The International Capital Markets Review

Seventh Edition

Editor
Jeffrey Golden

The LawReviews

THE INTERNATIONAL CAPITAL MARKETS REVIEW

SEVENTH EDITION

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THE LAWREVIEWS

Chapter 11

IRELAND

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I INTRODUCTION

i Legal framework

In 2017, the EU capital markets consolidated the reinstatement of some portions of the marketplace from the regulatory uncertainty caused by changes implemented as a response to the financial crisis. A settled market for CLO and RMBS issuance was in evidence and steady issuance occurred. The highly cyclical volatility caused by regulatory uncertainty in previous years has almost completely abated, and it was a strong year-on-year growth from 2016 issuance levels. However, the impact of Brexit on wider EU markets still remains to be seen. In particular, while it is likely Ireland will not just be unaffected but be enhanced by Brexit as an EU issuer location of choice by UK arrangers and banks, there will be some issues to deal with on recognition of judgments and governing law. This will be the same for all other remaining EU legal systems dealing with English law documents and counterparties.

While domestic corporate issuance of capital markets debt in Ireland has always been modest, significant volumes of structured finance debt were issued as part of collateralised loan obligations (CLOs), collateralised debt obligations (CDOs), residential mortgage-backed securities (RMBS), commercial mortgage-backed securities (CMBS) and repackaging transactions out of Ireland. This was significantly curtailed in 2011 and 2012, saw some return to activity (especially CLOs) in 2014, and has steadily increased since 2015 with CLO and repackaging volumes up on previous years. In 2016, issuance showed strong volumes above 2015 levels, with 41 public CLO deals completed compared with 33 deals in 2015.

Indeed, public CLO issuance reached €16.8 billion by the end of 2016 (up from €13.8 billion for 2015). European CLO issuances stood at €12.4 billion by the end of the third quarter in 2017 from 31 deals, compared to €11.8 billion from 29 deals in the same period in 2016. Market participants have shown that they will continue to use Ireland as one of the preferred international financial locations – in 2017, as with 2016, Ireland remained the leading EU jurisdiction of issuance for public CLOs with more than 70 per cent of deals issued out of Ireland.

In addition to fresh issuance, much of 2016 and 2017 volume has been enhanced by CLO notes attracting reduced spreads from 150 bps for AAA tranches at the start of 2016 to 100 bps by year end, further dropping to as low as 85 bps over the course of 2017. This drop has triggered refi/reset activity by managers seeking to take advantage of these enhanced market conditions.

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Capital markets transactions law

Irish capital markets law is generally integrated into parallel systems of common law, equity and statute, without any specialised tribunals governing its administration or enforcement. The fundamental legal principles governing debt and contractual obligations created under bonds and securities are still rooted in the original provisions set out in the Bills of Exchange Act 1882 but have been overtaken and enhanced significantly by a plethora of domestic and EU-originated legislation.

Current regulatory and legal status

The principal regulator of capital markets in Ireland is the Central Bank of Ireland (CBI).

The country's only regulated stock exchange is the Irish Stock Exchange (ISE). The ISE has two markets on which debt can be admitted: the Main Market, which is regulated, and the Global Exchange Market (GEM), which is not. Both of these include general corporate debt and specialist securities including asset-backed securities, specialist bonds and warrants. The Main Market and the GEM have each developed a large following in the international capital markets because of their quick turnaround times on 'reads' or reviews of draft listing documents and prospectuses, and on well-settled content requirements for relatively complex obligor structures. In 2013–2014, there was a significant increase in the number of general corporate debt issuers seeking a listing in Ireland and that trend has continued. Most notably, a number of medium term note (MTN) corporate programmes continue to migrate their listings to Ireland. The boom in US-issued CLOs was reflected in 2016 with 6,779 debt securities issued on the ISE overall, and 479 new issuers and programmes listing.

The key legal, statutory and regulatory provisions relevant to debt securities include:

a contract law;
b statutory company law (including, in particular, the Irish Companies Acts 2014);
c common law;
d Directive 2003/71/EC, as amended by Directive 2010/73/EU (the Prospectus Directive);
e Commission Regulation (EC) No. 809/2004, as amended by Commission Delegated Regulations (EU) 486/2012 and 862/2012 (the Prospectus Regulation);
f Directive 2004/109/EC (Transparency Directive);
g Regulation (EU) 596/2014 (the Market Abuse Regulation) and the European Union (Market Abuse) Regulations of Ireland (S.I. 349 of 2016); and
h the Listing Rules and the Admission to Trading Rules of the Main Securities Market (Listing Rules) or the Listing and Admission to Trading Rules, Global Exchange Market (GEM Rules), as applicable.

There are also statutory provisions and regulations applicable to particular classes or types of securities including in particular commercial paper, certificates of deposit, RMBS or CMBS, general securitisations and uncertificated securities. The Companies Acts regime also incorporated (in 2006) certain exempting provisions from the general formal requirements for Irish companies issuing debentures for particular restricted classes of debt securities, to facilitate the use of private companies for non-public bond transactions.

Privately placed, unlisted debt securities are not ordinarily subject to the rules of the Prospectus Directive, the Prospectus Regulation, the Transparency Directive or the Market Abuse Regulation. The interplay of regulations within this regulatory environment is a complex area and invariably requires detailed specialist advice.

Companies Act 2014

The Companies Act 2014 commenced into law on 1 June 2015 and replaces all existing Irish companies' statutes in what is largely a consolidation, simplification and codification exercise. There are a number of provisions that will impact new Irish issuers of listed securities and require steps to be taken for existing Irish issuers of listed debt securities. The Companies Act 2014 creates a new type of private company limited by shares called a designated activity company (DAC) and changes the form of the existing private company limited by shares (LTD). The LTD is a more streamlined, simplified form of an existing private company limited by shares. The key difference between an LTD and a DAC is that an LTD shall neither:

a apply to have securities (or interests in them) admitted to trading or to be listed; nor
b have securities (or interests in them) admitted to trading or listed.

This applies on any market, whether regulated or not, in Ireland or elsewhere (an LTD must also not have an objects clause).

A DAC, however, is not subject to such restrictions as regards the listing of its securities. Other than the ability to issue listed debt securities, there is little difference in the company law applicable to DACs and that currently applicable to existing private limited companies.

Conversion to a DAC

There was an 18-month transition period (from June 2015) under the Companies Act 2014 to allow existing issuers of listed debt securities to convert to DACs. Liability may arise for the directors and the company if they fail to convert within the prescribed time frame. Most Irish issuers should have completed their conversion process by now if required to do so.

Conversion occurs by a simple resolution of the board of directors. The conversion process requires a change in the issuer's name (to include the 'DAC' abbreviation in place of 'limited') and includes the deemed amendment of the issuer's constitutional documents to reflect this change.

Existing Irish capital markets issuers that are public limited companies were not required to take any conversion steps under the Companies Act 2014 (though it was considered prudent that they amend their constitutional documents to update them for the purposes of the Companies Act 2014).

Private limited companies incorporated prior to the enactment of the Act that had securities admitted to trading or listed on any market, whether regulated or not, in Ireland or elsewhere before 1 June 2015 do not need to convert to a DAC and will not be in contravention of the Act for having such listed securities (under the Companies Act 2014 (Commencement) Order 2015 (as amended)).The Companies (Accounting) Bill 2016 published in July 2016 provides that the Act will be amended to make this exemption permanent for companies that have listed securities before 1 June 2015.

Public offers

Section 68 (and section 981, in relation to DACs) of the Companies Act 2014 states that an offer of debentures to the public by a private company will not be considered an offer to the public if:

a the offer is addressed solely to qualified investors;
b the offer is addressed to fewer than 150 persons other than qualified investors,

c the terms of the offer provide that the minimum consideration payable by each investor is at least €100,000;
d the terms of the offer provide that the denomination of units of the debentures being offered is at least €50,000 (increased to €100,000 by Section 68);
e the terms of the offer expressly limit the total consideration for the offer to less than €100,000; or
f the offer relates to classes of instruments usually dealt on money markets having a maturity date of less than 12 months.

Therefore, in the case of a retail transaction, an Irish issuer will be required to be incorporated as a public limited company, whereas in relation to a wholesale transaction it is possible to use an Irish private limited company as issuer. The above exemptions are analogous to the exemptions from the requirement to publish a prospectus contained in the Prospectus Directive.

