Structured Finance & Securitisation 2020

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LEXOLOGY®
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the sixth edition of *Structured Finance & Securitisation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Greece and Ireland.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Patrick D Dolan of Norton Rose Fulbright US LLP, for his continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

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GENERAL FRAMEWORK

Legislation

1 What legislation governs securitisation in your jurisdiction? Has your jurisdiction enacted a specific securitisation law?

While section 110 of the Taxes Consolidation Act 1997 established a tax regime to facilitate securitisation transaction, there is no specific Irish legislation that governs securitisation transactions. The law in Ireland applicable to securitisation transactions is derived from EU law that has been implemented into Irish domestic law or has direct effect in Ireland, primarily Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 (the Securitisation Regulation).

Applicable transactions

2 Does your jurisdiction define which types of transactions constitute securitisations?

Irish domestic legislation does not include a specific definition of securitisation. However, the Securitisation Regulation and the Financial Vehicle Corporations (FVC) Regulation include different definitions of securitisation that apply in different contexts.

The Securitisation Regulation defines a securitisation as a transaction or scheme whereby the credit risk associated with an exposure or a pool of exposures is tranched, having all of the following characteristics:

- payments in the transaction or scheme are dependent upon the performance of the exposure or of the pool of exposures;
- the subordination of tranches determines the distribution of losses during the ongoing life of the transaction or scheme; and
- the transaction or scheme does not create exposures that possess all of the characteristics listed in article 147(8) of Regulation (EU) No. 575/2013.

Market climate

3 How large is the market for securitisations in your jurisdiction?

The majority of market data for securitisations is based on the statistical data reported to the European Central Bank in respect of FVC securitisations, which has been compiled since 2009.

In respect of the second quarter of 2019, the total number of FVC vehicles across the eurozone amounted to 4,199, which held €2,022 billion of assets, of which Ireland accounted for 1,123 FVC vehicles (26.7 per cent) holding €476 billion of assets (23.6 per cent) (source: Atlantic Star Consulting, Irish SPV Report Q2-2019).

REGULATION

Regulatory authorities

4 Which body has responsibility for the regulation of securitisation?

Ireland enacted the European Union (General Framework for Securitisation and Specific Framework for Simple, Transparent and Standardised Securitisation) Regulations 2018 (Irish Securitisation Regulations) to give further effect to the Securitisation Regulation, which came into force on 1 January 2019 and apply to all in-scope securitisation transactions.

Under the Irish Securitisation Regulations, the Central Bank of Ireland (CBI) has been appointed as the competent authority for securitisations for Irish institutional investors, originators, sponsors, original lenders and securitisation special purpose entities (SSPEs).

Licensing and authorisation requirements

5 Must originators, servicers or issuers be licensed?

Licensing requirements impact various elements of the securitisation. The holding of legal title, retention of strategic management and control and loan servicing of certain forms of consumer and SME loan assets are regulated pursuant to the credit servicing regime provided for in the Central Bank Act 1997 (as amended). Safe harbours to this regime exist for certain actors, such as financial institutions authorised to provide relevant credit in Ireland by either the CBI or EEA-equivalent authorities. Certain forms of lending, such as consumer and mortgage lending, require separate licences either as a credit institution or a retail credit firm. The Irish government recently proposed to extend the retail credit firm regime to other forms of consumer credit, such as personal contract plans in respect of auto receivables. The arranger or placement agent of the securitisation will need to be licensed or operating in Ireland on a passported basis pursuant to the Capital Requirements Regulation or Markets In Financial Instruments Directive II or fall into certain safe harbours for third-country providers. Since the introduction of the General Data Protection Regulation (GDPR), registration of data controllers is no longer required, though all parties must adhere to their general GDPR obligations.

6 What will the regulator consider before granting, refusing or withdrawing authorisation?

The CBI must be satisfied that the mind and management of the firm is situated in Ireland, as evidenced by factors such as the location and residency of senior management and whether there are 'boots on the ground' in Ireland. Outsourcing is permitted, but is subject to careful scrutiny by the CBI. Other core assessments are made in respect of the financial soundness, integrity and reputation of the firm and its shareholders, directors and senior management, the business plan proposed and the effectiveness and robustness of the proposed controls and supervision in respect of its operation.

