IRELAND

Maples Group

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Consumer and SME loan regulation

On January 21 2019, the Irish Consumer Protection (Regulation of Credit Servicing Firms) Act 2018 (Act) came into force. This Act radically alters the operation of the secondary acquisition, ownership and servicing of performing and non-performing Irish consumer loans, and certain small and medium enterprise (SME) loans (together, Relevant Loans).

The Act amends the existing Irish credit servicing regime introduced in 2015, by extending the scope of regulated activities. These originally comprised (in summary) loan administration and customer communication. The Act extends the scope to include:

- The holding of legal title to Relevant Loans (Legal Title Holding); and,
- Managing or administering the Relevant Loans, including by (i) determining the overall strategy for the management and administration of a portfolio of Relevant Loans or, (ii) maintaining key control over major decisions relating to such portfolios (Loan Portfolio Management, and, together with Legal Title Holding, Relevant Activities).

Immediate effects

Carrying on Relevant Activities without a credit servicing firm licence is now a criminal offence under Irish law. There are exemptions for certain National Asset Management Agency (NAMA) entities, and other persons which are deemed to be so licensed under the credit servicing regime. These include firms already authorised as credit servicing firms (there are eight such service providers), and regulated firms authorised by the Central Bank of Ireland (CBI), or by another comparable European Economic Area (EEA) competent authority, to provide credit in Ireland (Exempted Persons).

For any continuing and future sales of Relevant Loans, a prospective purchaser will need to ensure compliance with the Act in order to complete the acquisition. In broad terms, from a structuring perspective, all Relevant Activities will need to be carried on by an Exempted Person (eg, a bank, a retail credit firm or a retail credit servicing firm). Alternatively, a credit servicing firm licence will need to be obtained before closing (eg, for the acquisition vehicle and/or its investment manager).

In either situation, potentially difficult choices will need to be made by bidders.

Transitional provisions and existing portfolios

For existing portfolios, a three month transition period applies (which ends on April 21 2019). During this period, any entity carrying out Relevant Activities will need either to restructure its activities to bring itself outside the scope of the Act, or apply for a credit servicing firm authorisation.

Where an entity submits a complete authorisation application, it will be granted a transitional licence until the CBI ultimately grants or refuses the application. Any such transitional licence holder will in the meantime be subject to usual CBI powers of supervision.

Brexit and UK credit institutions

The Act contains latent Brexit risk in that UK credit institutions will not continue to qualify under the Act as Exempted Persons in a Brexit situation where the UK does not remain in the EEA. Without legislative change, any UK bank engaged in Relevant Activities will have to restructure its portfolio arrangements, or obtain a credit servicing authorisation to avoid breaching the Act.

Securitisation exemption

The Act contains a safe-harbour for a special purpose vehicle (SPV) issuer engaged in certain forms of primary and secondary securitisations of Relevant Loans. The securitisation must be risk retention compliant under the relevant EU rules, and the Exempted Person must hold legal title to the portfolio. While it is possible to structure both primary and secondary securitisations to fit these safe-harbour requirements, ultimately this merely clarifies that the SPV issuer in such a structure is not required to be authorised. In most cases, the issuer will not be engaged in any regulated activities anyway.

EU policy on regulation of the non-performing loans (NPL) market

The Act conflicts with the EU's proposed directive on credit servicers, credit purchasers and the recovery of collateral (NPL Directive) which was published in March 2018. The NPL Directive largely adopts the position in Ireland existing before the Act, and provides for the regulation of credit servicers – but not credit purchasers. While it imposes some secondary reporting obligations on credit purchasers, it makes it clear that there is no need to regulate loan purchasers (as they do not impose a systemic risk). The NPL Directive specifically provides that loan purchasers may not be subjected to additional requirements. If implemented, the NPL Directive would likely apply from 2021 at which point Ireland would be in breach of EU law unless the new regulatory regime for loan purchasers is repealed.

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