Lending to a Company in Ireland: Structuring the Transaction

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A Practice Note looking at the key considerations involved in structuring a loan to a company incorporated or located in Ireland (which may also involve a guarantor or security provider incorporated or located in, or assets located in, Ireland), where the lender is incorporated in another jurisdiction.

It looks at considerations such as tax, costs and regulatory issues, and issues that can affect taking security and guarantees.

Lawyers advising a lender who proposes to make a loan to a borrower incorporated or doing business in another jurisdiction need to be aware of a variety of issues that can affect the structure of the loan transaction. In addition, if a transaction also involves a guarantor or security provider incorporated or doing business in another jurisdiction, or the assets over which security is being taken are located in another jurisdiction, then there will be other issues to consider.

It is important to identify these issues in the early stages of structuring a transaction, as they can have an impact on key elements of the transaction structure, such as:

- Who the borrower, guarantor, and security providers will be.
- Whether taking guarantees and types of security will be feasible in light of the costs involved.
- The lender's ability to enforce security interests and guarantees.
- The lender's rights in an insolvency of the borrower or other obligors.

This Note looks at the following issues which may affect the structure of a loan transaction:

- Tax considerations and implications, including withholding taxes, documentary taxes, and other types of taxes that may affect a lender or borrower.
- Costs affecting the transaction, including registration fees, notaries' fees, and any other similar costs imposed on the transaction.
- Issues involved in taking a guarantee or security.
- Issues involved in enforcing a loan, guarantee, or security interest.
- Lenders’ rights in an insolvency of a borrower, guarantor, or security provider.
- Regulatory issues affecting foreign lenders, including licensing or registration requirements in Ireland applicable to foreign lenders making commercial loans to a borrower in Ireland.

Unless otherwise stated, a reference in this Note to:

- "Irish law" is used to refer to the laws of Ireland.
- "Irish company" denotes a company incorporated in Ireland.
- "Ireland" means the island of Ireland excluding Northern Ireland.

Tax Implications

The taxes applicable to a loan transaction with a borrower who is incorporated in, or doing business in, a different jurisdiction from the jurisdiction where the lender is incorporated or doing business may have a significant impact on the transaction.

Withholding Taxes

A withholding tax applies generally to payments of interest made to a foreign lender by a company incorporated or tax resident in Ireland.

Where withholding tax is imposed on a payment, the company is required to deduct an amount from the payment owing to the foreign lender, paying that amount to Irish Revenue Commissioners (Revenue) on account of the foreign lender's tax liability. If the company fails to make the payment, Revenue can pursue either the company or the foreign lender for the amount that should have been withheld and paid to them.

Ireland imposes withholding tax at the rate of 20% on certain payments of interest that have an Irish source. Interest typically has an Irish source where it is payable by a company incorporated in Ireland or resident in Ireland for tax purposes, or by a borrower who is borrowing for the purposes of business carried on in Ireland.

Irish withholding tax typically does not apply where a loan is made for a term of less than 365 days.

There are a number of exemptions from withholding tax which are relevant if the lender is a body corporate resident in a "Relevant Territory", which means a jurisdiction that is a member of the EU (other than Ireland) or a jurisdiction with which Ireland has signed a double tax treaty.

Under Irish domestic law, an Irish company can make a payment free of Irish withholding tax on interest to a lender that is a body corporate and is, by virtue of the law of a Relevant Territory, resident in the Relevant Territory for tax purposes. Importantly, the Relevant Territory (being the jurisdiction in which the lender is resident) must impose a tax that generally applies to interest receivable in that jurisdiction by companies from sources outside that jurisdiction. Persons who are tax exempt, or who are entitled to operate on a remittance basis (where they are taxed only on interest that is remitted to the jurisdiction) may not qualify under this exemption. The lender must not be carrying on a trade or business in Ireland to which the interest relates.

A second material exemption is relevant if the foreign lender is a body corporate (as discussed earlier), and the foreign lender is exempted under one of the following:

- It is exempted from the charge to Irish income tax under the terms of a double taxation treaty entered into between Ireland and another jurisdiction that is in force on the date the relevant interest is paid.