Sanctions

7 | What sanctions can the regulator impose?

The CBI has extensive powers to investigate suspected contraventions and, if necessary, takes steps against non-compliant firms and individuals, such as the power to issue directions, impose fines, prohibit individuals from holding certain management positions, withdraw authorisation and suspend business. The CBI has been appointed the Irish competent authority in respect of the Securitisation Regulation.

Public disclosure requirements

8 | What are the public disclosure requirements for issuance of a securitisation?

Prospectus Regulation

Any securitisation transactions that constitute an offer to the public of the securities within the EU or involve the listing of securities on a regulated market in the EU require the preparation of a prospectus in accordance with Regulation (EU) 2017/1129 (the Prospectus Regulation).

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

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

It must be written and presented in a format that is 'easily analysable, concise and comprehensible', taking into account the nature and circumstances of the issuer, and the type of securities.

The prospectus must be approved by the relevant competent authority (in Ireland this is the CBI) and must be publicly available.

Securitisation Regulation

The Securitisation Regulation requires that at the outset of the securitisation, the following information be made available to investors, relevant competent authorities and potential investors (the recipients):

- the final offering document or the prospectus (or where no prospectus is required to be prepared, the transaction summary), together with the closing transaction documents, excluding legal opinions;
- for traditional securitisation, the asset sale agreement, assignment, novation or transfer agreement and any relevant declaration of trust;
- the derivatives and guarantee agreements, as well as any relevant documents on collateralisation arrangements where the exposures being securitised remain exposures of the originator;
- the servicing, back-up servicing, administration and cash management agreements;
- the trust deed, security deed, agency agreement, account bank agreement, guaranteed investment contract, incorporated terms or master trust framework or master definitions agreement or such legal documentation with equivalent legal value;
- any relevant inter-creditor agreements, derivatives documentation, subordinated loan agreements, start-up loan agreements and liquidity facility agreements; and
- the underlying documentation shall include a detailed description of the priority of payments of the securitisation.

9 | What are the ongoing public disclosure requirements following a securitisation issuance?

Securitisation Regulation

During the life of a securitisation, the Securitisation Regulation requires quarterly investor reports be prepared and made available to the recipients. Such reports must include the following:

- all materially relevant data on the credit quality and performance of the underlying exposures of the securitisation;
- information on events that trigger changes in the priority of payments or the replacement of any counterparties and data on the cashflows generated by the underlying exposures and by the liabilities of the securitisation; and
- information about the risk retained in compliance with the risk retention requirements under article 6 of the Securitisation Regulation.

Furthermore, originators, sponsors and SSPEs need to make available to the recipients the following ad hoc information during the life of the securitisation:

- where applicable, any inside information relating to the securitisation as required under the Market Abuse Regulation (MAR) (Regulation (EU) 596/2014) (see below in relation to MAR disclosure requirements);
- a material breach of the obligations provided for in the transaction documents, including any remedy, waiver or consent subsequently provided in relation to such a breach;
- a change in the structural features that can materially impact the performance of the securitisation;
- a change in the risk characteristics of the securitisation or of the underlying exposures that can materially impact the performance of the securitisation; and
- any material amendment to the transaction documents relating to the securitisation.

Market Abuse Regulation

MAR requires issuers who have had their securities admitted to trading (or have made an application for admission to trading) on a regulated market or a multilateral trading facility in the EU to publicly disclose as soon as possible any inside information that directly concerns that issuer.

Inside information is defined in MAR as 'information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments'.

Disclosure must be made in a manner that 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:

- immediate disclosure is likely to prejudice the issuer's legitimate interests;
- the delay is not likely to mislead the public; and
- the issuer can ensure the confidentiality of the information.

