Trends and Developments

Contributed by:
Vincent McConnon, William Foot, John Adams, Emily Ashford, Michelle Holligan and Nicole Burke
Matheson

Matheson was established in 1825 in Dublin, Ireland. With offices in Cork, London, New York, Palo Alto and San Francisco, 800 people now work across Matheson's six offices, including 121 partners and tax principals and over 540 legal, tax and digital services professionals. Matheson services the legal needs of internationally focused companies and financial institutions doing business in and from Ireland. Their clients include over half of the world's 50 largest banks, seven of the world's ten largest asset managers, seven of the top ten global technology brands and they have advised the majority of the Fortune 100 companies.

Authors

Vincent McConnon is a partner in the finance and capital markets department at Matheson. Vincent's experience covers a range of structured finance work, including, substantial experience in various types of asset-backed securitisations, covered bonds, corporate bond issuances, collateralised loan obligation transactions, green bonds, project and infrastructure finance, loan portfolio disposals, noteholder consent solicitations, MTN programmes, securitisation terminations and other structured finance products. Prior to joining Matheson, Vincent worked in the securitisation practice of a Magic Circle law firm in London for several years.

William Foot is a partner in the finance and capital markets department at Matheson. William advises financial institutions, asset managers, originators, private equity firms, investment banks, arrangers, issuers, trustees and investors on a range of debt capital markets, securitisation and structured finance transactions. William's industry experience includes senior in-house legal roles at a major CLO manager and other regulated entities, where he specialised in securitisation, private equity, credit risk mitigation and EMTN matters, as well as providing regulatory advice relating to MiFID, AIFMD, CRR, EMIR and the Securitisation Regulation.

John Adams is a professional support lawyer in Matheson's finance and capital markets department. John has a broad range of experience in various aspects of banking and finance law. He has particular expertise in debt capital markets, securitisations, structured finance, loan sales, derivatives, financial regulation and syndicated lending. As well as extensive experience as a private practice lawyer working on transactions and other matters, John's industry experience includes senior in-house legal roles at an Irish pillar bank.

Emily Ashford is a senior associate in the firm's Finance and Capital Markets Department, working within the Structured Finance Team. Emily has assisted on a range of finance and structured finance transactions, including a variety of asset-backed securitisations and collateralised loan obligation transactions. Her experience includes advising financial institutions in relation to a variety of asset-backed securitisation transactions including RMBS, auto loan ABS and consumer loan ABS; advising leading financial institutions on the establishment of Irish debt issuance programmes and issuances from such programmes; and advising in relation to the termination of securitisation transactions.

Michelle Holligan is a senior associate in the finance and capital markets department at Matheson. Michelle advises several leading international investment banks, asset managers, arrangers, private equity firms, issuers and financial services providers on all aspects of securitisation, debt capital markets and structured finance transactions. Michelle regularly advises on the establishment of Irish investment vehicles for the purposes of acquiring and/or originating a range of financial assets across Europe and the USA.

Nicole Burke is an associate working in the finance and capital markets department at Matheson. Nicole has experience advising on a broad range of structured finance transactions, including trade receivables securitisations, collateralised loan obligation transactions, asset backed commercial paper programmes, synthetic securitisation transactions, corporate bonds issuances and separately managed account structures. Nicole's industry experience includes an in-house legal role at a major CLO manager, where she worked on a variety of transactions such as CLOs, risk retention structures, separately managed accounts and provided regulatory advice on the Securitisation Regulation, MiFID II, AIFMD, CRR and EMIR.

IRELAND TRENDS AND DEVELOPMENTS

Contributed by: Vincent McConnon, William Foot, John Adams, Emily Ashford, Michelle Holligan and Nicole Burke, **Matheson**

Matheson

70 Sir John Rogerson's Quay
Dublin 2
Ireland

Tel: +353 1 232 2000
Fax: +353 1 232 3333
Email: dublin@matheson.com
Web: www.matheson.com

Introduction

Securitisation markets across Europe faced challenges in 2023. Headwinds included high interest rates, inflation and other macroeconomic factors – not to mention a number of significant geopolitical events. Notwithstanding that, the securitisation markets have proved resilient and at the time of writing there are some early promising signs for 2024.

