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Securitisation

Ireland

Law & Practice

Garry Ferguson, Jonathan Sheehan,
Andrew Traynor and Sinéad Gormley
Walkers Ireland LLP

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Law and Practice

Contributed by:

Garry Ferguson, Jonathan Sheehan,
Andrew Traynor and Sinéad Gormley
Walkers Ireland LLP see p.16



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1. Structurally Embedded Laws of General Application

1.1 Insolvency Laws

Ireland is a leading domicile within Europe for securitisation activity and the leading European jurisdiction by value for securitisation special purpose entities (SPEs). While the legislative regime incorporates a number of supportive taxation measures, no equivalent measures exist in the area of insolvency law. Issuers and originators in Ireland are subject to the general insolvency law and utilise well-established structures to insulate the underlying assets from the balance sheet (and insolvency estate) of the originator. See **1.3 Transfer of Financial Assets**.

While we have seen an increase in synthetic securitisations, an Irish securitisation of receivables is typically structured as a “true sale” via an assignment from the originator directly, or through an intermediary vehicle, to the issuer. True sale transactions are subject to two principal risks in an originator insolvency: recharacterisation of the sale as a secured loan and clawback on originator insolvency. Both true sale and synthetic securitisations may be impacted by rules on consolidation of assets, avoidance of certain contracts and examination of companies.

Recharacterisation as Secured Loan

True sale

A transfer of assets purporting to be a true sale may in certain circumstances be recharacterised by an Irish court as a secured loan. In determining the legal nature of a transaction, a court considers its substance as a whole, including economic features and the parties’ intention; and irrespective of any labels.

Recharacterisation was considered by the High Court in *Bank of Ireland v ETeams International Limited* [2017] IEHC 393 (subsequently upheld by the Court of Appeal in *Bank of Ireland v ETeams (International Ltd)* [2019] IECA 145), which endorsed the principles set out in the English cases of *Re: George Inglefield* [1933] Ch.1, *Welsh Development Agency v Export Finance Co. Limited* [1992] BCLC 270 and *Orion Finance Limited v Crown Financial Management Limited* [1996] BCLC 78.

Re: George Inglefield prescribed three indicia distinguishing a sale from a security transaction.

- Return of the asset – a security provider is entitled, until the security has been enforced, to recover its secured asset by repaying the sum secured; whereas a seller is not entitled to recover sold assets by returning the purchase price.
- Sale at a loss – if a secured party realises secured assets for an amount less than the sum secured, the security provider is liable for the shortfall; whereas a purchaser bears any loss suffered upon a resale.

- Sale at a profit – if a secured party realises secured assets for an amount greater than the sum secured, it must account to the security provider; whereas a purchaser is not required to account to the seller for any profit made upon a resale.

None of the above indicia of a security transaction is necessarily inconsistent with a sale; a transaction may be a sale notwithstanding that it bears all three features. The following are generally considered as being consistent with a sale:

- a seller acting as servicer for, or retaining some credit risk on, sold assets;
- a seller repurchase obligation on breach of asset warranties; and
- extraction of profits for the seller via the waterfall after transaction expenses have been met.

A sale transaction will be upheld unless it is (i) in substance, a security arrangement (for example, the transaction documents do not indicate a sale); or (ii) a sham (for example, the transaction documents do not reflect the parties’ intentions).

Consequences of recharacterisation

Subject to the list of “excluded assets” set out in Section 408(1) of the Irish Companies Act 2014 (as amended) (the Companies Act), the particulars of security created by an Irish company must be registered with the Registrar of Companies within 21 days of creation. In practice, this is done at closing to secure priority under the Companies Act, which confers priority by time of registration. Failure to register within this timeframe renders the security void as against any liquidator or creditor of the company. It is not the practice in Ireland to make precautionary security filings. Consequently, a true sale which is recharacterised as a secured loan would constitute an unregistered security interest of the originator and render the issuer its unsecured creditor as regards the assets.

The issuer would rank *pari passu* with other unsecured creditors and behind the claims of secured and preferential creditors, the costs and fees of the insolvency process and certain insolvency officials, and certain amounts deducted from employees’ remuneration.

Claw-Back

Several provisions of Irish company law entitle a liquidator to seek to set aside pre-insolvency asset transfers.

Unfair preference

Any transaction in favour of a creditor of a company which is unable to pay its debts as they become due, which occurs during the six months prior to the commencement of the company’s winding-up, and with a view to giving that creditor a preference

over other creditors constitutes an unfair preference and is invalid. Case law indicates that the company must have a dominant intent to prefer one creditor over its other creditors. No question of unfair preference can arise where the originator is able to pay its debts as they become due at the transaction date. An originator therefore certifies its solvency at closing.

The six-month period is extended to two years for transactions in favour of “connected persons” (including directors, shadow directors, de facto directors and “related companies” (as defined in Section 2(1) of the Companies Act)).

Fraudulent disposition

Any conveyance (including an assignment, charge or mortgage) made with intent to defraud a creditor or other person is voidable by any person thereby prejudiced. However, this does not apply to any estate or interest in property conveyed for valuable consideration to any person in good faith not having, at the time of conveyance, notice of the fraudulent intention; or affect any other law relating to bankruptcy or corporate insolvency.

Invalidity of floating charge

A floating charge on the property of a company created during the 12 months before the commencement of its winding-up is invalid unless it is proved that the company, immediately after the creation of the charge, was solvent. This is subject to an exception for 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 subsequent to the creation of, and in consideration for, the charge and interest at the appropriate rate. The 12-month period is extended to two years if the chargee is a connected person.

Consolidation

Irish courts have a limited jurisdiction to consolidate assets where satisfied that it is just and equitable to do so.

An Irish court may order that two or more “related companies”, which are being wound up, are treated as one company and wound up accordingly (a pooling order). In deciding whether to so order, it must consider:

- any intermingling of businesses;
- involvement of one company in the management of the other;
- conduct towards each other’s creditors; and
- responsibility of one company for the circumstances giving rise to the winding-up of the other.

An Irish court may also order the related company to contribute to the whole or part of the provable debts in the winding-up (a contribution order). The court must consider, as regards the

related company, amongst other things, (i) its involvement in the management of, and conduct towards creditors of, the company being wound up; and (ii) the likely effect of a contribution order on its own creditors.