Where an issuer delays disclosure of inside information, MAR requires such issuer to inform the relevant competent authority (in Ireland, the CBI) 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.

ELIGIBILITY

Originators

10 | Outside licensing considerations, are there any restrictions on which entities can be originators?

If an entity intends to act as an originator for the purposes of the Securitisation Regulation, it must come within the scope of the following definition:

- itself or through related entities, directly or indirectly, was involved in the original agreement that created the obligations or potential obligations of the debtor or potential debtor giving rise to the exposures being securitised; or
- it purchases a third party's exposures on its own account and then securitises them.

An entity established or operating for the sole purpose of securitising exposures will not be considered to be an originator.

Receivables

11 | What types of receivables or other assets can be securitised?

There are no specific laws on securitisation in Ireland that prohibit the securitisation of any particular asset classes. The Securitisation Regulation prohibits securitisations of underlying assets which themselves are securitisation positions (resecuritisations). There are very limited derogations to the ban on resecuritisations, which are set out at article 8 of the Securitisation Regulation.

If it is intended that a securitisation qualify as a simple, transparent and standardised (STS) securitisation under the Securitisation Regulation, the underlying assets must comply with certain procedural and structural requirements. Commercial mortgage-backed securitisations and actively managed portfolio structures will not meet the STS eligibility criteria. Irish securitisation transactions are used for a wide range of asset classes, including:

- loan portfolios (residential mortgage-backed securities (RMBS), commercial mortgage-backed securities, collateralised loan obligations);
- leases (eg, aircraft);
- trade receivables;
- credit cards;
- car finance; and
- hire purchase arrangements.

Investors

12 | Are there any limitations on the classes of investors that can participate in an offering in a securitisation transaction?

While Irish law does not impose absolute prohibitions on certain classes of investors, securitisations are typically structured so that the securities are only offered to sophisticated investors, with transaction documentation containing selling restrictions designed to ensure this is the case and, where applicable, to avoid the need to publish a prospectus or the creation of a Key Investor Document pursuant to Regulation (EU) 1286/2014, in each case by prohibiting any sale of securities to retail investors.

Custodians/servicers

13 | Who may act as custodian, account bank and portfolio administrator or servicer for the securitised assets and the securities?

The roles of custodian, account bank and portfolio administrator or servicer are generally performed by a bank or investment firm, which is regulated by the CBI or another European competent authority.

For certain classes of Irish assets, such as residential mortgages, the servicer must be licensed (or deemed licensed) as a credit servicing firm under a domestic Irish regulatory regime.

Public-sector involvement

14 | Are there any special considerations for securitisations involving receivables with a public-sector element?

There are no special considerations for securitisations involving receivables with a public-sector element in Ireland. In certain instances, public-sector bodies could be entitled to claim sovereign immunity, and due diligence should be carried out on a public-sector body prior to entering into any agreements with public bodies.

Prior to entering into an transaction with the National Asset Management Agency (NAMA), consideration should be made of the National Asset Management Agency Act 2009, which provides the NAMA with extensive powers going beyond those available to traditional players in the Irish finance market.

TRANSACTIONAL ISSUES

SPV forms

15 | Which forms can special purpose vehicles take in a securitisation transaction?

Special purpose vehicles (SPVs) in securitisation transactions usually take the form of either a private limited company (usually a designated activity company, which is the only form of private limited company that is permitted to list its securities) or a public limited company. The most common form is a designated activity company, with public limited companies only being used for cases where the transaction involves a retail issue of securities (namely securities with a minimum denomination of less that €100,000).

SPV formation process

16 | What is involved in forming the different types of SPVs in your jurisdiction?

SPVs are usually incorporated within three to five business days, although this period can be longer in respect of public limited companies. The organisational documents of the SPV comprise the certificate of incorporation and the constitution of the company, which comprises the memorandum and articles of association.

An SPV incorporated as a private limited company can have a nominal issued share capital. However, a public limited company is required to have a minimum issued share capital of €25,000, a quarter of which must be paid up in order that the company receive a certificate to permit it to commence trading.