While the regulatory structure outlined above provides the backdrop to much of the structuring and formal requirements of the legal documentation surrounding capital markets transactions in Ireland, most securities issued in Ireland tend to be listed in any event for legal or tax reasons. Accordingly, the key focus on production of a prospectus (in the case of the Main Market) or listing particulars (in the case of the GEM) for such securities is on the requirements of the Prospectus Directive/Prospectus Regulation and Listing Rules or the GEM Rules, as applicable, and the production of a prospectus or listing particulars in a form acceptable to the CBI (in the case of the Main Market) or the ISE (in the case of the GEM). In addition, it is not unusual for Irish note transactions to be listed on other 'recognised' exchanges for tax purposes such as the Cayman Islands Stock Exchange.

Other regulatory frameworks – listed securities

Where an issuer lists its debt on the Main Market of the ISE, in addition to the obligation to publish a prospectus complying with the requirements of the Prospectus Directive, the issuer will also be regulated under the Market Abuse Regulation and the Transparency Directive. It should be noted that from July 2016, issuers with securities listed on the GEM have also been subject to the requirements of the Market Abuse Regulation.

Obligations under the Market Abuse Regulation include:

a the prohibition of insider dealing and market manipulation or attempted-insider dealing and marketing manipulation;
b an obligation to disclose price-sensitive non-public information to the market without delay;
c preparation and maintenance of insider lists in the prescribed form of persons with access to inside information;
d reporting of certain transactions of persons within the issuer discharging managerial responsibilities (PDMR) and persons closely associated (PCA) with them and restrictions on PDMRs dealing in the securities of the issuer; and
e market soundings to be conducted in accordance with the procedure provided for in MAR.

Additional detail on the market abuse regime in Ireland is set out below.

Obligations under the Transparency Directive include:

a the publication of audited accounts within four months of each financial year end and the preparation of half-yearly financial reports (where the minimum denomination of the securities is less than €100,000);
b the requirement to treat security holders equally; and
c the requirement to maintain a flow of information to security holders on an ongoing basis.

The Transparency Directive is implemented into Irish law by the Transparency (Directive 2004/109/EC) Regulations 2007 on 13 June 2007.

Prior to 2016, the Transparency Directive only applied to securities listed on a regulated market, unless those securities derive their value from another security or instrument traded on a regulated market. Thus, GEM-listed and unlisted securities were typically not subject to the Transparency Directive On 3 July 2016, 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 all EU Member States including Ireland. Also, it should be noted that a number of the GEM Rules mirror the requirements of the Transparency Directive (which forms the basis of the continuing obligation rules for the Main Market).

There are also short-selling restrictions imposed on investors in relation to positions held in EU sovereign debt under Regulation (EU) No. 236/2012 from 1 November 2012.

Additional detail on the Transparency Directive (and related matters) for listed issuers is set out below.

ii Structure of the Irish courts

The Supreme Court, the Court of Appeal, the High Court, the Circuit Court and the District Court constitute the various courts in the Irish legal system. The Courts (Establishment and Constitution) Act 1961, and the Court of Appeal Act 2014, provide for the establishment of, and prescribe the jurisdiction of, the various courts.

The district and circuit courts do not play an appreciable role in dispute resolution in a commercial context because of their limited jurisdictions and are, thus, irrelevant for present purposes.

It follows that the High Court is invariably the court of first instance for significant commercial disputes. Within the High Court structure, there is a specialist list called the Commercial List (or the Commercial Court), which is an administrative division of the High Court. The Court of Appeal was established on 28 October 2014 and serves as an appellate jurisdiction between the High Court and Supreme Court for civil and criminal matters, and its decisions are, in the ordinary course, final.

iii The Commercial Court

The establishment of the Commercial Court in 2004 represented a radical departure in the manner in which commercial disputes were managed under the Irish legal system. Following similar reforms in England and Wales, the Commercial Court was established to reduce the often inordinate delay in the conduct of commercial proceedings in the ordinary High Court. In that regard, it was typical for a dispute in the ordinary High Court to take several years from commencement of proceedings to the handing down of the judgment. This can still apply for disputes not admitted to the Commercial List.

The establishment of the Commercial Court has been a considerable success, largely because the rules established for the conduct of proceedings in the Commercial List provide a specific procedural framework designed to handle complex commercial disputes in an efficient, expeditious and cost-effective manner. This division of the High Court has also been proactive in promoting alternative dispute resolution (ADR), particularly mediation. The role of the courts in promoting mediation has been strengthened by the recent passing into law of the Mediation Act 2017, which now places on a statutory footing the obligation on litigants to consider mediation.

The Commercial Court rules (Order 63A of the Rules of the Superior Courts) detail a largely self-contained system for dealing with pretrial procedure, although it should be noted that the Commercial Court rules operate in tandem with the Rules of the Superior Courts; there are, however, some notable differences – chiefly the ability of the Commercial Court judge to take a proactive role in case management and conduct of the proceedings.

Jurisdiction

The jurisdiction of the Commercial Court is invoked by one or other of the parties to proceedings making an application for entry to the Commercial List. The primary criterion for entry is that the case is a 'commercial proceeding'. A number of categories of 'commercial proceedings' are defined in Order 63A of the Rules of the Superior Courts. By far the most frequently invoked category of commercial proceeding is a claim arising from a business document, business contract or business dispute where the value of the claim or counterclaim is at least €1 million. In addition, the Commercial Court judge has a residual discretion to admit a claim that does not meet this threshold, having regard to the particular commercial or other aspects thereof.

Based on the fairly minimal threshold of €1 million and the relatively broad concept of what constitutes a 'commercial' dispute, together with the residual discretion of the Commercial Court judge, the Commercial Court has become the forum of choice for the resolution of the majority of banking disputes in Ireland. This has had a particularly beneficial effect on the conduct of such cases, and should generally have a positive effect on the conduct and undertaking of complex cases in the future, including financial cases, and including many of the likely complex capital markets transactions that may find their way into the courts.

Once admitted, Commercial Court proceedings are closely case managed to aggressive time frames. Typically, the time limit for each step in the proceedings is either two or three weeks. The ensuing requirement for parties to focus on the merits of their respective cases at an early stage in the proceedings often acts as a catalyst for settlement well in advance of the trial date. The Commercial Court's case management has also led to the introduction of procedural steps that are not normally a feature of ordinary High Court cases, such as the exchange of witness statements and the ability to serve interrogatories without the leave of the court.

The Commercial Court has extensive powers to impose costs sanctions for delays and defaults in compliance with its directions, and may, in the case of more substantial default, order that the proceedings be removed from the Commercial List. This latter sanction creates a significant incentive for plaintiffs to ensure their case is dealt with expeditiously.

iv Appellate jurisdiction

The Court of Appeal was established on 28 October 2014 under the Court of Appeal Act 2014 on the result of a referendum resulting in the Thirty-third Amendment of the Constitution of Ireland. The Court of Appeal was established to deal with the backlog of appeals before the

Supreme Court and now hears most appeals from decisions of the High Court (including the Commercial Court) in civil matters. Decisions of the Court of Appeal are, in the ordinary course, final, subject to leave being sought and granted by the Supreme Court to hear an appeal. Such leave will only be granted where the Supreme Court is satisfied that the decision involves a matter of general public importance, or in the interests of justice it is necessary that there be an appeal to the Supreme Court. Case management is utilised for all appeals before the Court of Appeal in an effort to save time and costs. Certain categories of appeals fall into the expedited appeal category, which involves a compulsory process involving tight time frames for each stage of the appeal. Such expedited appeals include appeals made against the making or refusal of interlocutory orders. Towards the end of 2016, the president of the Court of Appeal issued a practice direction setting out the requirements of the Court in relation to the content and presentation of civil appeal papers with a view to identifying the net issues in the appeal and confining the papers to relevant material to improve time efficiencies in the oral presentation of the appeal.

The Supreme Court remains the court of final appeal; however, its appellate jurisdiction has undergone considerable change since the establishment of the Court of Appeal. The Supreme Court only hears appeals from the Court of Appeal in limited cases as set out above. In certain exceptional instances, the Supreme Court may hear appeals directly from the High Court (i.e., 'leapfrog' appeals) where the Supreme Court is satisfied that there are exceptional circumstances warranting an appeal to it in accordance with Article 34.5.3 of the Constitution.