There is no reported judicial authority in Ireland addressing the circumstances in which a court would exercise these discretions. The use of an orphan SPE and compliance with standard separateness covenants reduces the likelihood of an issuer and an originator being considered related companies.

Disclaimer of Onerous Contracts

A liquidator may, with leave of the court, at any time within 12 months of the commencement of the liquidation, disclaim any property of a company being wound up which consists of unprofitable contracts or any property that is unsellable or not readily saleable.

Examinership

Examinership is a protection procedure under the Companies Act to facilitate the survival of Irish companies in financial difficulty. Where an Irish company is, or is likely to be, unable to pay its debts, an examiner may be appointed if the court is satisfied that there is a reasonable prospect of the survival of the company and all or part of its undertaking as a going concern. Petitions may be presented by the company, its directors, contingent creditors, prospective creditors or members holding at least one tenth of the voting share capital. Non-petition provisions in transaction documents are intended to prevent the presentation of such petitions in respect of an issuer. However, an argument could be made that such provisions should not be given effect to on the basis that they oust the jurisdiction of, or restrict the right of access to, the courts. This point has not been judicially considered to date.

An examiner is appointed for a period of 70 days, which can be extended by a further 30 days where the court is satisfied that it is required to enable the examiner to complete their work. A court may order a further 50-day extension where exceptional circumstances exist in respect of the relevant company, pursuant to temporary measures (currently due to expire on 9 June 2021 but subject to prolongation) introduced by the Companies (Miscellaneous Provisions (Covid-19)) Act 2020.

During the period of protection, the examiner formulates proposals for a compromise/scheme of arrangement to assist the survival of the company or the whole or any part of its undertaking as a going concern. A scheme of arrangement may be approved by the court when at least one class of creditor has accepted it and the court is satisfied that the proposals are fair and equitable to members or creditors who do not support

the proposals and whose interests would be impaired by their implementation.

There has been no instance to date of an examiner being appointed to an entity with the typical characteristics of a securitisation SPE.

Credit Institutions

Where an insolvent originator is a credit institution, Irish and EU rules on resolution and recovery of credit institutions and the Central Bank Acts 1942 to 2018 are also relevant.

1.2 Special-Purpose Entities

Form and Structure

An Irish SPE is structured as a bankruptcy-remote orphan company and formed as a private limited company (an LTD), a designated activity company (a DAC) or a public limited company (a PLC). Its issued share capital is held on trust by a professional trustee for charitable purposes.

The form chosen will depend on the type of securities to be issued and whether or not they will be listed. An LTD can issue unlisted notes falling within the “excluded offer” exemption under Regulation (EU) 2017/1129 (the Prospectus Regulation, or PR). A DAC can issue both listed and unlisted notes falling within the excluded offer exemption. Only a PLC may offer securities to the public, other than pursuant to an excluded offer and/or list securities other than debentures. Most securitisations involve the issuance of listed debt securities via a DAC.

The board of directors of the SPE should be comprised of at least two independent persons. A corporate service provider will usually provide the SPE’s independent directors, company secretary, registered office and various reporting services. The SPE’s contractual relations are structured on a non-petition/limited recourse and arm’s length basis. Its constitution may also contain restrictions.

Non-consolidation

The transaction documents will seek to minimise the risk of consolidation of assets on originator insolvency by binding the SPE to separateness covenants, requiring it, for example to:

- maintain its own books and records separately from those of any other entity, including the originator;
- act solely in its own corporate name and through its own officers and agents;
- manage its business and daily operations independently;
- enter into all transactions on an arm’s length basis;
- maintain its assets separately from those of any other entity;
- observe all corporate formalities;

- discharge all expenses and liabilities incurred by it out of its own funds, and allocate fairly and reasonably any shared overheads; and
- limit its activities to its securitisation.

1.3 Transfer of Financial Assets

Requirements of Valid Transfer – Perfection

An Irish securitisation of receivables is typically structured as a true sale via an assignment from the originator directly, or through an intermediary vehicle, to the issuer. A true sale may also be achieved by declaration of trust, sub-participation or novation. These methods are generally employed only where an assignment is not feasible and are not discussed below.

A valid legal assignment of a debt must be:

- absolute;
- in writing and signed by the assignor;
- for the entire amount of the debt; and
- expressly notified in writing to the debtor.

Assignments not meeting the above requirements take effect in equity only. Both legal and equitable assignments can execute a true sale. Most Irish securitisations employ an equitable assignment (achieved by omitting notification to the underlying obligors). The issuer (or trustee) may, upon the occurrence of certain trigger events – for example, issuer insolvency – perfect the assignment by notifying the underlying obligors of the assignment.

Additional perfection requirements apply for certain asset classes. In particular, assignments of rights in real property must be registered with the Property Registration Authority in order to take effect as a legal assignment.

Prior to perfection, an equitable assignee is exposed to the following risks:

- its rights are subject to any prior equities that have accrued to the underlying obligor, including rights of set-off;
- an underlying obligor can exercise rights of set-off which accrue after the date of the assignment;
- it cannot sue for the debt in its own name and must join the assignor to any action;
- repayment of the debt to the assignor is a valid discharge of the debt; and
- it ranks behind any third-party bona fide purchaser for value without notice which takes a legal assignment of the assets.

True Sale

See the “Recharacterisation as Secured Loan” section of **1.1 Insolvency Laws**. A legal opinion confirms the effectiveness of the sale; and subject to certain factual assumptions and qualifications, that such sale is not liable to be recharacterised as a secured loan.

1.4 Construction of Bankruptcy-Remote Transactions

If assignment is not possible, an originator may declare a trust over the assets in favour of the SPE. The SPE obtains an equitable interest in the assets. However, unlike an equitable assignment, this interest cannot be elevated to a legal interest by delivery of notice. As such, the SPE will remain subject to the risks set out in the “Requirements of Valid Transfer – Perfection” section in **1.3 Transfer of Financial Assets**.

See also **7. Synthetic Securitisation**.

A trust is validly constituted where there is certainty as to the intention to create the trust, the subject matter and the beneficiaries. A legal opinion will confirm that the trust satisfies these requirements subject to certain factual assumptions, including as to the correct identification in the transfer agreement of the assets.