Governing law

17 | Is it possible to stipulate which jurisdiction's law applies to the assignment of receivables to the SPV?

Irish law will, in most instances, recognise the choice of law by the parties to the transaction. In respect of Irish-law-governed receivables, typically the receivables sale agreement will be governed by Irish law, given it is Irish law that determines valid sale and perfection issues for Irish law receivables.

Asset acquisition and transfer

18 | May an SPV acquire new assets or transfer its assets after issuance of its securities? Under what conditions?

Irish law does not prohibit the SPV transferring assets or acquiring new assets after its securities. Any restrictions in doing so would be included in the transaction documents governing the securitisation.

Registration

19 | What are the registration requirements for a securitisation?

Under the Irish Securitisation Regulations, the SPV (as well as any Irish entity acting as originator or sponsor of the securitisation) is required to notify the CBI of the issuance of the securities under the securitisation within 15 working days of the issue of the securities.

Obligor notification

20 | Must obligors be informed of the securitisation? How is notification effected?

Obligors under a securitisation are not required to be informed of the securitisation. It is normal for the receivables under a securitisation to be assigned to the relevant trustee by way of equitable assignment. In such a scenario, the obligor continues to repay its debt as it normally would and receives good discharge of its debt if it repays the assignor and not the SPV.

21 | What confidentiality and data protection measures are required to protect obligors in a securitisation? Is waiver of confidentiality possible?

The GDPR does not apply to the data of corporations and only applies to the data of natural persons. In some instances (such as in an RMBS securitisation) there might be the transfer of residential mortgages from a seller to the SPV, which would involve the provision of personal data. It is normal for the names and personal details of such natural persons to be anonymised or not included in the transaction documents at all; if not, it will be necessary to comply with the requirements imposed by GDPR.

Credit rating agencies

22 | Are there any rules regulating the relationship between credit rating agencies and issuers? What factors do ratings agencies focus on when rating securitised issuances?

Regulation (EC) No. 1060/2009 (as amended) governs the relationship between the SPV and rating agencies. If the securities are to be rated, the SPV must appoint at least two credit rating agencies to provide credit ratings independently of each other in respect of the securitisation. Aside from portfolio-level credit quality, the rating agencies focus on legal and tax issues such as true sale analysis, insolvency of the issuer and withholding tax on the notes.

Directors' and officers' duties

23 | What are the chief duties of directors and officers of SPVs? Must they be independent of the originator and owner of the SPV?

The directors of the SPV must adhere to the duties of a director as set out in Part 5 of the Companies Act 2014, including acting in good faith and in the best interests of the company, acting in accordance with the company's constitution and avoiding conflicts between duties to the company and personal interests. There is no requirement for the directors of the SPV to be independent of the originator or owner of the SPV. In order for the SPV to be tax-resident in Ireland it is usual for a majority of directors to be Irish tax-resident and for board meetings to be held in Ireland. If the SPV is an orphan SPV (ie, the shares of the SPV are held on trust for a charity), it is more common for the directors of such an SPV to be independent directors who are usually provided by the corporate administrator of the SPV.

Risk exposure

24 | Are there regulations requiring originators and arrangers to retain some exposure to risk in a securitisation?

In accordance with article 6 of the Securitisation Regulation, the originator, sponsor or original lender of a securitisation must retain on an ongoing basis a material net economic interest in the securitisation of not less than 5 per cent. That interest is measured at the origination and shall be determined by the notional value for off-balance-sheet items. Article 6 of the Securitisation Regulation sets out five permitted retention methods. These include the following (which are the most commonly chosen approaches):

- the retention of a first loss exposure of not less than 5 per cent of every securitised exposure in the securitisation; or
- the retention of not less than 5 per cent of the nominal value of each of the tranches sold or transferred to investors.

Where it is proposed that an originator be established to hold the retention amount, this may not be an entity that has been 'established or operates for the sole purpose of securitising exposures'. The aim here is to prevent structures being established to meet the literal legal requirements of the retention rules but not comply with the spirit of the Securitisation Regulation, and so an originator must both meet the above definitions and certain substance tests applied by market participants to satisfy the above 'sole purpose' test.