Prior to the establishment of the Court of Appeal, delays of up to three years were being experienced in having appeals heard by the Supreme Court. In the period after its establishment, the Court of Appeal radically reduced the backlog of appeals that had accumulated before the Supreme Court. However, according to recent statistics, waiting times are instead now increasing in the Court of Appeal; short civil appeals where judgment can be delivered on the day of the hearing typically experience waiting times of nine months, whereas the waiting time for appeals requiring more than two hours is 18 months. The Chief Justice of Ireland has recently called for the appointment of additional Court of Appeal judges in an effort to tackle the growing backlog of cases.

The Court of Justice of the European Union (ECJ) has a limited supervisory jurisdiction from the High Court to hear and determine points of European Community law, typically by way of reference under Article 267 of the Treaty on the Functioning of the European Union.[2]

v Tax

Ireland's Section 110 regime[3] allows the taxable profits of qualifying Irish debt special purpose vehicles (SPVs) to be calculated on the same basis as a regular trading company. In addition, provided the Section 110 company is appropriately structured, a full deduction should be available for interest and profit-dependent payments payable by the company on its debt securities, allowing the company to operate on a tax-neutral basis.

To benefit from the Section 110 regime, a company must satisfy a number of conditions. It must be resident in Ireland for tax purposes and must acquire, hold or manage qualifying

2 Formerly Article 234 of the EC Treaty.

3 Section 110 of the Irish Taxes Consolidation Act 1997.

assets or have entered into certain arrangements, such as swaps or loans, that themselves constitute qualifying assets. Importantly, the market value of the qualifying assets must be €10 million or more on the initial date they are acquired, held or entered into.

Although initially targeted at traditional bank securitisations, the flexible nature of the regime has led to its use in a range of international financial services transactions including repackagings, CDOs and investment platforms. Ireland's Finance Act 2011 expanded the scope of the Section 110 regime to allow companies to hold tradeable commodities and plant and machinery in addition to financial assets, while also introducing focused restrictions on the Section 110 company's ability to deduct profit interest accrued or paid in certain structures. These changes have for example assisted (where required) in establishing aircraft financing platforms with aircraft assets being held directly by Section 110 companies. In October 2016, the Irish Minister for Finance sought to restrict or clarify the application to some Irish property transactions – this is dealt with in more detail below.

There should be no Irish withholding tax on payments of interest by a Section 110 company, provided the securities are listed on a recognised stock exchange (such as the ISE) and qualify as quoted Eurobonds. Other Irish withholding tax exemptions are available, such as where the investors are persons who are EU-resident or resident in a treaty partner of Ireland, or where wholesale debt is issued (or where a double tax treaty applies – see below in more detail). Transfers of securities issued by Section 110 companies will generally be exempt from Irish stamp duty.

Generally, no withholding tax should arise on bonds issued by any Irish issuer that similarly qualify as quoted Eurobonds or for payments to EU or treaty-resident companies. Ireland has an extensive double taxation treaty network that facilitates capital markets transactions. There are also some other non-treaty-related withholding tax exemptions available to certain capital markets transactions (e.g., short-term paper).

II THE YEAR IN REVIEW

i Developments affecting the capital markets

The international capital markets in 2017 have, similar to 2015–2016, been less uncertain than previously, and no different in Ireland. There have been numerous noteworthy developments in the industry and some increased regulatory oversight, but also good classification of regulatory positions has lent welcome certainty to the market in Ireland and internationally.

CISA

The Credit Institutions (Stabilisation) Act 2010 (CISA) was introduced by the Irish government in December 2010 as part of the ongoing efforts to stabilise and recapitalise the Irish banking system. CISA was designed as a temporary emergency bank stabilisation regime with a 'sunset clause' limiting the application of the legislation to the end of 2012. CISA and its associated powers only apply to credit institutions headquartered in Ireland, which have received financial assistance from the Irish government.

The powers contained in CISA were designed to constitute reorganisation measures within the meaning of the Credit Institutions Winding-Up Directive (CIWUD). Powers under CISA were, however, not exercised in 2013, and CISA was amended by the Central Bank and Credit Institutions (Resolution) Act 2011, and extended beyond its 'sunset' date of end of 2012 to 31 December 2014 but then ceased on that date.

BRRD

The Central Bank and Credit Institutions (Resolution) Act 2011 (Resolution Act), enacted on 28 October 2011 is designed as a permanent bank resolution structure the implementation of which is required by the IMF, the EU and the ECB under the Irish government's memorandum of understanding with the 'troika'. There have not been any significant powers exercised under CISA by the Minister for Finance.

The Resolution Act is similar to CISA, insofar as it seeks to permanently codify transfer orders and special management orders; there are, however, a number of key differences between the Resolution Act and CISA:

a the Resolution Act applies to all Irish licensed credit institutions, not only designated institutions;

b the Resolution Act does not allow the government to impose haircuts on subordinated creditors;

c the powers in the Resolution Act are exercised by the governor of the CBI and not the Minister and there are stringent intervention conditions that must be satisfied before the powers are exercised;

d the Resolution Act creates a new resolution fund to be funded by credit institutions to finance potential future bailouts;

e the Resolution Act allows for the establishment of bridge banks by the CBI to manage a resolution process; and

f the CBI is given an institutional role in a credit institution liquidation process, including a veto power over the appointment of a liquidator, the power to petition for the winding-up of an institution and the power to appoint a special liquidation committee to oversee the interests of depositors.

Like CISA, the Resolution Act is designed to be CIWUD-compliant and the main powers are exercisable by court order.

The Resolution Act was not intended to remain in force for very long (the relevant levy period stipulated under it only runs until 30 September 2014 unless amended), as the European Commission published on 6 June 2012 a legislative proposal for a Directive introducing a recovery and resolution framework for credit institutions and investment firms in June 2012, which is designed to institutionalise extraordinary powers on a cross-Community basis. As expected, the Resolution Act was amended by the Central Bank (Supervision and Enforcement) Act 2013 and the European Union (Bank Recovery and Resolution) Regulations 2015, which transpose the Bank Recovery Resolution Directive 2014/59/EU, and so remains in force.

EU Bank Recovery and Resolution Directive

The EU Directive 2014/59/EU (known as the Bank Recovery and Resolution Directive (BRRD)) has been implemented in Ireland by the European Union (Bank Recovery and Resolution) Regulations 2015 (BRR Regulations). The BRR Regulations came into operation on 15 July 2015 save for Regulations 79 to 94 (on the objective and scope of the bail-in tool), which shall come into operation on 1 January 2016. The BRRD aims to give national regulators credible powers and tools for dealing with unsound or failing financial institutions and to establish a framework for cooperation in cross-border resolution action.

The BRR Regulations apply to credit institutions and large investment firms authorised in Ireland and their subsidiary financial institutions, to EU branches of third-country credit institutions and large investment firms and to different types of financial holding companies established in Ireland, and in some cases to their subsidiary financial institutions (covered entities).

The BRR Regulations introduce reforms that may impact netting and set off arrangements such as the Netting Provisions for counterparties to covered entities including, among other things, suspension of termination rights, payment or delivery obligations and providing for the override of contractual termination triggers upon the implementation of a resolution measure.

Certain safeguards for, among others, netting and set-off arrangements. in the event of the exercise of resolution powers, are provided by the BRR Regulations. Regulation 138 places restrictions on the extent to which a resolution measure can effect a partial transfer of a covered entities' assets, rights and liabilities in order to protect counterparties from a partial transfer that would disrupt the mutuality of obligations between the original parties to a netting or set off arrangement thereby undermining the enforceability of netting or set-off on insolvency.

If a relevant institution enters into an arrangement with an issuer and is deemed likely to fail in the circumstances identified in the BRRD, the relevant Member State national authority (Resolution Authority) may employ such tools and powers in order to intervene in the relevant institution's failure (including in the case of derivatives transactions, powers to close-out such transactions or suspend any rights to close-out such transactions). In particular, liabilities of relevant institutions arising out of the transaction documents or underlying instruments connected with a capital markets transaction (for example, liabilities arising under participations or provisions in underlying instruments requiring lenders to share amounts) not otherwise subject to an exception, could be subject to the exercise of 'bail-in' powers of the relevant Resolution Authority. It should be noted that certain secured liabilities of relevant institutions are excepted. If the relevant Resolution Authority decides to 'bail-in' the liabilities of a relevant institution, then subject to certain exceptions set out in the BRRD, the liabilities of such relevant institution could, among other things, be reduced, converted or extinguished in full. As a result, the issuer and ultimately the noteholders in a capital markets transaction may not be able to recover any liabilities owed by such an entity to the issuer. In addition, a relevant Resolution Authority may exercise its discretions in a manner that produces different outcomes amongst institutions resident in different Member States. It should also be noted that similar powers and provisions are being considered in the context of financial institutions of other jurisdictions.