2. Tax Laws and Issues

2.1 Taxes and Tax Avoidance

Stamp Duty

Irish stamp duty is a tax on instruments and can apply on instruments of transfer (including agreements to transfer) which are executed in Ireland or which relate to Irish situated assets. The current rate of stamp duty on non-residential property is 7.5%, or 1% in the case of shares in an Irish incorporated company. While the transfer of assets without a change in beneficial ownership (eg, to a nominee of the beneficial owner) should not trigger a charge to stamp duty, a transfer of financial assets by an originator to an SPE would typically involve a change in beneficial ownership. However, a number of exemptions from the charge to stamp duty are available in respect of various financial assets. For example, an agreement for the sale, or a transfer on sale, of debts is exempt from stamp duty where the sale is in the ordinary course of business of the seller or the purchaser. This is commonly relied on in the case of the acquisition of loans by Irish SPEs which are in the business of buying and/or selling loans/receivables. In addition, loan capital (as defined) is exempt from stamp duty on transfer/sale. Exempt loan capital for these purposes means any debenture stock, bonds or funded debt, or any capital raised by a company which has the charac-

ter of borrowed money. The exemption applies where the loan capital:

- is not convertible into Irish shares or marketable securities;
- does not carry similar rights to shares;
- has not been issued at a discount of more than 10% of its nominal value; and
- is not index linked in terms of repayment or interest.

Other common exemptions include the transfer of shares in a non-Irish incorporated company, Irish shares which are traded on the Enterprise Securities Market (ESM) of the Irish Stock Exchange, American depositary receipts, swap agreements, forward agreements, financial futures agreements and options (each as defined). Specific exemptions also apply in case of stock borrowing and stock repos. The transfer of a mortgage is also outside of the charge to Irish stamp duty. Irish SPEs are also typically structured so as to take advantage of the Irish securitisation tax regime set out in Section 110 of the Taxes Consolidation Act 1997 of Ireland, as amended (Section 110). The issue or transfer of securities issued by a Section 110 company is exempt from Irish stamp duty where the money raised by those securities is used in the course of its business. In circumstances where a stamp duty exemption is not available, non-Irish situated assets may occasionally be transferred by way of instrument executed outside of Ireland. Alternatively, it may be possible to effect a novation, or to transfer economic exposure only by way of sub-participation and not give rise to a stamp duty charge.

Value Added Tax (VAT)

Irish VAT at the standard rate (21% for the period from 1 September 2020 to 28 February 2021 and thereafter 23%) can apply on the supply of services (which can include the supply of intangible assets – eg, financial assets). However, financial services consisting of the issuing, transferring or otherwise dealing in existing stocks, shares, debentures and other securities are exempt from VAT.

2.2 Taxes on SPEs

Where the SPE qualifies as a Section 110 company, it would be subject to Irish corporation tax at the rate of 25% on taxable profits. Section 110 companies can take advantage of Ireland's favourable securitisation tax regime, which permits certain financial transactions to be carried out in a tax efficient manner where certain conditions are met. Section 110 provides for the taxable profits of a Section 110 company to be computed on the same basis as a trading company. This allows for the cost of funding and other revenue expenditure, incurred wholly and exclusively for the purposes of its business, to be tax deductible.

In addition, a Section 110 company can deduct profit participating interest (and interest which exceeds a reasonable commer-

cial rate of return) in computing its taxable profits (subject to conditions). Accordingly, while a Section 110 company is subject to corporation tax at the higher 25% rate, the tax is levied on the company's net taxable profit which is generally maintained at a negligible level by matching deductible expenditure with income through the sweep-out mechanism of a profit participating loan or note.

A qualifying company, for the purposes of Section 110, is one which is resident in Ireland for tax purposes and which, among other things, carries on in Ireland a business of holding, managing, or both the holding and managing of qualifying assets (financial assets, commodities and plant and machinery) and apart from activities ancillary to that business, carries on no other activities. It is also a requirement of Section 110 that the first assets held or managed by the SPE have an aggregate value of not less than EUR10 million. This requirement applies only to the first transaction entered into by the Section 110 company and the value of subsequent transactions is irrelevant for this purpose. An SPE will not be a qualifying company for Section 110 if any transaction is entered into by it otherwise than by way of a bargain made at arm's length. However, there is an exception to this requirement in certain circumstances in relation to the payment of profit participating interest.

Exceptions to Anti-avoidance Rules

In accordance with Section 110 anti-avoidance rules, deductions for profit participating interest are disallowed except in the following circumstances:

- the interest is paid to an Irish tax resident person or a person who is otherwise within the charge to Irish corporation tax;
- the interest is paid to certain pension funds or other tax-exempt bodies that are resident in a "relevant territory" (ie, an EU member state or double tax treaty country); or
- under the laws of a relevant territory, the interest is subject to a tax (without any reduction computed by reference to the amount of the interest) and that tax corresponds to Irish corporation tax or income tax and applies generally to profits, income or gains received in that territory by persons from sources outside that territory.

The anti-avoidance rules generally do not apply to transactions where the debt is issued as a quoted Eurobond or wholesale debt instrument (see **2.3 Taxes on Transfers Crossing Borders**) and the investors are third-party persons otherwise unconnected with (through the sale of assets or holding of shares or voting power or significant influence) the Section 110 company.

An interest restriction applies in respect of the payment of profit participating and/or excessive interest by Section 110 compa-

nies investing in Irish real estate-related assets (eg, Irish real estate-secured loans). Provided the financial assets acquired by the SPE are not related to Irish real estate, the interest restriction should not apply.

2.3 Taxes on Transfers Crossing Borders

Irish withholding tax applies at the rate of 20% to payments of yearly interest which have an Irish source and are made to both Irish resident persons and non-Irish resident persons. Interest is considered to be yearly interest if the principal is outstanding (or is capable of being outstanding) for at least one year.

A number of exemptions from withholding tax are available to Section 110 companies such as the quoted Eurobond exemption for securities which are quoted on a recognised stock exchange (subject to conditions). There is also no obligation to withhold tax in respect of interest paid by a Section 110 company to a person who is tax resident in an EU member state (other than Ireland), or in a country with which Ireland has signed a double tax treaty. In addition, Section 110 companies can take advantage of the "wholesale debt" exemption, which, inter alia, applies to debt instruments which are issued in denominations of not less than EUR500,000 and which mature within two years (subject to conditions).

Where interest is profit dependent (or represents more than a reasonable commercial return), a Section 110 company is only entitled to claim a tax deduction for the interest if certain conditions are met (see discussion in **2.2 Taxes on SPEs**). If these conditions are not met, the interest would be recharacterised as a non-deductible distribution and 25% dividend withholding tax may apply (subject to certain exceptions).