SECURITY

Types

25 | What types of collateral/security are typically granted to investors in a securitisation in your jurisdiction?

Irish securitisation SPVs typically grant legal (or equitable) assignments and fixed or floating charges over their assets (including the transferred receivables and all accounts established by the SPV in connection with the operation of the securitisation) in favour of a security trustee (to hold for itself and for the benefit of the secured parties to the transaction). Such security is typically directly enforceable by the security trustee only; however, the other secured creditors normally have an ability to direct the security trustee.

An assignment (legal or equitable) is a transfer of title together with a condition for reassignment on redemption and constitutes a mortgage, while a fixed or floating charge, in comparison to an assignment, is simply an encumbrance on the assets entitling the security holder to a preferential right to payment out of the assets in priority to other creditors of the SPV.

Certain formalities must be complied with in order for an assignment to constitute a legal assignment. These formalities include:

- the delivery of notice in writing of the assignment to the underlying obligor(s) in accordance with the requirements of section 28(6) of the Supreme Court of Judicature (Ireland) Act 1877 (the Judicature Act);
- the assignment constituting an assignment of the whole (and not part) of the debt;
- the assignment being in writing and under the hand of the SPV; and
- the assignment being an absolute assignment and not one by way of a charge.

Assignments not complying with these requirements are equitable in nature. Any subsequent assignment made after an equitable assignment that is compliant with the aforementioned formalities will take priority over the equitable assignment where the Judicature Act has not yet been complied with, with respect to that equitable assignment.

A fixed charge is commonly granted over specific assets and restricts the ability of the chargor to deal with the affected assets. A floating charge is granted over a class of assets (both present and future) and entitles the SPV to continue managing the charged assets in the ordinary course of its business pending the occurrence of a defined 'crystallisation event'. Upon the occurrence of a defined crystallisation event, the floating charge will attach to the relevant assets and effectively become a fixed charge. In determining whether a charge is a fixed charge or a floating charge, the Irish courts will assess the degree of control over the assets rather than how it is named or described. A fixed charge ranks ahead in priority to a floating charge and for this reason creditors of the SPV will seek to take as much notionally fixed security as possible and also a qualifying floating charge.

Perfection

26 | How is the interest of investors in a securitisation in the underlying security perfected in your jurisdiction?

If an Irish SPV grants security over certain types of assets, it must register short particulars of that with the Irish Registrar of Companies within 21 days of its creation. In such circumstances, the Irish SPV is said to have created a registrable charge. Security granted over the following assets does not constitute a registrable charge and is exempt from the requirement to register particulars with the Irish Registrar of Companies:

1. cash;
2. money credited to an account of a financial institution, or any other deposits;
3. shares, bonds or debt instruments;
4. units in collective investment undertakings or money market instruments; and
5. claims and rights (such as dividends or interest) in respect of anything referred to in any of (2) to (4) above.

Failure to register a registrable charge within 21 days of its creation will result in the charge being void as against the liquidator and any creditors of the Irish SPV.

While there is a 21-day time period during which a registrable charge is required to be registered, the preference is that a registrable charge be registered as soon as possible after its creation, as the priority of charges is linked to the date of registration, rather than the date of creation of the charge.

Enforcement

27 | How do investors enforce their security interest?

In respect of an Irish securitisation, the SPV will usually grant the security package to the security trustee who holds the security for the benefit of itself and the other secured parties, including the investors. As such, it is the security trustee who will take steps, either at its own initiation or at the direction of the secured parties, to enforce the security. Where there has been an event of default or any other event triggering enforcement, the security is then enforced in accordance with the terms of the security document. Typically, the security trustee will appoint a receiver in accordance with the terms of the security document, and while receivers typically have wide-ranging powers to use and dispose of the charged assets, such powers are subject and limited to the terms of the relevant security document. In theory, a receiver could service the charged assets and operate the cashflows of the SPV for the remaining life of the securitisation. However, the more likely course of action will be that the receiver will try to sell the assets for the highest price reasonably achievable and distribute the proceeds thereof in accordance with the applicable post-enforcement priority of payment.