- It would be exempted from the charge to Irish income tax under the terms of a double taxation treaty entered into between Ireland and another jurisdiction signed on or before the date on which the relevant interest is paid but not in force on that date, assuming that treaty had the force of law on that date.

This second exemption is typically used by tax-exempt body corporates that are resident in a jurisdiction with which Ireland has signed a tax treaty.

Although based on the presence of a treaty, neither of these jurisdictions require a formal treaty claim to be made. Instead, the market practice is for the lender to provide a representation as its status in the transaction documents.

A third exemption is for any US corporation that is incorporated in the United States and is subject to US federal income tax on its worldwide income. In addition, under Irish Revenue practice, a US domiciled LLC, the ultimate owners of which are persons who would be exempt from Irish withholding tax, is exempt from Irish withholding tax.

This exemption does not apply to a US limited partnership. In a case where partnerships are owned by persons who are eligible for treaty exemptions, it is possible to apply for a concessional relief. This requires a specific advance approval from Irish Revenue to exempt the payment to the limited partnership.

If one of the above domestic exemptions does not apply, parties may still rely on a double tax agreement. However, to rely on the treaty lender provisions, the lender must provide a form to the borrower prior to the payment of interest.

Given the popularity of Ireland in international financing transactions, Irish-based borrowers will frequently be structured as companies that qualify under section 110 of the Irish Taxes Consolidation Act 1997. These are often referred to as "Section 110 Companies". It is worth highlighting that payments of interest by such companies are subject to specific exemptions from Irish withholding tax.

It is not uncommon for Irish companies to structure their borrowing in the form of a loan note, which qualifies as a security.

The legal and commercial outcomes of loan notes are similar to those for a loan agreement, but the method of creation is more complex. The borrower (the "issuer", in this case) executes a deed constituting the loan notes and then issues the notes to the lenders (the "subscribers") evidenced by a certificate with the conditions of the loan notes attached. Despite the extra complexity, loan notes may be preferred to a loan agreement where the following conditions apply:

- Not all lenders are identified when the notes are issued, as adding them later and increasing the loan amount is more cumbersome with a loan agreement to amend.
- The loan terms are relatively simple and do not require lender consents or detailed information requirements.
- Transfer is anticipated; as securities, loan notes allow more easily for partial and complete transfers.
- Non-bank lenders will be involved, as banks usually prefer to lend on their own standard terms or under loan agreements with more complete terms.

Irish withholding exemptions are available where a form of loan note security has been issued. These are for Quoted Eurobonds (which are loan notes (or securities) listed on a recognised stock exchange) and Wholesale Debt Instruments (which are sub-2-year loan notes). Loan notes are frequently employed to benefit from the withholding tax exemptions.

In 2023, Ireland introduced legislation on new taxation measures that applies to outbound payments. These new rules will restrict withholding tax exemptions on interest payable to lenders where the lender is associated with the borrower and is resident in a

jurisdiction listed on the EU's non-cooperative jurisdictions list or a zero-tax jurisdiction. These provisions should not impact loans where there is no association between a lender and borrower.

Stamp Duty and Documentary Taxes

No Irish stamp duty arises on the signing or entry into a loan document or novation of a loan. However, stamp duty might arise on the acquisition of a loan by way of assignment. There are a range of possible exemptions however, including where the buyer or seller of the loan is acting in the ordinary course of their business.

When security over shares in an Irish company is created, a transfer of shares to a lender or its nominee to perfect the security is exempt from Irish stamp duty. However, stamp duty is payable if the security is subsequently enforced. That stamp duty is normally equal to 1% of the amount of the debt or, if less, the value of the shares.

Capital Gains Tax Issues

Certain features of the Irish capital gains tax system are relevant in cases of enforcement and sale of the secured asset, and on transfers of loans.

If the security is enforced against an Irish resident company or the assets of an Irish branch and the assets are sold, any capital gains tax arising on the disposal by the borrower of the secured asset must be paid in priority to the secured lender. This can be an issue where the secured asset would be subject to capital gains tax, including specifically where the secured asset is Irish land or buildings.