2.4 Other Taxes

The issue or transfer of securities, issued by a Section 110 company, is exempt from Irish stamp duty where the money raised by those securities is used in the course of its business.

The activities of a Section 110 company are often exempt activities for the purposes of Irish VAT. However, if the Section 110 company's investments are located outside of the EU, partial VAT recovery may be available. There are specific exemptions from Irish VAT in relation to investment management and corporate administration services provided to a Section 110 company. However, legal and audit services provided to a Section 110 company in Ireland will be subject to VAT. To the extent that a Section 110 company receives taxable services from outside of Ireland the company will be obliged to register for VAT and self-account for Irish VAT on those services on the reverse-charge basis at the standard rate (21% for the period 1 September 2020 to 28 February 2021 and thereafter 23%).

ATAD

Similar to all EU member states, Ireland is required to implement a number of corporation tax measures as a result of the EU Anti-Tax Avoidance Directive (ATAD) – the EU’s response to the OECD’s Base Erosion and Profit Shifting (BEPS) project of corporation tax reform. Of the measures proposed in ATAD, the “interest limitation rule” and the “hybrid mismatch provisions” could have an impact on Section 110 companies by restricting or denying a deduction for interest in certain circumstances. Hybrid mismatch legislation came into effect in Ireland on 1 January 2020. However, a noteholder should not in general be treated as an associated enterprise of a Section 110 company merely as a result of holding notes, meaning that in many cases payments of interest by a Section 110 company should not come within the scope of hybrid mismatch provisions. Reverse hybrid mismatch provisions are expected to be introduced by 2022. The implementation date for the interest limitation rule in Ireland is yet to be announced. However, an implementation date in Ireland of 1 January 2022 is currently considered to be the most likely based on the recent announcements made as part of the Irish Government’s Budget 2021 process. Accordingly, the final form and impact of the interest limitation rule on Section 110 companies in Ireland remains uncertain.

2.5 Obtaining Legal Opinions

Legal opinions are generally provided by counsel to the issuer in a securitisation. The opinion typically addresses, in an Irish tax context:

- whether the issuer meets the conditions to qualify for the Irish securitisation tax regime;
- whether interest on the relevant debt securities is deductible for Irish tax purposes and can be paid by the issuer free from withholding tax;
- whether stamp duty arises in connection with the entry into of the transaction documents; and
- certain VAT confirmations (eg, that the services of the investment manager and corporate services provider to the issuer are exempt from Irish VAT).

3. Accounting Rules and Issues**3.1 Legal Issues with Securitisation Accounting Rules**

The accounting analysis is undertaken by accountancy professionals. Key considerations are balance sheet treatment of the transferred assets and consolidation for accounting purposes of the SPE into the originator’s group. A securitisation may be considered on-balance sheet for accounting purposes and off-balance sheet at law.

3.2 Dealing with Legal Issues

No legal advice is provided on accounting matters.

4. Laws and Regulations Specifically Relating to Securitisation**4.1 Specific Disclosure Laws or Regulations**

The specific measures relating to securitisation are:

- Regulation (EU) 2017/2402 (the Securitisation Regulation, or SR) and related technical standards (the Technical Standards);
- SI 656/2018 (the Irish SR); and
- Regulation (EU) 1075/2013 (the FVC Regulation) and Section 18 of the Central Bank Act 1971 (as amended, Section 18 CBA 1971).

Securitisation Regulation

The SR imposes harmonised rules on due diligence, risk retention and disclosure for all securitisations and provides a framework for simple, transparent and standardised (STS) securitisations.

SR Article 7 requires the originator, sponsor and SPE to make available detailed information relating to the securitisation to the holders of a securitisation position, national competent authorities (NCAs) and, upon request, potential investors. They may designate one entity amongst themselves as responsible for this purpose – although market practice is still developing, it appears likely that SPEs will be designated. The disclosure obligations include making available:

- on a quarterly basis, detailed information on the underlying exposures and investor reports;
- all underlying documents relating to the securitisation that are essential for understanding the transaction;
- a detailed transaction summary for “private” deals (ie, where no prospectus is required);
- the STS notification for STS securitisations;
- without delay, inside information required to be disclosed under Regulation (EU) 596/2014 (the Market Abuse Regulation or MAR); and
- where the MAR does not apply, details of significant events that may materially impact the performance of the securitisation.

For public deals, disclosures must be made via a securitisation repository – an entity registered with the European Securities and Markets Authority (ESMA) under the SR for that purpose. The means of disclosure for private deals is not prescribed. The ESMA Q&A on the Securitisation Regulation (ESMA33-128-

563) confirms that, in the absence of any instructions or guidance from NCAs, reporting entities can use any arrangements that meet the conditions of the SR. Barring further guidance from the Central Bank of Ireland (the CBI), it is logical to assume that parties reporting to the CBI should use the same channels of communication as are used for CB Notifications (as defined below).

See **4.4 Periodic Reporting**.

Irish SR

The Irish SR require the originator, sponsor or SPE – where one of them is located in Ireland – to notify the CBI of a securitisation within 15 working days of the first issue of securities (the CB Notification). This notification must include:

- the securitisation's International Securities Identification Number(s) (ISIN);
- whether the person making the notification is originator, sponsor or SPE;
- the name and address of the entity designated from amongst the originator, sponsor or SPE to comply with SR reporting obligations; and
- if the person making the notification is not the originator, sponsor or SPE, that person's name, address, corporate status and legal entity identifier (if any).

The CB Notification must be submitted in the manner set out on the CBI's Securitisation Regulation webpage. Firms supervised/regulated by the CBI must use their pre-existing channels of communication. SPEs subject to the CBI's financial vehicle corporation (FVC) registration regime must use the channels prescribed for that regime, and other in-scope entities must notify via email to securitisation@centralbank.ie.

FVC Regulation and Section 18 CBA 1971

See the "FVC Regulation and Section 18 CBA 1971" section of **4.4 Periodic Reporting**.