Commingling risk

28 | Is commingling risk relating to collections an issue in your jurisdiction?

Commingling risk arises where, for example, the proceeds of receivables are paid into a collection account that also holds other amounts. In these circumstances, the risk is that if the account holder of the collection account were to go insolvent, the proceeds related to the receivables might not be readily identifiable and therefore may be available to the securitisation investors. Techniques employed in securitisation transactions to mitigate this risk include, among others, inserting terms into the transaction documents that require a regular sweep of the funds in the collection account to a separate account.

TAXATION

Originators

29 | What are the primary tax considerations for originators in your jurisdiction?

Originators tend not to be established or resident in Ireland. The relevant tax issues relating to arrangements between a non-Irish originator and an Irish resident issuer include:

- whether the transfer of any assets by the originator will be subject to VAT;
- whether fees payable under any of the servicing arrangements between the originator and the issuer will be subject to VAT or withholding taxes;
- whether the activities of the originator could create a taxable presence or permanent establishment of the issuer outside Ireland; and
- if an originator is transferring any debts or assets that have an Irish situs, that transfer may be chargeable to Irish stamp duty unless there is an applicable exemption (the Irish stamp duty legislation includes exemptions for debt factoring and transfer of loan capital).

Issuers

30 | What are the primary tax considerations for issuers in your jurisdiction? What structures are used to avoid entity-level taxation of issuers?

The primary concerns for Irish resident issuers include:

- ensuring no Irish withholding tax will be imposed with respect to payments of interest or other distributions by the issuer;
- ensuring the issuer can take a deduction for Irish tax purposes for any such payments of interest or other distributions; and
- analysing whether any of the services provided to the issuer by service providers outside Ireland are subject to VAT in Ireland on the reverse charge basis.

Irish issuers are generally structured as qualifying companies for the purposes of section 110 of the Irish Taxes Consolidation Act 1997, commonly known as section 110 companies. In order to qualify for the tax treatment under section 110, the company must satisfy a number of conditions:

- it must be resident in Ireland for tax purposes;
- it must acquire, hold or manage qualifying assets (broadly, all forms of financial assets, commodities, plant and machinery and carbon offsets) or have entered into certain arrangements, such as swaps, which themselves constitute qualifying assets;
- the market value of the qualifying assets must be €10 million or more on the date they are first acquired, held or entered into;
- it must generally enter into all transactions on an arm's-length basis, although certain exceptions exist for profit-related interest or distributions; and
- it must make a notification to the Irish Revenue Commissioners.

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. Any residual profit is liable to corporation tax at 25 per cent.

In general, interest paid on a quoted eurobond or wholesale debt instrument is deductible, subject to certain conditions being met. In addition, interest paid to another Irish-resident person or to a person that is subject to tax in an EU member state or jurisdiction with which Ireland has signed a double taxation agreement is also generally deductible.

There are certain anti-avoidance provisions that can restrict deductibility of interest payments by the section 110 company issuer where the interest is paid to a person who is not subject to tax in an EU member state or jurisdiction with which Ireland has signed a double taxation agreement and who controls or has entered into a material contractual relationship with the issuer. The Irish Finance Bill 2019 contains additional anti-avoidance provisions that are intended to increase the number of structures that are subject to these provisions. These amendments are in draft form and the final form of the legislation is still uncertain.

Payments of interest by an Irish issuer are generally subject to interest withholding tax at 20 per cent. However, there are a number of domestic exemptions that can apply, including for payments on quoted eurobonds and wholesale debt instruments and payments by section 110 companies to persons resident in the EU or a jurisdiction with which Ireland has signed a double taxation agreement.

Investors

31 | What are the primary tax considerations for investors?