Revenue consider that a loan secured by a mortgage on Irish land is an interest in Irish land. As a result, a transfer of a loan secured by Irish land could constitute a taxable event for the lender. Under Irish law, the person acquiring the loan is required to deduct 15% of the consideration payable on the transfer unless the transferor produces a capital gains tax clearance certificate. It is possible to obtain a capital gains tax clearance certificate through an application to Revenue in advance of the transfer.

Costs Affecting a Transaction

Registration Fees

There are no significant fees involved in registering or filing security with government authorities under Irish law. However, some nominal filing or registration fees are incurred in the registration of security at certain registry offices, such as the Companies Registration Office (CRO) or other offices with respect to certain types of assets. For example, an application to the CRO to register a charge created by an Irish company with the CRO will cost EUR40 through the CRO's online filing system, CORE.

For mortgages on real property, the fee to register a charge (mortgage) over registered property with Tailte Éireann (a land registry) is EUR175. Registering a charge over unregistered property with the Registry of Deeds costs EUR50. However, if a charge over registered property is registered electronically with Tailte Éireann, the application fee is currently waived, in accordance with S.I. No. 677/2023 Tailte Éireann (Land Registry (Registration of Certain Charges)) (Fees) Order 2023. This initiative aims to encourage the use of electronic or e-registration.

In all instances the filing fees are generally paid by the borrower on behalf of the lender.

Notaries' Fees

There is no notarisation requirement for Irish-law governed loan agreements, guarantees, or security documents to be valid in Ireland and, therefore, notaries' fees are not applicable when these documents are entered into.

Issues in Taking a Guarantee or Security

In the context of share acquisitions, laws relating to corporate benefit, financial assistance, loans to directors and connected persons, and potential environmental liability, may need to be considered by a lender who is proposing to lend to a company in Ireland.

Corporate Benefit

Where the lender requires a guarantee or security not only from the borrower but also from its parent, a subsidiary, or other companies in the group, it may not be clear what benefit the borrowing company receives in return.

While not explicitly stated in the Companies Act 2014 (Companies Act), it is generally accepted that the guarantee or security could be declared invalid in an insolvency proceeding of that company if either of the following is true, and the lender had actual or imputed knowledge of the irregularity:

- The directors of the company providing the guarantee or security did not believe the transaction was in the company's best interests.
- No reasonable board of directors could have considered that it was in the company's best interests.

Loans to Directors and Connected Persons

Section 239 of the Companies Act prohibits an Irish company from entering into certain transactions with directors of that company, or persons connected with a director of that company. This includes a prohibition on the making of a loan or a quasi-loan, a credit transaction, the provision of a guarantee or security to a director of the company (or of its holding company), or to a person connected with a director.

However, the Companies Act contains a number of exemptions from the restriction in section 239. The most frequently used exemption in Irish transactions is the intra-group exemption, contained in section 243 of the Companies Act, which lifts restrictions on transactions with directors where the company carrying out the restricted activity, and the company benefiting from that action, are both within the same group of companies. In most lending transactions, the obligors will be in the same group of companies and, therefore, any cross-guarantees or security which are being provided will benefit from this exemption.

In addition, Section 240 of the Companies Act sets out a "*de minimis"* threshold. If the value of the transaction is below that threshold, in a transaction that would otherwise fall foul of section 239, the transaction will not be invalidated. The threshold in question is a transaction value of less than 10% of the company's relevant assets.

Another frequently relied on exemption is the use of the Summary Approval Procedure (SAP) under Section 242. Effectively, any transaction that is prohibited under section 239 is capable of being whitewashed by carrying out an SAP which involves a declaration of solvency by all or a majority of the directors of the company plus approval by the shareholders. It is worth noting that this process is not specific to transactions under section 239 but can also be used to whitewash or "bless" various transactions that are otherwise restricted under the Companies Act.

Finally, two other exemptions exist under the Companies Act:

- Section 244 of the Companies Act provides for an exemption where the director incurred properly vouched expenses.
- Section 245 permits a transaction that would otherwise be prohibited, if the transaction is entered into in the ordinary course of business and at arm's length.