4.2 General Disclosure Laws or Regulations

In addition to the specific disclosure regime, regard must be had to the general regime for issue of securities. Key measures include the following (each as amended as applicable):

- the Prospectus Regulation;
- EU (Prospectus) Regulations 2019 (the Irish Prospectus Regulations);
- Companies Act 2014;
- the Market Abuse Regulation;
- Directive 2014/57/EU on criminal sanctions for market abuse;
- SI 349/2016 (the Irish Market Abuse Regulations);

- Directive 2004/109/EC (the Transparency Directive);
- SI 277/2007 (the Irish Transparency Regulations); and
- SI 366/2019 (the Market Conduct Rules).

Prospectus Regime

An issuer seeking to list debt securities on a regulated market or offer securities to the public must publish a prospectus and have it approved by the appropriate NCA – the CBI in Ireland. A number of exemptions exist, including for debt securities where the offer:

- is addressed solely to qualified investors;
- is addressed to fewer than 150 natural or legal persons per EU member state, other than qualified investors;
- is addressed to investors who acquire securities for a total consideration of at least EUR100,000 each, for each separate offer;
- denomination per unit amounts to at least EUR100,000; and
- has a total consideration in the EU of less than EUR8 million (calculated over a 12-month period).

A securitisation issuer rarely makes an offer of securities to the public. The obligations to publish a prospectus is usually triggered by listing on a regulated market. In such cases, the issuer must comply with the rules on format and content of a prospectus under prospectus law and applicable stock exchange listing rules.

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

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

Risk factors in a prospectus must be specific to the issuer or securities, and material to making an informed investment decision. Detailed requirements are contained in Commission Delegated Regulation (2019/979) and Commission Delegated Regulation (2019/980), each as amended.

Market Abuse Regime

The market abuse regime prohibits insider dealing, unlawful disclosure of inside information and market manipulation in respect of financial instruments:

- admitted to trading on a regulated market (such as Euronext Dublin's Official List) or for which admission for trading has been sought;
- traded on organised trading facilities;

- traded or admitted to trading on multilateral trading facilities (MTFs) (such as Euronext Dublin's Global Exchange Market) or for which admission to trading has been sought; and
- the value of which depends, or has an effect, on any of the above.

Issuers must make public as soon as possible inside information which directly concerns the issuer in a manner which enables complete and timely assessment by the public. Disclosures cannot be combined with marketing information and must be available on the issuer's website for at least five years. Disclosure can be delayed in limited circumstances; for the duration of such delay, the information must remain confidential.

Transparency Regime

The Irish Transparency Regulations specify minimum requirements for disclosure of periodic financial information and ongoing information by issuers whose securities are admitted to trading on a regulated market. It also requires a holder of certain securities to notify the issuer if its holding reaches, exceeds or falls below specific thresholds.

4.3 Credit Risk Retention

The SR requires that an originator, sponsor or original lender (the retainer) holds, on an ongoing basis, a material net economic interest of not less than 5% in the securitisation for the duration of the transaction. This is satisfied where the retainer holds:

- a vertical slice of the securitisation representing at least 5% of the nominal value of each tranche sold or transferred to investors;
- where the securitisation is of a revolving pool of assets, an interest in the pool equal to at least 5% of the nominal value of the securitised assets;
- randomly selected assets equal to at least 5% of the nominal value of the securitised assets provided that:
 - (a) the selected assets and the securitised assets together number at least 100; and
 - (b) the selected assets would otherwise have been securitised;
- the first loss tranche of the structure equal to at least 5% of the nominal value of the securitised assets; and
- the first 5% loss exposure on each securitised asset.

The retained interest may not be subject to risk mitigation techniques. In addition, investors must, prior to investing, verify compliance with the risk retention requirement.

Sanctions

Possible sanctions for contravention of the SR or Irish SR include:

- administrative fines for corporates of up to 10% of annual turnover;
- bans from participating in the management of any originator, sponsor or SPE; and
- temporary withdrawal of authorisation from the entity responsible for confirming compliance with STS requirements.

Sanctions may be imposed on regulated financial service providers under the Central Bank Act 1942 (as amended) for contraventions of the Irish SR. Criminal liability may also attach.

4.4 Periodic Reporting

Periodic reporting is required under a number of measures detailed below. Financial reporting is required under Irish company law but falls outside this chapter's scope.

Securitisation Regulation

The SR imposes two quarterly reporting obligations. Firstly, issuers must provide information on underlying exposures. Secondly, issuers must provide an investor report containing:

- material data on the credit quality and performance of underlying exposures;
- information on events which trigger changes in the priority of payments or the replacement of counterparties, and data on cash flows; and
- risk retention compliance information.

Technical Standards issued under SR Article 7 entered into force on 23 September 2020 and specify the precise information required (Commission Delegated Regulation 2020/1224) and templates to be used (Commission Delegated Regulation 2020/1225) for this purpose. The information must be made available simultaneously and at the latest one month after the due date for the payment of interest.

In relation to sanctions, see the "Sanctions" section of **4.3 Credit Risk Retention**.

FVC Regulation and Section 18 CBA 1971

Irish securitisation SPEs which are FVCs must report statistical data to the CBI on a quarterly basis under the FVC Regulation (Regulation (EU) No 1075/2013). An FVC is an entity whose principal activity meets both of the following criteria:

- it carries out securitisations and is insulated from the risk of bankruptcy or any other default of the originator; and

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

Many Irish SPEs are FVCs. Since 2015, the CBI has extended this regime to non-FVC SPEs (via Section 18 CBA 1971) which must provide quarterly balance sheets and annual profit and loss data.

Credit Reporting Act

The Credit Reporting Act requires that in-scope lenders (including SPEs that acquire loan portfolios), provide detailed and ongoing information on the performance of certain loans to the CBI. A person who provides false information to the CBI may be liable to a fine (of unspecified amount) and/or up to five years imprisonment.

4.5 Activities of Rating Agencies

Regulation (EU) 1060/2009 (the CRA Regulation) and related regulatory technical standards established a regulatory framework for credit rating agencies (CRAs) in the EU requiring that they be registered with, and supervised by, an NCA, avoid conflicts of interest and apply sound rating methodologies. The CRA Regulation was amended by Regulation (EU) 513/2011 (CRA 2), which transferred the responsibility for registration and supervision to ESMA and by Regulation 462/2013 (CRA 3), which addressed issues including the reliance of firms on external credit ratings, sovereign debt ratings, competition in the CRA industry, the civil liability of CRAs and the independence of CRAs.

EU financial institutions can only use for regulatory purposes credit ratings that have been issued: (i) by a CRA registered with ESMA; (ii) in a third country and endorsed by a registered CRA; or (iii) by a third-country CRA certified by ESMA; and, in the case of (ii) and (iii), subject to compliance with certain conditions.