Meanwhile, regulatory evolution continued apace in 2023. This article will explore some of the main legal and regulatory developments that impacted the securitisation market in Ireland in 2023 and that are likely to impact the securitisation market in 2024. As a hub for securitisation activity in the EU, the legal framework in Ireland tracks both EU and domestic Irish legislation. The impact of new and proposed EU laws and regulations on Irish issuers of securitisation debt, and which will be of interest to market participants generally, are considered below. We also advised on the Irish tax implications for securitisation transactions and on the listing of securitisation transactions throughout 2023 – although such matters are outside the scope of this article.

Credit Servicing Directive

On 28 December 2021, the EU Directive on Credit Servicers and Credit Purchasers (EU/2021/2167) (the "Credit Servicing Directive") entered into force. EU member states were required to transpose the Credit Servicing Directive into national law by 29 December 2023. At the time of writing, the Irish Department of Finance (the "Department") has not yet completed the transposition of the Credit Servicing Directive under Irish law but has confirmed that it intends to meet this deadline.

The Credit Servicing Directive applies to the sales and servicing of non-performing loans issued by a credit institution established in the EU. EU credit institutions must comply with new pre-sale and post-sale disclosure and reporting obligations. Credit servicers must obtain an authorisation in their home EU member state and will then have the right to provide those services in other EU member states. In-scope credit purchasers do not need to be authorised although they must comply with certain obligations, including an obligation to appoint an authorised credit servicer, an EU credit institution or an EU-supervised consumer credit or mortgage creditor to service their non-performing loans with certain specified types of borrowers.

There is an obligation on EU member states to transpose the minimum requirements of the Credit Servicing Directive but a limited number of discretionary options have been identified for consideration by EU member states on certain issues in relation to the Credit Servicing Directive. In January 2023, the Department launched a public consultation on the transposition of the Credit Servicing Directive in Ireland. The consultation paper sought feedback on the ten points in the Credit Servicing Directive where EU member states have an element of discretion. In June 2023, the Department published its decisions following this consultation. The published outcome of the consultation sets out the initial decisions taken by the Department as to which discretions will be exercised in the context of the transposition of the Credit Servicing Directive into Irish law.

There is an existing Irish credit servicing regulatory framework (which was introduced by the Irish Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 and has subsequently been further amended) under Part V of the Irish Central Bank Act 1997. Amongst other matters and although the Department decisions are subject to change, the published decisions document appears to clarify a couple of key items in terms of the likely impact of the Credit Servicing Directive on the existing credit servicing regulatory framework in Ireland.

Firstly, the Department has indicated that the existing Irish credit servicing regulatory framework will operate alongside this new EU regime (once introduced) – effectively creating two parallel regimes. The decisions document provides as follows: "It has been decided to maintain the existing domestic regulatory regime for credit servicers and credit purchasers (including the obligation on the holder of the legal title to the rights of the creditor to be authorised) for matters and agreements not expressly covered by the scope of the Directive".

Secondly, there will be an automatic recognition of existing Irish credit servicing firm authorisations under the Credit Servicing Directive. The decisions document provides that "entities carrying out credit servicing activities under the provisions of Part V of the Central Bank Act 1997 will be recognized as authorized credit servicers" under the Credit Servicing Directive.

Credit Securities Depository Regulation

Article 3 of the Central Securities Depository Regulation (CSDR) aims to centralise the ownership record and improve traceability in respect of transferable securities, by requiring them to be recorded in book-entry form. Since 1 January 2023, Irish issuers of certain transferable securities that are traded, or admitted to trading, on EEA trading venues have been required to represent new issuances in book-entry form. Issuers have until 1 January 2025 to convert legacy in-scope securities still existing in certificated form into book-entry form.