The primary concerns for investors in an Irish issuer include:

- ensuring they receive payments from the issuer without deduction of withholding tax; and
- ensuring they are not subject to tax in Ireland with respect to payments received from an Irish issuer. Investors who are not resident and who do not carry on a business in Ireland through either a branch or agency in Ireland are only liable to Irish taxation on their Irish source income. A debt due by an Irish-resident company may be regarded as property that is situated in Ireland and if that is the case, the interest payable on a debt instrument issued by an Irish issue would be regarded as Irish source interest. However, such income will be exempt from Irish income tax where:
  - the debt instrument constitutes a quoted eurobond and the investor is resident in an EU member state or a jurisdiction with which Ireland has signed a double taxation agreement; or
  - the issuer is a section 110 company and the interest is paid out of the assets of the company.

BANKRUPTCY

Bankruptcy remoteness

32 | How are SPVs made bankruptcy-remote?

In order to protect the parties to a securitisation transaction, such transactions are designed to insulate the SPV and its assets from the insolvency of any party, or the ability of any party to take insolvency proceedings against the SPV. Bankruptcy remoteness is often achieved through the following steps:

- ensuring that the SPV is incorporated as a new orphan entity with a distinct and separate legal personality;
- ensuring limited recourse and non-petition language is included in the relevant securitisation transaction documents;
- ensuring the transfer of assets to the SPV is achieved by means of a true sale, rather than a mere secured loan;
- restricting the SPV's ability to incur liabilities additional to those liabilities incurred through participating in the securitisation through the use of negative pledges and covenants in the transaction documents; and
- restricting commencement of insolvency proceedings by third parties (eg, unsecured creditors) by granting security over all the SPV's assets in favour of the security trustee for the SPV's secured creditors.

True sale

33 | What factors would a court in your jurisdiction consider in making a determination of true sale of the underlying assets to the SPV (eg, absence of recourse for credit losses, arm's length)?

If an Irish court was to examine whether a transfer of assets was a true sale or a transfer by way of security of such assets, it would apply the principles set out *In re George Inglefield* [1933] Ch1, as considered and applied by the English Court of Appeal in *Welsh Development Agency v Expert Finance Co Ltd* [1992] BCC 270 (the recent Irish case of *Re Eteams (International) Limited* (in voluntary liquidation) affirmed that 'those decisions represent good law on that issue and that it is right to follow them'). In doing so, a court must look to the substance of the legal obligations concerned and, in the absence of the contract being held to be a sham, the nature of the contract is determined by the objective terms and their legal effect. The above decisions have identified the following as key elements of a true sale transaction:

- there is no right to reacquire the assets by repaying the purchaser the price received on the sale;
- the purchaser has no obligation to account to the seller for any profit made on the disposition by it of the assets; and
- the purchaser has no right of recourse to the seller if the purchaser realises the assets acquired by it for an amount less than the price paid for it.

Consolidation of assets and liabilities

34 What are the factors that a bankruptcy court would consider in deciding to consolidate the assets and liabilities of the originator and the SPV in your jurisdiction?

In the event of the insolvency of an Irish company, an Irish court has the power in certain specific circumstances to pierce the corporate veil to make contribution or pooling orders in respect of related companies and their assets.

There is no specific doctrine of substantive consolidation akin to what exists under US law. However, Irish case law has provided that a court may, in exceptional circumstances, disregard the separate legal personality of two or more companies and treat them as a single entity if this conforms to the economic and commercial realities of the situation and the justice of the case so requires. However, on the basis that there are statutory remedies (as referred to above), the indications are the courts would only exercise this jurisdiction in the most exceptional cases.

UPDATE AND TRENDS

Key developments of the past year

35 Are there any rules governing securitisations pending in your jurisdiction or reforms under way, such as prohibitions on financial firms betting against the securities they package, improved disclosure and oversight of the asset-backed securities market, rules limiting bank compensation structures that incentivise risk, etc?

All key developments, updates and trends relating to securitisation legislation and regulation in Ireland have been outlined above.

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