Financial Assistance Relating to Share Acquisitions

The financial assistance regime under Irish law should be considered by a lender in the context of an acquisition finance.

Under section 82 of the Companies Act, it is unlawful for a company to give any financial assistance, directly or indirectly (such as providing security, a guarantee, or other financial support), for the purchase of shares in that company or in that company's holding company.

While there is no definition of "financial assistance" in the Companies Act or extensive judicial clarification of its scope, it is accepted that financial assistance is not limited to the granting of loans, guarantees, or security.

Importantly, any financial assistance will be permitted where the company’s principal purpose in giving the assistance is not for the purpose of the acquisition, or where it is incidental to some larger purpose, and the assistance is given in good faith.

As with section 239, the giving of financial assistance will be permitted if approved in advance by an SAP.

A number of other exemptions to the general restriction on providing financial assistance are contained in the subsections of section 82, including exemptions for the following:

- The payment of dividends.
- The discharge or payment of lawfully incurred debts.
- Share redemptions.
- The lending of money in the ordinary course of business of the company.
- Employee share schemes.
- Loans to non-director employees to acquire shares of the company.
- Re-financings.
- Representations and warranties in share purchase acquisitions.
- Fees and expenses of advisers.
- Expenses in share listings.
- Takeovers.
- Payment of commissions and fees on allotment of shares by public limited companies.
- Employee share ownership schemes and trusts.

Environmental Law Liability

A lender's potential exposure to environmental law liability is unclear due to a lack of relevant case law in Ireland.

However, the "polluter pays" principle is operative in Ireland under S.I. No. 547/2008 European Communities (Environmental Liability) Regulations 2008 (the EU Regulations). Certain provisions of the EU Regulations impose liability on an owner or occupier of land who causes or permits the environmental damage. The liability of the lender might arise under environmental laws only on the occurrence of an event of default by virtue of the lender controlling or participating in the activity or decision-making that caused the breach of law, and therefore falling within the definition of a polluter.

Under the EU Regulations, if a lender is found by the Environmental Protection Agency to have caused damage to protected species, natural habitats, waters, or lands by exercising an occupational activity, the lender could incur criminal liability of up to EUR500,000 or up to a term not exceeding 3 years imprisonment, or both, depending on the severity of the offence.

Lenders can take proactive steps aiming to decrease the risk of such liability occurring. For example, lenders can:

- Conduct an environmental appraisal or other due diligence as part of the risk assessment process before making the loan.
- Perform routine environmental audits.
- Require the borrower to indemnify the lender in the case any environmental law liability arises.

For more information on issues in taking guarantees and security, see Practice Note, Lending to a Company in Ireland: Legal and Documentation Issues.

Issues in Enforcing a Loan, Guarantee, or Security Interest

There are no restrictions on foreign lenders, by comparison with domestic lenders, in relation to their ability to commence proceedings against an Irish company or to enforce guarantees or security rights in Ireland, nor are there exchange controls restricting payments to a foreign lender. Further, foreign lenders are bound by the same statutory limitation periods within which a claim must be brought.

However, in certain circumstances, a foreign lender may be required to hold, or have passported, an appropriate regulatory authorisation, which can be obtained from the Central Bank of Ireland, or where applicable, the Single Supervisory Mechanism. Some lenders based in the European Economic Area may be regulated in their home EEA Member State and may be authorised to provide services in Ireland under passporting arrangements.

There are two types of passporting, passporting in and passporting out:

- Passporting in is where a financial firm uses an authorisation obtained in another EEA Member State (or in some cases, from a country that is outside the EEA) to sell its products or services to consumers in Ireland.
- Passporting out is where a financial firm, authorised by the Central Bank of Ireland, sells its products or services to consumers in another EEA country.

While the concept of administration does not exist in Ireland, if the court is satisfied that an insolvent company (or part of its business) has a "reasonable prospect" of survival, the court can provide protection to the company through examinership. This is a process aimed at rescuing insolvent companies, during which the company is the subject of court protection.