In 2023, compliance with Article 3 of the CSDR was a central focus for Irish issuers of listed securities which are not traded through the clearing systems, and will continue to be so in 2024, as these issuers must not only ensure compliance for new issuances, but also turn their attention to the significant task of making legacy securities Article 3-compliant in advance of the January 2025 deadline.

In 2024, we will also see the entry into force of an amendment (brought in under Commission Delegated Regulation (EU) 2023/1626) to Article 19 of the regulatory technical standards on settlement discipline under the CSDR which will impose an obligation on central securities depositories (CSDs) to carry out the calculation, collection and distribution of cash penalties for settlement fails on cleared transactions. While this obligation currently lies with central counterparties (CCPs), following a European Securities and Markets Authority (ESMA) consultation process, it was decided that CSDs should take over this process, as they already have obligations in relation to the penalties process for settlement fails for uncleared transactions. This amendment also aims to reduce operational risk, technical complexities and costs. The change will not take effect until 2 September 2024, in order to give CCPs and CSDs time to implement any necessary changes to their internal systems and procedures.

Lastly, a provisional agreement was reached between the Council of the EU and the European Parliament on 27 June 2023 on a proposed CSDR "Refit" regulation. It was formally approved by the European Parliament on 9 November 2023 and by the Council of the EU on 27 November 2023. Publication of the CSDR "Refit" regulation in the Official Journal is still awaited at time of writing. The updated regime is intended to reduce the financial and regulatory burden on CSDs and improve their ability to operate across borders. The key areas it will focus on are:

- a simpler CSD passporting regime;
- improving co-operation between supervisory authorities;
- banking-type ancillary services for CSDs;
- an amended settlement discipline regime; and
- the oversight of third country CSDs.

Securitisation Regulation

There were a number of developments regarding Regulation (EU) 2017/2402 (the "Securitisation Regulation") throughout 2023 and which are of relevance to Irish issuers. Some of the most important are outlined below.

Risk retention RTS

On 18 October 2023, Commission Delegated Regulation (EU) 2023/2175 (the "Risk Retention RTS") was published in the Official Journal. It entered into force on 7 November 2023 and replaced the existing 2014 regulatory technical standards under the Capital Requirements Regulation.

The key issues dealt with under the Risk Retention RTS include the following:

- Hedging – the Risk Retention RTS provide that:
  - (a) a retention holder is entitled to hedge against risks other than the credit risk of the retained securitisation positions;
  - (b) hedging is permitted where it was undertaken prior to the securitisation as a legitimate means of credit granting or risk management subject to investors not being disadvantaged; and
  - (c) where a retention holder retains more than 5% of the economic interest, hedging against any retained interest exceeding 5% is permissible.
- NPE securitisations – the Risk Retention RTS clarify that the requirement to retain a minimum material net economic interest of 5% can be calculated against the net value of the non-performing exposures (NPEs) rather than the nominal amount.
- Sole purpose test – in order for an entity not to be deemed as having the sole purpose of securitising assets:

(a) it must have the business strategy and capacity to meet its payment obligations from income that is not derived from the securitised exposures; and
(b) its management must have the relevant experience to pursue the established business strategy.

- Own-issued instruments – providing a securitisation is comprised of solely own-issued debt instruments, risk retention requirements will not apply.
- Change of retention holder – the Risk Retention RTS clarify that the entity retaining the risk can be changed in certain situations (eg, if the retention holder becomes insolvent, is no longer in a position to act as the retention holder for reasons beyond the control of the retainer or its shareholders, or if retention is on a consolidated basis).

EBA consultation on STS synthetic securitisations

The consultation relating to guidelines on the simple, transparent and standardised (STS) criteria for on-balance-sheet securitisations closed on 7 July 2023 with the European Banking Authority (EBA) committing to publish their final draft guidelines by Q1 2024.