The resolution mechanisms under the BRRD correspond closely to those available to the Single Resolution Board (SRB) and the European Commission under the single resolution mechanism provided for in Regulation (EU) No. 806/2014 (the SRM Regulation). The SRM Regulation applies to participating Member States (including Member States outside the eurozone that voluntarily participate through a close cooperation agreement). In such jurisdictions, the SRB will take on many of the functions that would otherwise be assigned to national Resolution Authorities by the BRRD. If a Member State outside the eurozone (such as the UK) has chosen not to participate in the bank single supervisory mechanism, relevant institutions established in such Member State will not be subject to the SRM Regulation, but to the application of the BRRD by the Resolution Authorities. It is possible, on the specific facts of a case, that resolution plans and resolution decisions made by the SRB may differ from the resolution schemes that would have been applied by the Resolution Authorities.

Therefore, the way in which a relevant institution is resolved and ultimately, the effect of any such resolution on an issuer and noteholders may vary depending on the authority applying the resolution framework.

Alternative performance measures

In October 2015, ESMA published the ESMA Guidelines on Alternative Performance Measures (APM Guidelines).[4] The APM Guidelines are aimed at promoting the usefulness and transparency of alternative performance measures (APMs) included in prospectuses or regulated information. The purpose of the APM Guidelines is to improve comparability, reliability and comprehensibility of APMs. The APM Guidelines apply to APMs disclosed by issuers or persons responsible for the prospectus when publishing regulated information or prospectuses on or after 3 July 2016 and regulated information disclosed under the Transparency (Directive 2004/109/EC) Regulations 2007 or Market Abuse Regulation (EU 596/2014).

PD

Amendments to the Prospectus Directive and Transparency Directive, incorporated into Irish law on 1 July 2012, increased the thresholds for the applicability of certain exemptions from the obligations imposed by these Directives. The changes also affected the format of the prospectus required to be produced for particular structured products, in terms of summary requirements for prospectuses in relation to retail issuances and the contents of final terms used in respect of series issued under a programme. Market participants have indicated that the CBI has adopted a more balanced and commercial approach to the application of the new rules in contrast to other European competent authorities, including demonstrating a willingness to engage in a certain level of consultation with issuers on technical matters. The continued migration of a number of listings to the ISE since 2012 was attributed to this facilitative approach having been adopted by the CBI. In the first half of 2017, 312 CLOs (US and European) were listed on the ISE, 89 per cent on the GEM. This listing popularity was unaffected by the new application of the MAR to GEM-listed deals (see below).

Since 1 January 2016, Regulation 23(3) of the Prospectus Regulation no longer requires issuers to send final terms to the competent authority of host Member States. Instead, the CBI, as the home Competent Authority, must send final terms that have been filed with it to the competent authorities of host Member States. The CBI will also communicate those final terms to ESMA.

Regulation (EU) 2017/1129 (PD3) was published on 30 June 2017 and entered into force 20 days later. The PD3 requires the European Commission to adopt delegated acts within 18 months of its entry into force.

Some key items prescribed under the PD3 were with respect to the summary and to risk factors. A summary for retail issuances may be no longer than seven A4 pages (with certain exceptions) and shall be made up of the following four sections whose content is further prescribed:

a an introduction containing warnings;
b key information on the issuer;
c key information on the securities; and

4 Reference: ESMA/2015/1415.

d key information on the offer of securities to the public or the admission to trading, or both.

The risk factors featured in a prospectus shall be limited to risks that are specific to the issuer and the securities, and that are material for taking an informed investment decision, as corroborated by the content of the prospectus. The issuer will need to assess the materiality of the risk factors based on the probability of their occurrence and the expected magnitude of their negative impact.

ESMA was tasked by the European Commission with providing technical advice, including in relation to the format and content of the prospectus, base prospectus and final terms. They issued a Consultation Paper on 6 July 2017 requesting feedback by 28 September 2017. A final report of ESMA's technical advice is due to be published in the first quarter of 2018. Proposals from ESMA included making a cover note of a maximum of three pages a mandatory obligation, the requirement that the risk factors be included after the summary, the mandatory inclusion of a use of proceeds section and the requirement to provide signposting in base prospectuses for retail issuances. It is proposed that a summary not be required for a base prospectus but that an issue-specific summary following the prescribed format would be required for each issuance. A simplification of the annexes is proposed with changes such as the removal of the bank registration document annex and with the derivative securities note being replaced with a separate building block to be read alongside the appropriate wholesale or retail securities note. The changes contained within the derivative building block are the most wide-ranging of the annex changes. There are other proposals to require that issuer websites be included and that certain documentation be available for inspection via electronic means.

RTS

Commission Delegated Regulation (EU) 2016/301 of 30 November 2015 supplementing Directive 2003/71/EC of the European Parliament and of the Council with regard to regulatory technical standards for approval and publication of a prospectus and dissemination of advertisements and amending Commission Regulation (EC) No. 809/2004 came into force on 24 March 2016.

TD

The CBI's Transparency Rules were updated effective 30 November 2015. The Transparency Rules set out procedural and administrative requirements and guidance in respect of the Transparency Regulations. The changes made are to reflect the transposition of Directive 2013/EU/2013. Changes made to the Transparency Rules include deletion of references to interim management statements, changes to the major shareholdings notification requirements, amendments to home Member State notification procedures, the inclusion of references to the new standard forms, deletion of guidance relating to filing of amendment to instruments of incorporation, updates to legislative references, and other minor changes.

With effect from 27 November 2015, new requirements for the disclosure of home Member States under the Transparency Regulations applied. An issuer is now required to disclose its home Member State to:

a the competent authority of its home Member State;
b the competent authority of the Member State where its registered office is located, where applicable; and

c the competent authorities of all host Member States.

An issuer is also required to disclose its home Member State to the market.

Disclosure of home Member States to the relevant competent authorities should be made using the Standard Form for Disclosure of home Member States published on ESMA's website.

IDSA

In September 2012, the Irish Debt Securities Association (IDSA), was established with the stated objective of promoting the Irish debt securities industry internationally. All main market participants have signed up as members. IDSA has since engaged in many significant consultative processes with industry and regulators. In particular, IDSA has been very active in liaising with the Irish authorities on proposed changes to the Section 110 regime and associated legislation, most recently in 2017 in relation to carve-outs from certain Irish property-related changes to Section 110, and submitting industry responses to government and ESMA on matters such as changes to the prospectus regime, MiFID II's implementation in Ireland and the proposed STS Regulation.

MAR and CSMAD

The 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. The MAR and CSMAD repealed and replace the existing EU market abuse regime and, as well as modifying the previous EU market abuse regime, extended the regime, previously applicable to issuers of debt securities listed on EU-regulated markets only, to issuers of debt securities listed on EU multilateral trading facilities, such as the GEM.

The CBI and the ISE have also updated the Market Abuse Rules and Guidance and the GEM listing rules respectively in order to bring these into line with the new EU market abuse regime.

Obligations under the MAR regime in Ireland include:

a disclosure of inside information as soon as possible;

b prescribed conditions to be satisfied in order for the disclosure of inside information to be legitimately delayed;

c preparation and maintenance of insider lists in the prescribed form of persons with access to inside information;

d reporting of certain transactions of persons within the issuer discharging managerial responsibilities (PDMRs) and persons closely associated with them (PCAs);

e PDMRs to refrain from dealing in the securities of the issuer during prescribed closed periods;

f preparation and maintenance of lists of the issuer's PDMRs and PCAs; and

g market soundings to be conducted in accordance with the procedure provided for in the MAR.

The MAR regime in Ireland also prohibits:

a engaging or attempting to engage in, or recommending, inducing, aiding, abetting or inciting another person to engage in, insider dealing;

b engaging or attempting to engage in, or aiding, abetting or inciting another person to engage in, market manipulation; and *c* the unlawful disclosure of inside information (or aiding, abetting or inciting such disclosure).

