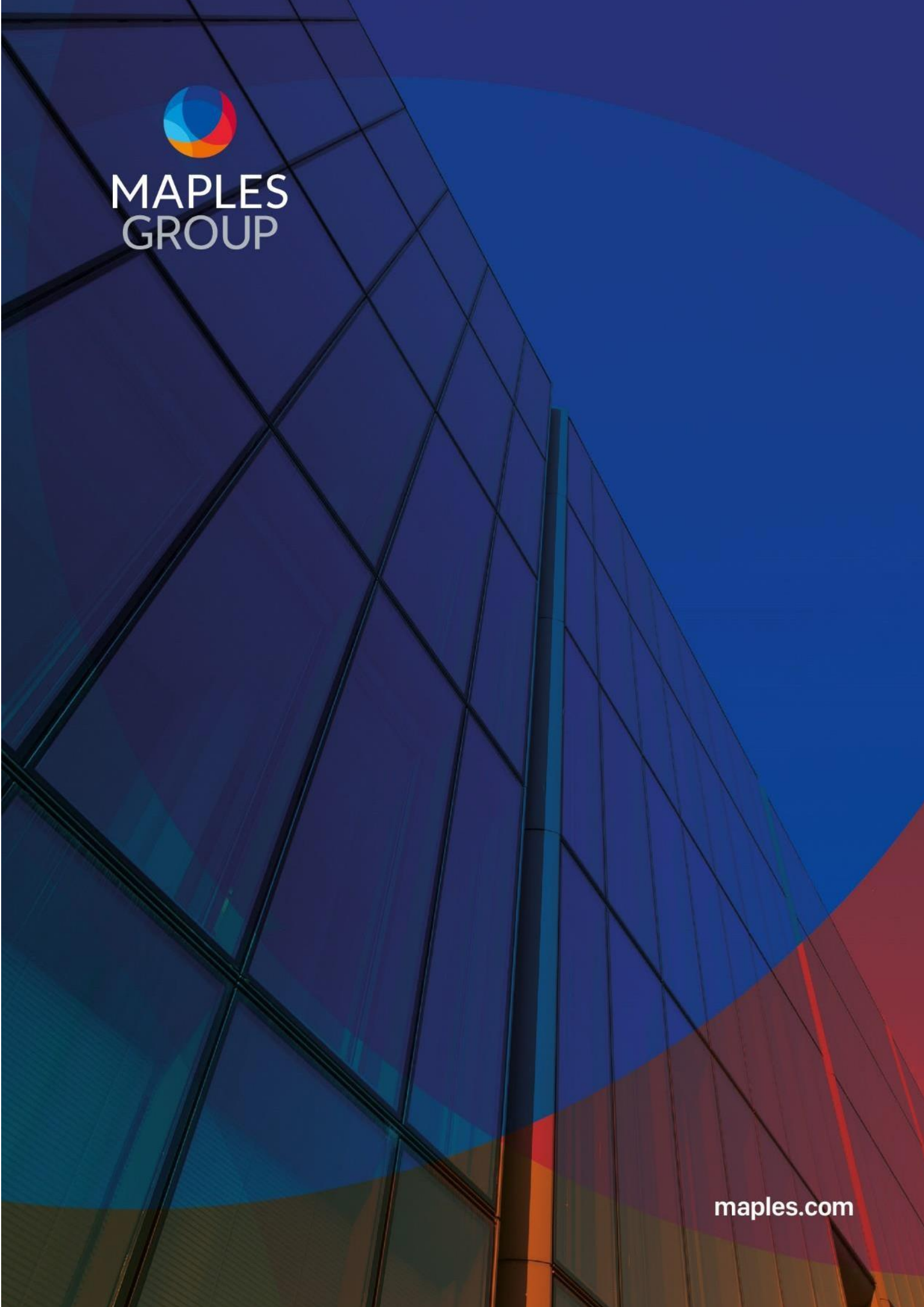
The EU GBS is aligned with the EU's broader policy objectives and runs in parallel with other initiatives such as the EU's Strategy for Financing the Transition to a Sustainable Economy (also known as the EU Sustainable Finance Strategy) and, as already noted, the Taxonomy Regulation.

This proposal's taxonomy-related disclosures requirement will create an entire ecosystem of sustainable finance by maintaining standards which are necessary to channel capital towards the investments needed to reach the EU’s sustainability goals.

Overall, the EU GBS will protect the integrity of the green bond market by fighting greenwashing and clearly recognising those bonds which truly represent a sustainable investment.

Next Steps

Following its adoption, the proposed EU GBS will be submitted to the European Parliament and Council as part of the co-legislative procedure. The estimated adoption date is slated for 2022, due to the need for co-legislators to reach an agreement.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