These draft guidelines are expected to comprise of three separate guidelines on the following topics:

- amended guidelines for asset backed commercial paper ("ABCP");
- amended guidelines for non-ABCP; and
- guidelines relating to synthetic securitisations which became eligible for STS status following an amendment to the Securitisation Regulation in April 2021.

EU Capital Markets Union

The European Commission published a series of proposed measures in December 2022 to further develop the EU's Capital Markets Union, including measures:

- to make EU clearing services more attractive and resilient (the "Derivatives Proposal");
- to harmonise certain corporate insolvency rules across the EU (the "Insolvency Proposal"); and
- to alleviate, through a new Listing Act, the administrative burden for companies (particularly SMEs) on stock exchanges (the "Listing Act Proposal").

The Derivatives Proposal extends beyond a focus on central clearing and makes a number of other amendments to the European Market Infrastructure Regulation (EMIR) as part of a broader review colloquially known as "EMIR 3.0". For example, the Derivatives Proposal amends the EMIR to provide non-financial counterparties that become subject for the first time to the obligation to exchange collateral for OTC derivative contracts not cleared by a central counterparty, with an implementation period of four months in order to negotiate and test the arrangements to exchange collateral.

The Insolvency Proposal lays down harmonised rules for insolvency proceedings, including on the annulment of transactions entered into by a debtor prior to insolvency (avoidance actions).

Finally, the Listing Act Proposal extends beyond enabling SMEs to access the capital markets and includes proposed amendments to the Prospectus Regulation, the Market Abuse Regulation and the Markets in Financial Instruments Directive.

At the time of writing, the Derivatives Proposal remains under review by the European Parliament and the Council of the EU. The Insolvency Proposal is currently at first reading before the Council of the EU. Lastly, the Council of the EU is urging to finalise the Listing Act Proposal before the end of the current legislative cycle in June 2024 and this proposal continues to progress through the legislative process.

Whilst the proposals are subject to change, it is important that corporates and financial market participants continue to monitor developments in 2024. The proposals are arguably of particular relevance to Ireland given its central role in EU securitisation transactions.

EU Green Bond Standard

As one of the EU's green finance initiatives, the European Commission proposed a voluntary EU green bond standard (EuGBS) under a proposed regulation on European green bonds in July 2021.

Regulation (EU) 2023/2631 of the European Parliament and of the Council (the "EU Green Bond Standard Regulation") was published in the Official Journal of the European Union on 30 November 2023 and will apply from 21 December 2024. This is a significant development, including for Irish issuers of green bonds.

While the EuGBS provided for in the EU Green Bond Standard Regulation is a voluntary standard, it has the potential to become the leading standard in the international green bond market.

The key terms of the EU Green Bond Standard Regulation include the following:

- The funds raised by EuGBS bonds must be allocated to projects aligned with the taxonomy outlined in the EU Taxonomy Regulation (the "EU Taxonomy"). For those sectors not yet covered by the EU Taxonomy and for certain very specific activities there will be a "flexibility pocket" of 15%.
- Transparency requirements on how EuGBS bond proceeds are allocated through detailed reporting requirements.
- All EuGBS bonds must be checked by an external reviewer to ensure compliance with the EU Green Bond Standard Regulation and that funded projects are aligned with the EU Taxonomy.
- External reviewers providing services to issuers of EuGBS bonds will need to be registered with and supervised by the European Securities and Markets Authority.

As well as corporate bond issuers, the EU Green Bond Standard Regulation is also relevant to issuers, sponsors and originators of securitisations.

The EU Green Bond Standard Regulation includes a provision that certain of the EuGBS requirements apply to the originator, rather than the issuer. This ensures that rather than being limited to including green collateral at the issuer level, a securitisation may benefit from looking at the originator's role in sourcing green assets and still meet the EuGBS standard. However, the EU Green Bond Standard Regulation also provides that bonds issued for the purpose of synthetic securitisation are not currently eligible to meet the EuGBS standard.