Issuers should ensure they have established policies and procedures to ensure their obligations under the MAR are complied with, including ensuring that:

a insider lists are prepared and maintained where required;

b form and content requirements of insider lists are followed; and

c persons on insider lists are notified of and have acknowledged in writing their obligations and the sanctions for non-compliance.

Issuers should also establish policies and procedures to ensure:

a a list of all PDMRs and PCAs is prepared and maintained;

b its PDMRs and PCAs are notified of, or have acknowledged in writing. or both, their obligations; and

c required notifications and public disclosures adhere to the form and content requirements of MAR.

The 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, which in Ireland include substantial fines and imprisonment.

It is also worth noting that US issuers listed on the GEM (which are predominantly US CLO issuers) are required to comply with this new regime.

AIFMD

The Alternative Investment Fund Managers Directive (Directive 2011/61/EU) (AIFMD) was implemented into Irish law on 22 July 2013 by the European Union (Alternative Investment Fund Managers) Regulations 2013 (AIFMD Regulations). While the AIFMD Regulations have done little to temper the impact of the AIFMD on structured finance vehicles, market participants obtained useful guidance from the CBI as to the approach it will adopt regarding the application of the AIFMD Regulations. Submissions had been made in 2013 to the CBI for it to adopt a similar position to that taken by the UK Financial Conduct Authority (FCA), which has stated that it would assume that a special purpose vehicle issuing debt securities will not be an 'alternative investment fund' if the arrangements meet the exclusion in Paragraph 5 of the Schedule to the Financial Services and Markets Act 2000 (Collective Investment Schemes Order 2001 (Debt Securities) (Paragraph 5)). Paragraph 5 identifies a number of arrangements that are not to be considered collective investment schemes. These include 'investments of the kind specified by article 77 of the Regulated Activities Order which are [...] issued by a single body corporate other than an open-ended investment company [...] and which are not convertible into or exchangeable for investments of any other description'. Article 77 of the Regulated Activities Order specifies debentures, debenture stock, loan stock, bonds, certificates of deposit and any other instrument creating or acknowledging indebtedness.

The Luxembourg CSSF also recently confirmed a similar position. Maples has been advocating the view that the intention of the AIFMD was not to regulate structured finance vehicles and, together with other members of IDSA, was engaged in discussions with the CBI requesting it to clarify its position as regards the application of the AIFMD to structured finance vehicles. As a result of these discussions an additional Q&A was included in the fifth edition of the AIFMD Q&A published by the CBI on 8 November 2013 (the text of this additional Q&A is set out in full below).

Accordingly, the current position of the CBI is that FVCs registered under the FVC Regulation and other debt issuing special purpose vehicles will not be considered to be within the scope of the AIFMD:

Special Purpose Vehicles ID 1065
Q. I operate an SPV. As ESMA has not yet issued guidance on how the Article 2(3)(g) exemption applies, what should I do to ensure that I am in compliance with the AIFMD?
As a transitional arrangement, entities which are either:

a) *Registered Financial Vehicle Corporations within the meaning of Article 1(2) of the FVC Regulation (Regulation (EC) No. 24/2009 of the European Central Bank), or*
b) *Financial vehicles engaged solely in activities where economic participation is by way of debt or other corresponding instruments which do not provide ownership rights in the financial vehicle as are provided by the sale of units or shares are advised that they do not need to seek authorisation as, or appoint, an AIFM, unless the Central Bank of Ireland issues a Q&A replacing this one advising them to do so. The Central Bank of Ireland does not intend to do that at least for so long as ESMA continues its current work on this matter.*

Over the course of 2015–2016, there have been no adverse comments or moves by ESMA in relation to the CBI position on this.

One further potential impact of AIFMD on structured finance vehicles is the imposition of risk retention requirements (AIFMD Retention Requirements) separate and distinct from those imposed on credit institutions and investment firms under Articles 404–410 of CRR (CRR Retention Requirements). Those are both dealt with in more detail below.

Section 110 amendments

The Irish Minister of Finance announced on 6 September 2016 a series of highly targeted measures to amend tax rules that apply to Section 110 companies.

The measures (which are subject to final implementing legislation being enacted) are focused exclusively on Section 110 companies that hold loans, shares or other financial assets which derive the greater part of their value from Irish real estate. Consequently, the changes will not affect most mainstream international structured finance transactions. On 19 October 2016, the Irish Minister for Finance published the draft Finance Bill to enact these measures. It included specific carve-outs to ensure these measures did not impact mainstream securitisations in the international capital markets. In particular, it is accepted that acquiring Irish property-based loans for the purposes of a wider securitisation transaction (e.g., as part of an initial warehousing phase) is not caught by these new measures.

S110 reporting

Prior to 20 November 2015, SPVs whose principal activity is 'securitisation' as defined in Regulation (EU) No. 1075/2013 (which replaced Regulation (EC) 24/2009) (FVC

Regulation) are classified as financial vehicle corporations (FVCs) and as a result have an obligation to register with the CBI and provide certain balance sheet and annual profit and loss data in respect of their business activities on a quarterly and annual basis. The CBI provides FVC statistical information to the European Central Bank. Most Irish FVCs have elected into the Irish tax regime for securitisation companies under the Section 110 regime. However, many Section 110 SPVs are not FVCs where they are not considered to be engaged principally in the activity of 'securitisation' which has a particular meaning under the FVC Regulation.

The CBI has introduced reporting requirements similar to those required under the FVC Regulation to all non-FVC Section 110 SPVs. The CBI has stated that the extension of statistical reporting to non-FVC Section 110 SPVs is necessary for the proper performance of the CBI's functions under financial services legislation, particularly those relating to the collection and study of data relating to the stability of the financial system. The CBI has confirmed that it is collecting this data so that it can compile national and EU statistics in relation to all Section 110 SPVs, not just FVCs. The CBI has confirmed that information will be treated as confidential.

The extension of this statistical reporting to non-FVC Section 110 SPVs is consistent with similar reporting regimes that already apply to non-FVC SPVs in other EU Member States.

As a result of the introduction of this measure, from 20 November 2015 all Section 110 SPVs that are not FVCs will be obliged to file quarterly and annual statistical returns with the CBI. The reporting requirements are very similar to those currently applicable to FVCs.

EMIR

Regulation (EU) No. 648/2012 is the EU Regulation on OTC derivatives, central counterparties and trade repositories (EMIR). It establishes new 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. It entered into force on 16 August 2012.

EMIR distinguishes its application between financial and non-financial counterparties. Irish securitisation or debt issuance entities generally fall within the designation 'NFC-' under EMIR in the Irish law context (i.e., an NFC that does not exceed certain clearing thresholds imposed by EMIR).

As NFC-s, Irish issuers have particular obligations under EMIR, including in particular valuation and portfolio reconciliation requirements (albeit in certain circumstances on a delegated basis). However, they are generally not required to satisfy mandatory clearing obligations. Changes were expected during 2015 to the EMIR regime that may have disapplied it from some structured finance transactions that are considered simple, transparent and standardised securitisations (STS) for the purposes of the proposed Securitisation Directive. These changes remain under discussion as the Securitisation Directive remains in negotiation. In addition, other clearing requirements may apply to transactions that were formerly exempted from clearing limits as mere hedging transactions, so there is uncertainty around this issue.

SFTR

Where the Irish issuer enters into any repos or reverse repos, or engages in securities lending, margin lending or total return swaps, Regulation (EU) 2015/2365 (SFTR) will need to be considered also. Central reporting (akin to EMIR reporting) has not yet commenced, but the relevant documentation should directly provide for the delegation of any future reporting, where possible.

PRIIPs

Regulation EU (1286/2014) (PRIIPs) is due to come into force on 31 December 2016, and may apply to Irish debt issuers in certain circumstances. While the EU Parliament rejected the PRIIPs regulatory technical standards proposed by the EU Commission, casting severe uncertainty on PRIIPs implementation, in-scope issuers need to be nonetheless prepared to comply with PRIIPs come 1 January 2017 (including the preparation of any Key Investor Documents) and we are seeing PRIIPs-related selling restrictions being imposed in wholesale deals also to ensure a clean audit trail where the issuer is not in-scope of PRIIPs.