Additional requirements apply to rating securitisations: issuers must seek ratings for each tranche from at least two CRAs and consider appointing a CRA with less than 10% of the total market share. Issuer directors typically consider and note this at a board meeting.

From July 2021, CRAs must also have regard to ESMA's Guidelines on Internal Controls for Credit Rating Agencies.

See also 4.3 Credit Risk Retention.

4.6 Treatment of Securitisation in Financial Entities

The capital treatment of a securitisation position is principally determined for credit institutions and investment firms under Regulation (EU) 575/2013 as amended (the CRR) and for insurers and reinsurers under Directive 2009/138/EC (Solvency II). This response focuses on credit institutions and investment firms.

As Originator

An originator which is a credit institution or an investment firm can exclude securitised exposures from the calculation of its risk-weighted exposure amounts and, where applicable, expected loss amounts under the CRR if:

- significant credit risk on the securitised exposures has been transferred to third parties; or
- it applies a 1,250% risk weight to all securitisation positions it holds in the securitisation, or deducts the securitisation positions from its common equity tier 1 items.

The NCA may not permit this treatment if it considers that it is not justified on the basis of the credit risk being effectively transferred; but may allow the treatment where the originator demonstrates that the reduction in own-funds requirements achieved by the securitisation is justified by a commensurate transfer of credit risk to third parties.

As Investor

Preferential treatment may be available for positions in STS securitisations that satisfy the requirements of CRR Article 243 and positions in SME synthetic securitisations that satisfy the requirements for STS (other than simplicity) and of CRR Article 270. Non-SME synthetic securitisations currently receive the same prudential treatment as traditional non-STS securitisations. Preferential treatment is expected to be extended to qualifying balance sheet synthetic securitisations via the EU's COVID-19 recovery package (the Recovery Package), which includes proposals to make the STS designation available to such securitisations. The timeframe for implementation of these proposals is unknown at the time of writing.

Since 30 April 2020, positions held in STS securitisations meeting the requirements in Article 13 of the Commission Delegated Regulation 2015/61 (as amended) qualify as Level 2B high quality liquid assets (L2BHQALs) under the CRR. This classification was previously available to all qualifying securitisations. However, non-STS deals that previously qualified as L2BHQALs were not grandfathered. L2BHQALs can comprise a maximum of 15% of a credit institution's liquidity buffer.

See also 4.3 Credit Risk Retention.

4.7 Use of Derivatives

The principal rules on derivatives are contained in:

- Regulation (EU) 648/2012 (EMIR) (as amended in particular, by Regulation (EU) 2019/834 (EMIR Refit) and Regulation (EU) 2019/2099 (EMIR 2.2)); and
- EU (European Markets Infrastructure) Regulations 2014 (the Irish EMIR Regulations).

The EMIR regime imposes obligations on parties to derivative contracts, according to whether they are “financial counterparties” (FCs), such as investment firms and credit institutions or “non-financial counterparties” (NFCs) or their third-country equivalents.

Broadly, EMIR’s requirements in respect of derivative contracts are:

- mandatory clearing by FCs and NFCs whose transactions in over-the-counter (OTC) derivative contracts exceed EMIR’s prescribed clearing threshold (NFC+s), of OTC derivative contracts declared subject to the clearing obligation through an authorised central counterparty (a CCP);
- risk mitigation techniques in respect of uncleared OTC derivative contracts; and
- reporting and record-keeping requirements in respect of all derivative contracts.

NFC+s are generally subject to more stringent requirements under EMIR than NFCs. Counterparties may exclude from their threshold calculations contracts that are objectively measurable as reducing risks directly relating to the NFC’s commercial activity or treasury financing activity. EMIR Refit, amongst other things, introduced a new method for NFCs such as SPEs to determine whether clearing thresholds have been exceeded.

Enforcement

The Irish EMIR Regulations empower the CBI to:

- issue directions and contravention notices;
- appoint assessors to investigate suspected contraventions; and
- impose sanctions, including administrative fines of up to EUR2.5 million.

Criminal liability may also attach.

In addition, from January 2021, an SPE constituting a non-financial counterparty under the Securities Financing Transactions Regulation (EU 2015/2365) (the SFTR) may be subject to additional trade reporting obligations in respect of its securities financing transactions (broadly, transactions deploying assets

for funding, liquidity and collateral management and execution of investment strategies) not falling within the scope of EMIR.

4.8 Investor Protection

Investors are afforded protection under the following regulations.

- SR disclosure requirements allow investors to diligence and monitor securitisations.
- PR disclosure requirements aim to provide “necessary information which is material to an investor” for making investments.
- The MAR aims to prevent insider dealing and market manipulation.
- The Irish Transparency Regulations provide minimum standards for disclosure of information concerning regulated markets.

See **4.1 Specific Disclosure Laws or Regulations**, **4.2 General Disclosure Laws or Regulations** and **4.4 Periodic Reporting**.

4.9 Banks Securitising Financial Assets

As Originator

A bank securitising its assets must consider rules governing the origination and servicing of those assets, which vary depending on asset class. Banks typically warrant compliance with relevant measures up to the date of transfer, with breach of warranty triggering a repurchase obligation. Of particular relevance for banks are consumer and data protection laws; some key elements of which (each as amended as appropriate) are summarised below.

Consumer Protection

Mortgage loans are principally governed by the Consumer Credit Act 1995 (the CCA) and the EU (Consumer Mortgage Credit Agreements) Regulations 2016 (the MC Regulations). The CCA imposes rules on advertising, provision of information and mandatory warnings. The MC Regulations include obligations to verify a borrower’s creditworthiness before lending, to explain prescribed information and to act in the borrower’s best interests when advising on mortgage loans.

The Code of Conduct on Mortgage Arrears 2013 governs management of arrears and pre-arrears in respect of a borrower’s principal dwelling or sole Irish residential property.

The Consumer Protection Act 2007 prohibits unfair, misleading, aggressive and prohibited commercial practices and applies to all Irish law consumer contracts.

The Consumer Protection Code 2012 specifies how regulated entities must deal with “personal consumers” and “consumers”.

Regulated entities must know their customers, assess their suitability for products or services and include prescribed information in their terms; and comply with requirements for post-origination ongoing information, complaints resolution and arrears handling.