The EU Green Bond Standard Regulation also contains some exclusions for securitised exposures and additional specific disclosure requirements for securitisations.

ESMA Statement about Sustainability Disclosure

On 11 July 2023, ESMA published its statement on sustainability disclosures in prospectuses seeking to align the approach of national competent authorities towards ESG-related disclosures included in certain prospectuses under the Prospectus Regulation. The statement sets out that the "use of proceeds" section of such prospectuses should contain disclosure about the use and management of the proceeds and information enabling investors to assess the sustainability credentials of issuers.

Citing Article 6(1) and Recital 54 of the Prospectus Regulation, ESMA reiterated that in determining whether information should be included or omitted from a prospectus, consideration must be given to its specificity and materiality to a potential investor. In making disclosures, ESMA recommended that any statements concerning the ESG profile of an issuer or its securities be substantiated and that any terms of art, such as mathematical terminology, be adequately defined and comprehensible to investors.

In the event that material ESG-related information is not disclosed in accordance with the Prospectus Regulation, an Irish issuer could find itself subject to both criminal charges and administrative fines under Ireland's European Union (Prospectus) Regulations 2019. Sanctions that may be imposed by the Central Bank of Ireland include a maximum fine of EUR20 million or 3% of the issuer's total annual turnover (or in the case of entities which prepare consolidated financial accounts, the annual turnover contained in such consolidated accounts). Where disclosures are known to be false or misleading, an issuer and its directors may be made subject to criminal prosecution, and if convicted, a fine of EUR5,000 or 12 months' imprisonment, or both.

Issuers and arrangers of securities with sustainability features should therefore review prospectus documentation to ensure ESMA's sustainability disclosure expectations are met.

European Commission Proposal on ESG Ratings

On 13 June 2023, the European Commission proposed a regulation on the transparency and integrity of ESG ratings activities (the "Proposed ESG Ratings Regulation"), with the aim of increasing transparency and confidence in sustainability-related information. On 14 July 2023, an amended version of the Proposed ESG Ratings Regulation was published. At the time of writing, the Council of the EU and the European Parliament are considering the Proposed ESG Ratings Regulation and finalising their negotiating positions ahead of trilogue negotiations.

If adopted in its current form, the potential application of the Proposed ESG Ratings Regulation would be relatively broad requiring any "legal person whose occupation includes the offering and distribution of ESG rating or scores on a professional basis" to be authorised by ESMA and to publish on its website prescribed information pertaining to the methodologies, models and key rating assumptions used. ESG ratings are defined widely as "an opinion, a score or a combination of both, regarding an entity, a financial instrument, a financial product, or an undertaking's ESG profile or characteristics or exposure to ESG risks… irrespective of whether such ESG rating is explicitly labelled as a "rating" or an "ESG score". Certain ESG ratings are explicitly out of scope, such as private ratings which are not publicly disclosed and ratings proposed by the EU or its member states' public authorities.

ESMA would have significant powers to supervise ESG ratings providers' compliance with the Proposed ESG Ratings Regulation and may carry out on-site inspections of such providers, as well as rated entities or outsourced third parties, without prior announcement. ESMA could also delegate supervisory tasks to the Central Bank of Ireland as competent authority in Ireland.

Where an infringement occurs, ESMA could withdraw the relevant provider's authorisation, temporarily suspend or prohibit ESG rating activities, issue public notices or impose fines (up to 10% of the relevant provider's total annual net turnover or, where the provider benefited from the infringement, the amount of such benefit). It is therefore incumbent on in scope providers to assess the potential impact of the Proposed ESG Ratings Regulation on their ratings methodologies and ensure any potential conflicts of interest are appropriately addressed.