CRA III

Regulation (EC) No. 1060/2009 (as amended by Regulation (EU) No. 462/2013 (CRA III)) will impact Irish SPVs if they issue structured finance instruments (SFIs). SFIs are financial instruments or other assets relating to a securitisation transaction that are issued in tranches, the subordination of which determines the distribution of losses, and where the return on the SFIs is dependent upon the performance of the underlying pool.

Where credit ratings are sought for SFIs issued by an Irish SPV, the ratings must now be obtained from at least two independent rating agencies regulated by CRA III. In selecting the rating agencies to be appointed, the SPV (or a related third party – e.g., the arranger of the transaction) must consider engaging at least one rating agency with a less than 10 per cent market share (as determined and published by ESMA annually). There is no obligation to appoint such a rating agency, only to consider the appointment. Where neither of the rating agencies appointed have a market share of less than 10 per cent, this fact must be documented (e.g., in the SPV board minutes, or the listing document relating to the SFIs).

Separately, CRA III creates various public reporting requirements that will apply for specified types of SFIs from 1 January 2017. Under current regulatory technical standards in force, only SFIs backed by specified underlying assets classes (e.g., CMBS, RMBS, SME loans) will be subject to reporting requirements.

This obligation applies regardless of whether the SFIs are rated or listed, and applies jointly to the SPV and each of the originator and original lender (where such parties are established in the EU, by reference to the location of their respective statutory seats).

It remains unclear until final publication of the text of the Regulation as to how the application of the concept of STS under the proposed Securitisation Directive will impact the application of CRA III to transactions, but as noted below we now appear in 2017 to have reached a landing point on the final position of the STS Regulation, including on risk retention proposals.

A number of the proposals of the Committee on Economic and Monetary Affairs of the European Parliament (ECON) were considered by many market participants to have the potential to seriously undermine the securitisation market in Europe and, by extension, Ireland. These included:

a increasing the economic interest in a securitisation to be retained by the risk retention holder from 5 per cent to 20 per cent;

b requiring that the retention holder (originator, original lender or sponsor) be a regulated entity; and *c* requiring that only institutional investors be permitted to invest in securitisations.

On 30 May 2017, the parties to trilogue discussions (the European Commission, Council and Parliament) announced that an agreement had been reached regarding the text of the STS Regulation. As regards the above issues, the retention level for all risk retention models is to remain at 5 per cent, there will be no requirement that the risk retention holder be a regulated entity (save as necessary to fall within the definitions of 'sponsor' or 'original lender') and finally, institutional, professional and (in certain circumstances) retail investors will all be entitled to invest in securitisations.

Participants in the European CLO market will welcome these recent developments for removing the perceived threats to the functioning of the market as detailed in the ECON proposals as well as providing a degree of certainty to a legislative process that has been ongoing for a considerable period of time.

CRR

These changes are highly relevant to Irish issuers as they will need to work with arrangers, originators, sponsors and investors to ensure capital markets transactions are risk-retention compliant.

The regime directly applicable with certainty to capital markets transactions is that enshrined in the CRR. There has been some market commentary as to whether the similar regime applicable under AIFMD to authorised alternative investment fund managers might apply to capital markets deals in the absence of complete clarity on interpretation in the form of technical standards. Both regimes are intended to be replaced by a single regime under the proposed Securitisation Directive, so clarity on this is critical to the convergence of these regimes.

MiFID II

In preparation for the implementation of MiFID II across the EU on 3 January 2018, Ireland published its MiFID II implementing regulations (the MiFID II Regulations) in mid-August 2017. The MiFID II Regulations effectively retain the third country investment firm safe harbour that US managers, in particular, rely upon to provide investment services to Irish CLO issuers without triggering any Irish regulatory or licensing requirements.

The MiFID II Regulations impose some additional conditions to access the safe harbour from 2018, including a requirement that a manager entity be established in a 'good' jurisdiction and authorised and supervised in that jurisdiction. For CLO purposes, the key jurisdictions – including the US, Cayman and the UK (even assuming a 'hard' Brexit) – are considered good jurisdictions.

The maintenance of the Irish safe harbour is excellent news for the European CLO market as it significantly reduces uncertainty and risk in this area not only for US managers but also for UK managers considering their options post-Brexit.

Credit servicing regime

New legislation to regulate the activity of administering and managing loans to Irish individuals and small to medium-sized enterprises (SMEs) was passed into law on 8 July 2015. The Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 (Act) contains important provisions for purchasers of Irish loans acquired from, or originated by, regulated lenders. In brief, it sets out a regime for the authorisation of any person whose activities include the management or administration of such loans to Irish individuals or SMEs. In broad terms, the Act distinguishes between the owner of the credit and the servicer of the credit. An owner need not be authorised where it has appointed a credit servicing firm authorised under the Act and engages in high-level strategic decision making only in relation to the portfolio.

Purpose of the Act

The overall purpose of the Act is to ensure that Irish individuals and SMEs continue to enjoy statutory protections where their loans have been transferred to an unregulated purchaser. Previously, where such a loan was transferred to an unregulated purchaser the borrower would lose such statutory protections. While some purchasers agreed voluntarily to observe these regulatory standards, this was not considered by the Irish government to be satisfactory from a policy perspective.

Scheme of the Act

The Act requires any person who administers or manages a loan portfolio, other than an owner of relevant loans that is itself authorised to provide credit in Ireland, to become authorised as a servicing firm by the CBI. Managing and administrating loans is defined to include typical loan servicing activities (e.g., borrower communication, complaint-handling, collecting payments, ongoing borrower credit assessment, arranging alternative repayment arrangements and enforcement). However, regulated activities are not defined exhaustively. Therefore a careful analysis of the services provided across any given portfolio needs to be conducted.

An unregulated owner need not become authorised where it has appointed a servicing firm and engages in high-level strategic decision making only in relation to the portfolio (see further below). It should be noted that there is no minimum authorisation threshold (whether by way of value or number of loans), nor does the CBI have any discretion to grant exemptions (e.g., where the individual or SME borrower element is a small part of the portfolio).

A person who applies to become a servicing firm will have to obtain CBI's approval of its management and owners as suitable persons to be involved in the provision of regulated financial services. It is also expected that key management and business functions will be subject to the CBI's Minimum Competency Code. While applicants may currently apply for authorisation as a servicing firm, CBI is currently consulting with the industry on appropriate authorisation requirements and standards. There are no minimal capital requirements but CBI will assess the financial strength of applicants. As part of the consultation process CBI is canvassing views on issues such as professional indemnity insurance, outsourcing and ensuring that the servicing firm's relationship with the portfolio owner does not impede regulatory compliance.

As this is not EU-driven legislation, a CBI authorisation to act as a servicing firm cannot be 'passported' to other EU/EEA Member States.

Safe harbour

Where an unregulated loan owner takes only high-level strategic decisions in relation to its portfolio of loans it will not need to become authorised as a servicing firm, provided that the day-to-day administration of the loan portfolio is carried out by a servicing firm. To enjoy this safe harbour the portfolio owner must confine itself to the following types of activity:

a determining the overall strategy for the portfolio;
b maintaining control over key decisions relating to the portfolio; and
c taking decisions that are necessary to enforce the terms of a credit agreement.

A further provision is that the unregulated loan owner does not require authorisation to do any of these things, provided that it does not take such actions in a manner which if taken by a regulated entity would constitute a breach of Irish financial services law. Therefore, the Act is far-reaching because it effectively imposes regulatory standards on unregulated entities.

Further, where the loan owner delegates such strategic or portfolio level decision-making to an investment manager (as is typical), that manager will enjoy the benefit of the same safe harbour, but will be subject to the same proviso. In this regard, relevant investment managers (or other actors, such as private equity firms) need to be careful of how they operate their investments in Irish loan portfolios.

SME loans originally provided by an unregulated lender are outside the scope of the Act. This is in keeping with the primary policy aim of the Act to ensure the continuation of statutory protections to relevant Irish borrowers. This is a welcome clarification, as it does not disrupt the current operating practices of alternative credit originators in the Irish market.

Retained protections

The key protections that will continue to apply in favour of Irish individuals and SMEs are as follows:

a a right to sue by way of a private right of action for damages for breach of financial services legislation;
b a right to refer disputes to the Financial Services Ombudsman; and
c the enjoyment of rights under CBI Codes of Conduct, such as the Code of Conduct on Mortgage Arrears, the Consumer Protection Code and the Code of Conduct for Business Lending to SMEs (or successor CBI regulations enacted pursuant to the Central Bank Supervision and Enforcement Act 2013).