The EC Communities (Unfair Terms in Consumer Contracts) Regulations 1995 to 2000 apply to contracts for the supply of services to consumers, including loans. Contractual terms deemed “unfair” are unenforceable against consumers.

Data Protection Laws

Personal data of borrowers must be safeguarded as per the GDPR ((EU) 2016/679), the Irish Data Protection Acts 1988 to 2018 and SI 336/2011 (the Irish ePrivacy Regulations).

As Investor

See **4.6 Treatment of Securitisation in Financial Entities**.

4.10 SPEs or Other Entities

See **1.2 Special-Purpose Entities** and **2.2 Taxes on SPEs**.

4.11 Activities Avoided by SPEs or Other Securitisation Entities

Securitisations are structured such that SPE activities are not characterised as banking, writing insurance or carrying on business as a retail credit firm.

Banking

Engaging in banking business or acceptance of deposits or other repayable funds from the public requires (i) an appropriate licence or authorisation from the CBI under the Central Bank Act 1971 (as amended) or the European Central Bank under Regulation 1024/2013 (the SSM Regulation); or (ii) a passported authorisation/licence. For (i), failure to hold the appropriate licence or authorisation is an offence punishable by a fine of up to EUR64,000 and/or up to five years’ imprisonment.

Insurance

An insurance company operating in Ireland must hold an authorisation from the CBI or appropriate authority in its home member state if passporting into Ireland. A synthetic securitisation may be structured using a credit derivative under which credit protection is provided by an SPE to an originator or third party (a beneficiary) in respect of losses occurring on an asset portfolio.

Retail Credit Firms

In general, a person providing cash loans directly to natural persons (other than professional clients under Directive 2014/65/EU (MiFID II) or another regulated financial services provider)

is regulated as a “retail credit firm” under the Central Bank Act 1997 as amended.

Certain activities are excepted from this regulation, including the purchase loans originated by another party (unless credit is subsequently provided) and the provision of credit on a once-only/occasional basis. The provision of this credit must not involve a representation, or create an impression that the credit would be offered to other persons on the same or substantially similar terms. Contravention of this requirement is an offence punishable by fines of up to EUR100,000.

4.12 Material Forms of Credit Enhancement

The type and level of credit enhancement in a securitisation is typically driven by rating requirements. Commonly utilised forms include:

- subordination of junior notes held by, or a subordinated loan from, the originator/affiliate;
- a deferred purchase price;
- over-collateralisation where assets are acquired for an amount less than their book value;
- excess spread whereby the income on underlying assets is greater than the fixed coupon on related securities; and
- reserves in the form of cash and highly liquid investments.

Credit enhancement from the originator must be on arm’s length commercial terms – see the “Clawback” section of **1.1 Insolvency Laws**.

4.13 Participation of Government-Sponsored Entities

Irish government-sponsored entities have not yet participated in the securitisation market. Subject to their internal rules, there is no restriction on doing so.

4.14 Entities Investing in Securitisation

The diverse investor base for securitisations includes credit institutions, insurance undertakings and investment funds.

5. Documentation

5.1 Bankruptcy-Remote Transfers

A bankruptcy-remote transfer is generally effected by a transfer agreement between the issuer, the originator and, in order to obtain the benefit of the contract only, the trustee. Key provisions include:

- agreement to sell and purchase;
- conditions precedent;

- declaration of trust by the originator over any proceeds deriving from the asset portfolio which are at any time held by it for the benefit of the issuer and the trustee;
- originator warranties in relation to corporate status, solvency and the asset portfolio;
- where the transfer is effected by equitable assignment – see **1.3 Transfer of Financial Assets** – the circumstances in which the issuer can perfect its title; and
- non-petition/limited recourse.

5.2 Principal Warranties

The originator representations and warranties include its corporate status, capacity and authority to enter into the securitisation, licensing and solvency. A breach of any of the foregoing would breach the relevant transaction document and may trigger an event of default. It may also entitle the issuer to seek rescission and/or damages. The originator also provides asset warranties addressing title to the assets and their compliance with any selection criteria and rules on origination. A breach of asset warranty may trigger a repurchase obligation.

5.3 Principal Perfection Provisions

See **1.3 Transfer of Financial Assets**.

5.4 Principal Covenants

Issuer covenants include covenants to comply with the transaction documents and to join in any action necessary to preserve the portfolio assets, as well as standard separateness covenants. Originator (and servicer) covenants include compliance with applicable laws and maintenance of authorisations. Breach of covenant will constitute a breach of the transaction documents which may trigger an event of default.

5.5 Principal Servicing Provisions

The servicer is responsible for day-to-day administration including collections and enforcement. The transaction documents will typically provide for replacement of the servicer upon insolvency or material breach of obligations.

Where the originator acts as servicer, the servicing agreement requires the servicer to administer the portfolio assets in the same manner as equivalent assets on its balance sheet.

The Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 (the 2015 Act) introduced protections for consumers and SMEs whose loans were purchased by entities that were unregulated by the CBI. It required the day-to-day servicing, management and administration of loans to “relevant borrowers” – ie, loans originated by a regulated financial service provider to: (i) natural persons within Ireland; and/or (ii) SMEs – to be undertaken by regulated “credit servicing firms” on behalf of the owners of that credit.

This regime was extended by the Consumer Protection (Regulation of Credit Servicing Firms) Act 2018 from 21 January 2019. Since that date, certain previously unregulated entities (eg, SPEs) that (i) hold legal title to relevant portfolios of Irish loans, and/or (ii) control the overall strategy or key decisions relating to credit, must seek authorisation as “credit servicing firms”. There is an exemption for traditional securitisations, however, its availability should be analysed on case-by-case basis.

5.6 Principal Defaults

Standard events of default are issuer failure to pay principal or interest due within any applicable grace period, issuer breach of transaction documents and issuer insolvency. Default under the securities will typically entitle the holders of the securities to instruct the trustee to declare the securities immediately due and payable and to enforce the transaction security.

5.7 Principal Indemnities

The issuer usually provides full indemnities to the trustee, agents and managers/arrangers in respect of losses and costs incurred in the performance of their roles. In addition, prior to a trustee taking action in relation to the transaction, it may require indemnification from the holders of the securities.

6. Roles and Responsibilities of the Parties

6.1 Issuers

The role and responsibilities of an issuer will depend on the nature of the transaction. See **1.2 Special-Purpose Entities** and **4. Laws and Regulations Specifically Relating to Securitisation**.