While the insolvent company is in examinership, no petition for winding up may be commenced, nor can a receiver be appointed over the company. As such, no action can be brought by any creditor, Irish or foreign, to enforce its security during this period.

Lenders' Rights in Insolvency

The principal insolvency and reorganisation procedures and mechanisms available in Ireland are liquidation, receivership, examinership, and schemes of arrangement.

Liquidation

Liquidation is the process by which the assets of a company are realised by a liquidator and distributed to the company's creditors in accordance with an order of priorities. As a general rule, secured creditors are entitled to realise their security outside of the liquidation (see Receivership). An insolvent company may be wound up in a voluntary process (called a creditors' voluntary liquidation) or in a compulsory process following the making of a winding-up order by the High Court (known as a compulsory liquidation).

Where a company's liquidation has commenced (either by the passing of a members' resolution or by the making of a winding-up order), creditors may not take any court action or proceedings against the company except with the leave of the court (*section 678, Companies Act*).

Under the EU Recast Insolvency Regulation, a judgment of an Irish court opening insolvency proceedings shall be recognised in all EU Member States and will, with no further formalities, "produce the same effects" in any other Member State as under the law of the State of the opening of proceedings, except where otherwise provided in the Regulation (*Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), Articles 19 and 20*).

Receivership

Receivership is a process in which a secured creditor enforces security that it holds over assets of a company. The effect of appointing a receiver is that the powers of the company and its directors, in respect of the charged assets affected, are largely suspended and can be exercised only with the consent of the receiver. The receiver's function is to take possession of the secured assets, realise the secured assets, and apply the proceeds of sale to discharge of the secured debt.

The appointment of a receiver does not carry with it a moratorium on any action or proceedings being taken by creditors, although in practice a company that is in receivership may also be in liquidation, in which case the moratorium referred to above will apply (see Liquidation).

Examinership

Examinership is a court-supervised rescue process in which an insolvent company is placed under the protection of the Irish High Court (and, in certain limited circumstances, the Circuit Court), so that a court-appointed examiner can investigate the company's affairs and report to the Court on the prospects of the company's survival. If the company or any part of its business is capable of being rescued, the Court may sanction proposals for a scheme of arrangement formulated by the examiner which usually involves partial payments being made to the company's creditors and the survival of the business of the company as a going concern.

Following presentation of a petition for the appointment of an examiner to a company, the examiner for a company is usually appointed for a period of 70 days from the date of presentation, which period may be extended by a further 30 days by the court. Creditors are prevented from taking the type of action that they would normally be entitled to take, such as enforcing security, presenting a winding-up petition, or (without leave of the court) issuing proceedings against the company (*section 520, Companies Act*).

Scheme of Arrangement

A scheme of arrangement is a statutory procedure provided under Irish law in which a company puts forward compromise proposals to its members or classes of members or creditors or classes of creditors. The creditors or members then meet and vote on the scheme. If the statutory voting majorities are obtained, the company will then seek the sanction (or approval) of the High Court to make the scheme binding on all parties.

A moratorium is not automatically available in the context of a scheme of arrangement, but the Court has the power to stay all proceedings or restrain further proceedings against the company for any time period as the court sees fit, on terms that the court deems just (*section 451, Companies Act*).

Transactions that May be Void or Voidable

In certain instances, transactions may be void or voidable where one or more parties to a transaction subsequently enters liquidation. The following are the primary examples of these void or voidable transactions:

- **Improper transfer**. Where a company entered a transaction that has the effect of perpetrating a fraud on the company, its members, or creditors, the court has the power (in a liquidation) to order a person who has the use or control of the assets concerned, or the proceeds of sale, to deliver the assets or pay a sum of money from the asset proceeds to the liquidator of the company. It is not necessary to prove that the company was insolvent at the time of the transaction. (*section 608, Companies Act*).
- **Unfair preferences**. A payment or transfer of property by an insolvent company to a creditor, which occurs within six months (or such longer period as the court considers just and equitable under the circumstances of the act concerned) prior to the commencement of the winding up of the company and at a time when the company was insolvent, will be deemed an unfair preference and will be invalid, if the payment or transfer was made with a view to giving the creditor a preference (or better treatment) over the other creditors of the company. Where the transaction is in favour of a "connected person" (as defined in the Companies Act), the relevant period is extended to two years (or such longer period as the court considers just and equitable under the circumstances of the act concerned) prior to the commencement of the liquidation, and an intention to prefer is presumed, unless the contrary is shown by the beneficiary. However, a transaction will not be considered an unfair preference, even if it is detrimental to the general body of creditors, unless there are other reasons to deem the transaction invalid, where the transaction was:
    - reasonable;
    - immediately necessary for the implementation of a scheme of arrangement under Part 10 of the Companies Act; and
    - carried out in accordance with a scheme of arrangement confirmed by a court.