The Act applies with immediate effect. Accordingly any loan portfolio owner that does not have a servicer that is, or has applied to become, authorised as a servicing firm runs the risk of committing a criminal offence or triggering civil liability for engaging in credit servicing activities without regulatory cover.

The Credit Reporting Act 2013

The Credit Reporting Act 2013 (the 2013 Act) will in 2017 establish, for the first time in Ireland, a central credit register operating on a statutory basis. The register will be administered by the CBI. The register will replace the Irish Credit Bureau – a scheme currently operated by banks but that has no statutory basis. The new register will establish a mandatory reporting system, and will be used by the CBI to collect statistical information about consumer and business credit in Ireland. Establishing the register was one of the requirements of the 'Troika' (the International Monetary Fund, the European Central Bank and the European Commission) when Ireland's bail-out programme began in 2010.

The 2013 Act will require most consumer and commercial lenders to register information concerning credit granted above €500, and basic information about the borrower and any guarantors. It is understood that the legislation will impact some 500 lending institutions in Ireland – banks, credit unions, other lenders and loan book purchasers. Lending institutions will have access to the register. Individual borrowers and guarantors will be allowed access to their own personal information. Lenders will have to check the register before providing credit in excess of €2,000. The 2013 Act will apply to all credit provided to Ireland-based borrowers and all credit governed by Irish law. It also obliges an applicant for credit to disclose to the lender if the applicant has in excess of €5,000 of foreign debt.

The CBI has outsourced the operation of the register following a tender process. It is understood that the CBI is currently in discussions with the Data Protection Commissioner to finalise the content of borrower information to appear on the register. Much of the detail concerning how the register will work will be contained in regulations to be made by the CBI. It is expected that when the scheme becomes operational it will contain consumer credit information, with commercial credit information following at a later date. The register will provide a systematic basis for lenders to check the credit history of a potential borrower. It is in keeping with the drive, particularly for consumer credit, to encourage responsible lending. However, it will impose additional regulatory burdens on banks that will, among other things, be required to update credit information over the lifetime of the credit agreement. It seems inevitable that the additional cost of compliance will be passed on to borrowers.

The relevance of the 2017 Act regime in the context of capital markets transactions is that many Irish issuers will be counterparties to loan or lending transactions in addition to bond/note transactions. Many structured finance transactions incorporate liquidity or on-lending structures or profit-participating loans. These may need to be reported to the relevant authority. The regime will apply on a look-back basis to all loan transactions of the relevant corporate falling under the regime. It is unlikely the regime will apply to bond transactions on the whole.

General trends – debt issuance

The high-yield market has not yet had a significant impact in Ireland. Traditionally, Irish corporates accessed bank finance. Significant change occurred with increased access to the PPN market (in the US in particular) for some of the larger Irish corporates in the late 1990s and later; however, confidence waned in Irish corporate credit risk following some high-profile PPN restructurings. European high-yield debt is still in its infancy as an issuing option for Irish corporates; however, if it continues to be touted as a solution to the European leveraged loan bubble, then Irish corporates who are in Loan Market Association-leveraged loans may also look to access that option. As noted below, multiple loan transfers are being effected under Irish borrower portfolio sale transactions that will seek to access the capital markets to finance such deals.

In the area of asset-backed security, debt issuance volume had significantly reduced in the years up to and including 2012 with an increase in volume since then; however, one area that has bucked this trend is that of commodities-linked and direct commodities-secured bonds. High-profile issuers such as Source have successfully issued significant volumes of this product type into the European market. This was enhanced by the widening in 2011 of the Section 110 regime to provide for the direct holding of tradeable commodities as 'qualifying assets' under that regime. This has clarified the position to facilitate in particular the issuance of precious metal secured bonds, and the development of many shariah-compliant structures, which commonly are secured on bullion (see Section I.ii).

In addition, the Section 110 regime was widened in 2011 to permit the holding of plant and machinery directly by Section 110 issuers. Again, this was a significant enhancement of the regime and facilitates, in particular, the simplification of aircraft securitisation structures

– a natural fit with Ireland's status as an aviation finance hub within Europe – along with other asset classes such as automobile leasing and rentals. There is significant industry and legislative support for the potential to finance the aviation industry through EETC-type instruments issued out of Ireland and the establishment of a primary and secondary market in Europe. This is perceived as a natural progression complementary to the traditional bank and ECA financing sources in the international aviation industry, especially given regulatory capital and balance sheet issues. In 2014, many significant aviation transactions have been completed using Irish AOEs to hold multiple aircraft portfolios. These Irish structures facilitate the efficient financing and leasing of such aircraft through capital markets technology. A number of ABS transactions also completed over 2015–2017 that were solely collateralised on aircraft assets. Avolon successfully completed the first aircraft securitisation to be publicly rated since before the financial crisis, and successfully raised $1.25 billion in a similar ABS transaction in September 2017 in five days, which augurs well for this asset class.

In the equity-linked space, there has been significant development over recent years in the capital markets in Ireland. While more traditional commoditised structured debt products have declined significantly, the area of hybrid equity products has opened up, in both bespoke (i.e., non-high-volume, commoditised) and commoditised platform products. Bespoke products have included some capital products and equity-linked products being accessed by institutions as positive approaches to debt restructuring with clients – seeking debt or equity swap solutions to restructurings rather than default, in an effort to adopt London Approach principles of forbearance, has brought capital markets technology to bear on banking workout solutions. More commoditised and higher-volume product areas have included products to some extent mimicking equity or fund structures. In this regard, the popularity of fund managed account platforms in the investment community has generated product in the debt world. This has presented new challenges to capital markets lawyers and technologies in that such fund products are usually characterised by high-volume trading and are priced and redeemed on a regular basis. Commoditised structured finance products traditionally are illiquid and are not exchange traded. In response to this, Irish capital markets products in this area have accessed the relatively newly established exchange traded platforms for debt on the London Stock Exchange (SETS), the Deutsche Börse (Xetra) and other EU-regulated exchanges. In addition, innovative certificated note structures have been developed to facilitate daily issuance and redemption of Euroclearable notes – not usual for these types of debt products. These product offerings have also presented challenges in the context of the Prospectus Directive requirements, and maintaining Prospectus Directive compliance has presented interesting documentary requirements and listing needs on a pan-European basis.

Irish SPVs continue to increase in popularity as structured solutions to the thriving funds industry in Ireland and the Cayman Islands. Irish SPVs complement Irish and Cayman funds by offering flexibility as finance vehicles where funds are acquiring particular types of financial assets, contracting with prime brokers and investment managers, and providing leverage. Irish qualifying investor alternative investment funds (QIAIFs) combined with Irish SPVs or holding companies also offer significant facilitation to purchasers and managers acquiring Irish and international asset portfolios. Irish SPVs are also being used to aggregate and manage restructuring solutions by financial institutions with attendant instruments being issued by the SPVs.

A huge increase in distressed asset, loan and property acquisitions in Ireland has occurred over recent years and remains ongoing in 2016. Many of these purchases have employed SPV technology to acquire and hold such assets, together with notes to finance the purchase and structure cashflows to and from relevant counterparties.

In addition, CLO capital markets technology has been used in Irish structures creating credit 'funds' lending to numerous sectors of Irish and pan-European borrowers including Irish government-backed initiatives in the SME sector. This form of funding was historically perceived by some industry sectors as 'disintermediation' of the banking industry, but there is clear evidence of increased co-operation between traditional lenders and newer credit fund or alternative lenders. The complementary nature of the services and funding each offers the market has created effective synergies, which has led to sharp growth of alternative lenders as a lending sector in Ireland (as in the rest of the EU). Throughout 2016 and 2017, many funding platforms have been established to facilitate lending for housing and to SMEs, activity that is supported by official policy. Many of these alternative lenders are now actively-lending, well-established players in the Irish market. Innovative lenders such as RELM and BOLT are also building unique technology platforms to interact with borrowers directly.

ii Relevant tax and insolvency law

Insolvency law

There have been significant general developments in Irish insolvency law over recent years. These have been predominantly in the area of pure bank lending to domestic borrowers rather than with the international capital markets; however, inevitably capital markets participants have seen such developments affect the nature of their Irish insolvency advice. The Personal Insolvency Act 2013 was passed and makes a number of fundamental reforms to Irish bankruptcy law; it provides a legislative mechanism for three non-judicial debt settlement procedures for individual debtors and shortens the bankruptcy period from the current 12 years to three years subject to certain conditions. One procedure, the personal insolvency arrangement, is available in respect of secured debt of up to €3 million (although all of the secured creditors can agree to waive this limit) and all unsecured debt.