6.2 Sponsors

The sponsor, often an originator, typically initiates and structures the securitisation. It, either directly or through an affiliate, will have originated or acquired the asset portfolio and will often act as servicer. The sponsor may be a credit institution, a large corporate or a fund. See also **4.3 Credit Risk Retention**.

6.3 Underwriters and Placement Agents

Underwriters and placement agents (also known as arrangers/managers) are typically investment banks. Where the originator is itself a bank, it may act as placement agent. At least two arrangers participate in most securitisations. They structure the transaction, market, and in some cases, underwrite the notes.

6.4 Servicers

The servicer is responsible for the day-to-day administration of the assets. It is often the originator/an affiliate. However, special-

ist servicing companies are becoming more commonplace. See

5.5 Principal Servicing Provisions.

6.5 Investors

Investors are usually sophisticated market participants and include financial institutions, private equity investors and funds. An investor may have responsibilities under the terms of the notes or by virtue of being a regulated entity. See also **4.3 Credit Risk Retention**.

6.6 Trustees

The trustee role is performed by professional trustee companies. The trustee holds the benefit of the issuer's covenant to pay and other contractual undertakings on behalf of the holders of the securities and the benefit of the transaction security for the secured parties. It will represent the holders of the securities vis-à-vis the issuer.

7. Synthetic Securitisation

7.1 Synthetic Securitisation Regulation and Structure

Synthetic securitisations are permitted in Ireland and are used primarily to transfer the credit risk of exposures held on-balance sheet by credit institutions to third parties. They are also used to arbitrage between a higher spread received on an underlying asset and a lower spread paid on related structured securities. Synthetic securitisation has not been common amongst credit institutions in Ireland in recent years, despite its being a leading jurisdiction for credit-linked note (CLN) issuers.

Regulation

Synthetic securitisations are regulated in the same manner as traditional securitisations. The requirements set out in **4. Laws and Regulations Specifically Relating to Securitisation** apply equally to synthetic securitisations; however, a synthetic securitisation (other than a qualifying SME synthetic securitisation) cannot achieve STS designation.

The requirements described in **4.7 Use of Derivatives** also apply to credit derivatives in synthetic securitisations. In addition, EMIR provisions on margining may also apply where the issuer's transactions in OTC derivative contracts exceed EMIR clearing thresholds. See also **4.11 Activities Avoided by SPEs or Other Securitisation Entities** and the "As Investor" section of **4.6 Treatment of Securitisation in Financial Entities**.

Structures

A synthetic securitisation may be structured to transfer the credit risk of underlying exposures to third party investors via:

- a direct contractual arrangement (direct structure) between an originator and third-party investors in the form of a credit default swap (CDS) or guarantee; or
- the issue by an SPE of CLNs.

In a direct structure, the originator buys credit protection on the underlying exposures directly from third party investors. Upon the occurrence of certain specified loss-producing credit events, for example a payment default, the protection seller pays an amount equal to the loss suffered (subject to any agreed de minimus or excess) to the originator. In return for this protection, the originator pays a periodic fee to the protection seller.

In a typical CLN structure, the originator transfers the credit risk on the underlying exposures to an SPE via a CDS or guarantee/credit protection deed (on terms similar to those outlined above for direct structures). The SPE issues CLNs, transferring the credit risk on to third party investors, and uses the proceeds to fund payments to the originator in respect of credit events under the CDS or guarantee/credit protection deed; and the periodic fee from the originator to pay the CLN coupon.

8. Specific Asset Types

8.1 Common Financial Assets

A wide range of asset classes have been securitised by Irish SPEs: residential mortgages, commercial mortgages, loan agreements, aircraft lease rentals, trade, credit card and hire purchase receivables. The Recovery Package includes proposals for securitisation of non-performing loans.

8.2 Common Structures

The structure of a securitisation is generally determined by desired regulatory capital treatment or investor requirements rather than underlying asset class.

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Authors



Garry Ferguson is the managing partner of Walkers' Ireland office, where he heads the firm's finance and capital markets team. He has acted for a wide range of international financial institutions, investment banks, arrangers, managers, agents, trustees, private equity groups and

hedge fund managers. Gary has acted as lead counsel, issuer counsel and trustee counsel on a wide variety of capital markets transactions, including all types of CLOs, CDOs, ABS and MBS deals, insurance-linked securities (CAT bonds and sidecar transactions), ABCP Programmes and Russian-originated deals. He has advised on and structured a wide variety of distressed asset acquisitions and fund financing structures.



Andrew Traynor is a partner in the firm's finance and capital markets group. He advises on a broad range of structured finance, securitisation and debt capital markets transactions, with a particular focus on ABS, CMBS, CLOs, synthetic securitisations and credit risk transfer

(CRT)/significant risk transfer (SRT), structured products, fund finance and structured credit. In addition, Andrew regularly acts for leading hedge fund managers, private equity outfits, credit opportunity funds and other market participants with respect to establishing bespoke, tax-efficient cross-border platforms for their investment, leveraging and through-bound activity structured through Ireland across Europe, Asia, the USA and emerging markets.



Jonathan Sheehan is based in Walkers' Ireland office, where he is a partner and head of the tax group. Jonathan advises across tax heads on all manner of financial, corporate and real estate transactions. In addition to advising on capital markets, investment funds and real estate work, he

also has extensive experience in advising on international tax reporting obligations, corporate migrations, cross-border mergers and loan portfolio sales and acquisitions. Jonathan has acted for a wide range of domestic and international clients, including publicly listed companies, financial institutions, private equity providers, fund managers and administrators, and Irish State bodies. Jonathan is admitted in Ireland and is an AITI Chartered Tax Adviser.



Sinéad Gormley is a professional support lawyer based in Walkers' Ireland office in the firm's finance and capital markets group. Prior to joining Walkers, Sinéad held a senior in-house position with a domestic bank, advising on a broad range of capital markets and structured finance

transactions, with a particular focus on significant risk transfers, securitisations and covered bonds. Sinéad is admitted in Ireland and is a member of the Incorporated Law Society of Ireland.

Walkers Ireland LLP

The Exchange
George's Dock
IFSC
Dublin 1
Ireland

Tel: +353 1 470 6600
Fax: +353 1 470 6601
Email: info@walkersglobal.com
Web: www.walkersglobal.com