    (*Section 604, Companies Act*).

- **Invalid floating charge**. A floating charge on the assets of a company that is created within 12 months prior to the commencement of the liquidation or winding up of the company will be invalid (except to the extent of monies actually advanced or paid or the actual price or value of goods or services sold or supplied to the company, at the time of or after the creation of, and in consideration for, the charge), unless the company was solvent immediately after the creation of the charge. Where the floating charge is created in favour of a "connected person", the relevant period (within which a floating charge can be held to be invalid) is extended to two years. (*Section 597, Companies Act*).
- **Guarantees.** A guarantee may potentially be set aside by a court, on various grounds, including undue influence, duress, and *non est factum.* The doctrine of *non est factum* applies where a guarantor enters a transaction in the belief that the essential effect of the transaction was radically different from what it was in fact.

Payment Priority

Where a company has entered liquidation, the amount of each lender's recovery depends, in part, on where the lender ranks in the order of priority, which applies when distributions are made.

In any liquidation, the obligation of a liquidator is to get in and realise property and assets of the company and ensure their realisation in such a manner that discharges the company's liabilities to its creditors. A key principle in the distribution of property of a company under Irish law is enshrined in section 618 of the Companies Act, which provides that all debts rank equally and where assets are insufficient to meet the debts, they abate in equal proportion.

While exceptions exist, both statutory and otherwise, the general order of priority of payments in a liquidation is as follows:

- Super-preferential claims.
- Remuneration, costs and expenses of an examiner (where one was appointed).
- Fixed charge holders (ranking in order of creation).
- Expenses certified by an examiner under section 529 of the Companies Act.
- Costs, fees and expenses of the winding up.
- Preferential debts.
- Uncrystallised floating charges (ranking in order of creation).
- Unsecured debts (ranking *pari passu* with each other).
- Deferred debts of members (ranking *pari passu* with each other).

All claims in one category must be paid in full before any remaining proceeds are distributed to the creditors in the following category. When there is an insufficient amount to meet the claims on a category in full, they are pro-rated.

Regulatory Issues Affecting Foreign Lenders

Making a Loan

For a summary of the regulatory requirements that a foreign lender needs to comply with before it may make a commercial loan to a borrower in Ireland, such as licensing, filing, or registration requirements, see Practice Note, Lending to a Company in Ireland: Regulatory Issues: Restrictions on Making Loans.

Taking a Guarantee or Security Interest

For a summary of the regulatory requirements that a foreign lender needs to comply with before it can take a guarantee or a security interest from an entity in Ireland, or a security interest over assets located in Ireland, see Practice Note, Lending to a Company in Ireland: Regulatory Issues: Restrictions on Taking Security or a Guarantee.

Enforcing Rights Under a Loan Agreement

For a summary of the regulatory requirements that a foreign lender needs to comply with before it can enforce its rights under a loan agreement against a borrower in Ireland, see Practice Note, Lending to a Company in Ireland: Regulatory Issues: Restrictions on Enforcing Rights under a Loan Agreement.

Enforcing Security Interests

For a summary of the regulatory requirements that a foreign lender needs to comply with before it can enforce security interests in Ireland, see Practice Note, Lending to a Company in Ireland: Regulatory Issues: Restrictions on Enforcing Security.

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RESOURCE HISTORY

Law stated date updated following periodic maintenance.

This document has been reviewed by the author as part of its periodic maintenance to ensure it reflects the current law and market practice on 1 November 2024.

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