Also, there have been a number of progressive and highly interesting examinership rulings (Ireland's Chapter 11-style regime), which have already had an impact on the nature and tenor of advice to capital markets clients. Bondholders on large financed transactions will inevitably be involved in any insolvency analysis with bank debt, and these recent changes have affected their general advisory requirements, including in particular the formulation of their defensive strategies as creditor groups. In broad terms an increase in the sheer volume of insolvency activity in the Irish courts has added clarification to particular areas of the law while also facilitating some judicial activism in certain areas. Some Irish corporate groups have achieved prepack-style examinership in substance if not in pure legal form.

Tax law and regulation

Ireland amended its tax code specifically to facilitate the variety of traditional Islamic finance structure extending the tax treatment that applies to conventional finance transactions to Islamic finance products so that these structures can be implemented in a tax-efficient manner. The Irish government has also publicly committed to further increasing the attractiveness of the jurisdiction to this sector over the coming years. Ireland continues to complete tax agreements with other countries, increasing transparency and promoting its facilitation as an international capital markets hub.

As at October 2017, the position was as follows:

Ireland's network of double taxation treaties (as at October 2017)

Albania	Hong Kong	Portugal
Armenia	Hungary	Qatar
Australia	Iceland	Romania
Austria	India	Russia
Bahrain	Israel	Saudi Arabia
Belarus	Italy	Serbia
Belgium	Japan	Singapore
Bosnia Herzegovina	Kazakhstan*	Slovak Republic
Botswana*	Kuwait	Slovenia
Bulgaria	Latvia	South Africa
Canada	Lithuania	Spain
Chile	Luxembourg	Sweden
China	Macedonia	Switzerland
Croatia	Malaysia	Thailand
Cyprus	Malta	The Republic of Korea
Czech Republic	Mexico	Turkey
Denmark	Moldova	Ukraine
Egypt	Montenegro	United Arab Emirates
Estonia	Morocco	United Kingdom
Ethiopia*	Netherlands	United States
Finland	New Zealand	Uzbekistan
France	Norway	Vietnam
Georgia	Pakistan	Zambia
Germany	Panama	
Greece	Poland	
* Treaty not yet in effect.		

Ireland was also an early signatory to an intergovernmental agreement with the US to implement FATCA. Ireland has also implemented the OECD Common Reporting Standards (CRS) in full.

The overall effects of the US Volcker Rules and how to deal with them in capital markets documentation generally are, however, still being assessed. International commentary highlights the need for a coordinated mutual recognition that does not currently exist.

iii Other strategic considerations

The Irish government has implemented a number of measures to deal with perceived and real issues within the regulation of financial institutions in Ireland. In particular, it implemented the Central Bank Reform Act 2010 to create a single organisation – the Central Bank Commission – replacing the boards of the CBI and the Irish Financial Services Regulatory Authority. The Act underpins the implementation of a new financial regulatory model, which intends to create a proactive risk-based model of supervision supported by a credible enforcement threat. In this regard, Part 3 of that Act introduced a new fitness and probity regime that sets new standards across the financial services industry and enhanced powers to approve, veto and investigate and, where appropriate, remove or prohibit position holders from 1 December 2011 (and fully effective from 1 December 2012).

In addition, the Central Bank and Credit Institutions (Supervision and Enforcement) Act 2013 has significantly enhanced the supervisory and enforcement powers of the regulatory authorities in Ireland. In particular, it provides for a significant increase in the financial penalties levied on regulated entities, including turnover-based penalties for corporations. For example, it doubles the current administrative sanctions penalties taking the maximum fine for individuals and bodies corporate to €1 million and €10 million (or 10 per cent of annual turnover) respectively. It will also include powers to restrict an entity's activity and to suspend and revoke the authorisation of credit institutions, and will provide protection for whistle-blowers. It also provides significant new rule-making powers for the CBI, and for a civil-law damages remedy for aggrieved customers who suffer loss as a result of a breach of the rules by a regulated entity.

During the financial crisis, the capitalisation of Irish banks relative to the size and stability of their loan books has fallen under the spotlight. In 2010 the CBI set new and more stringent capital requirements for Ireland's domestically owned banks through a process known as the prudential capital assessment review (PCAR), which raised the core Tier 1 capital ratios for those institutions first to 8 per cent and subsequently to 12 per cent. Subsequently, the PCAR process resulted in further stress tests imposing institution-specific requirements based upon the individual circumstances of each institution (the prudential liquidity assessment review, or PLAR) for any banks participating in PCAR.

In addition to the existing burden of PCAR and PLAR, the new Basel III requirements were scheduled to be introduced at the beginning of 2013 for Irish credit institutions, implementing new permanent standards of bank capitalisation (although at the time of writing there are still debates as to what timelines are feasible). Basel III will be implemented on a phased basis, as follows:

Capital type	2013	2015	2018
Equity	3.5%	4.5%	7%
Other Tier 1	1%	1.5%	1.5%
Tier 2	3.5%	2%	2%
Total requirement	8%	8%	10.5%

One of the key expected effects of Basel III is that it will force Irish banks to be much less reliant on Tier 2 capital and non-equity capital. In addition, from 2018 onwards all capital deductions (e.g., goodwill) will have to be made against Tier 1 (whereas there is currently a system of split deduction whereby half of the deductions are made from Tier 1 and the other half from Tier 2). This is why some commentators have speculated that core capital will have to rise by between sevenfold and tenfold to meet the new Basel III requirements.

These changes are certain to have a profound (albeit phased) impact on bank financing and the relationship between banks and the international capital markets – most notably, increased own funds requirements will significantly affect the ability of banks to use the capital markets as a leverage tool (although it will equally affect lending transactions).

III OUTLOOK AND CONCLUSIONS

In the international capital markets issuance arena, 2016 activity has continued to increase in public deals (CLDs, RMBS, CMBS, aviation ABS) and in the bespoke and commoditised sectors. Fundamentally, Ireland has retained its attraction as a structured finance location for international transactions. Seventy-five per cent of all public EU CLOs in 2015–2016 were issued out of Ireland. Brexit should not fundamentally affect this position, and indeed may enhance it. Structures that were historically established in the jurisdiction (in particular, limited recourse structures) have, notwithstanding credit events and defaults generally, worked as originally intended, and security and bankruptcy structuring has been robust. Our experience locally is that the locating of structured finance transactions in Ireland, in comparison with other jurisdictions of choice in Europe, was not seriously damaged by Irish domestic economic issues. The reduced volume of these transactions was driven largely by international economic factors. Ireland has recovered domestically to one of the fastest-growing economies in the EU in 2014–2016. Its international sovereign credit rating through its bond pricing has similarly made a significant recovery. Specific key areas of activity are rising, and there are significant volumes in certain specialised areas as Ireland re-establishes itself as a centre of choice for particular products. This has been reflected by a significant increase in the use of Irish SPVs over the course of 2016 and 2017 for public and private CLOs and repackaging transactions.

The broader public CLO market is, in using Ireland, unaffected by any local issues and the continuing resolution of EU regulatory issues on CRR, AIFMD and EMIR (as noted above) has assisted stability in the market. Recent legislative changes to the Section 110 regime were approached in a balanced manner and carved out all mainstream market securitisations and related relevant matters.

The uncertainty that was introduced to the capital markets from an Irish perspective through the emergency measures and burden-sharing provisions imposed by the Irish legislature has also been significantly counteracted by their ultimate abolition in whole or in part as necessary, and the introduction into EU law of a special resolution regime. While affording powers to Irish government officials and regulatory authorities, the nature of that regime shifted focus away from third-party investors towards the internal regulation and penalising of the credit institutions and officials, along with rescue and takeover provisions regarding the institutions. In practice, there were few Irish governmental actions taken, and there were no significant actions post-2014 nor any further expected from 2017 onwards.

Overall, the outlook for capital markets activity in or through Ireland is encouraging, and positive and increased activity is readily apparent and likely to continue.

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