Commentary – Ireland

In our publication “Legal Criteria for European Structured Finance Transactions” (the “EU Legal Criteria”), DBRS considers the application of the legal criteria and related methodologies for structured finance transactions in Europe. The criteria and methodologies set out in the EU Legal Criteria should be regarded as applying generally to a structured finance transaction in the Republic of Ireland (“Ireland”). This commentary (“Commentary”) sets out certain specific considerations arising in the context of structured finance transactions documented under the laws of Ireland (“Irish law”). Unless otherwise defined, words and expressions used in this Commentary shall have the meanings given to them in the EU Legal Criteria. The purpose of this Commentary is to highlight the legal issues that may arise in connection with (i) Irish law structured finance transactions or (ii) non-Irish law structured finance transactions which utilise an Irish SPV.

Ireland has traditionally been a preferred location for establishing and locating SPVs for structured finance transactions which, other than as a consequence of the use of an Irish incorporated SPV, do not have any Irish connection. References in this Commentary to “Irish structured finance transactions” encompass transactions governed by a law other than Irish law but which utilise an Irish SPV. Certain of the considerations set out below will not be relevant where the structured finance transaction is not governed by Irish law or where the Originator is not incorporated in Ireland or not otherwise likely to be subject to insolvency proceedings in Ireland.

Ireland has a specialist tax regime which facilitates the tax neutrality of SPVs. In terms of legal framework, there is no specific Irish law governing structured finance transactions and as a result structured finance transactions are governed by general Irish corporate and contract law. In relation to certain aspects of structured finance transactions there is no Irish legal authority. Given the connections between the English and Irish legal systems in the areas of contract, company, commercial and banking and finance law, the practice of the Irish courts in those areas is usually to have regard to relevant English case law. DBRS notes that in the absence of Irish authority on an issue, relevant English case law is likely to be of persuasive authority, although it is not binding on the Irish courts.

This Commentary does not purport to address every legal issue that might arise in connection with an Irish structured finance transaction nor may it be considered as legal advice.

Asset Transfer

In Ireland, the “true sale” of assets in a structured finance transaction is not enshrined in a specific statutory framework (as it is, for example, in Italy under Law No. 130), and so basic legal principles apply.

DBRS notes that structures other than ones based on a true sale may be used in structured finance transactions. Alternative structures which have been used in Irish structured finance transactions
include originator trusts and secured loans. Transactions structured other than through a true sale should be presented to DBRS as early as possible and are considered on a case-by-case basis.

**METHOD OF ASSIGNMENT**

Under Irish law, assets can be transferred by way of equitable or legal assignment. Under both of these methods, the transfer results in the SPV having a proprietary interest in the assets that are the subject of the transfer.

An assignment of debts and other choses in action will only qualify under Irish law as a legal assignment if the assignment meets the criteria laid down by section 28(6) of the Supreme Court of Judicature (Ireland) Act 1877. In brief, those criteria are (i) that the assignment is absolute and not merely by way of charge, (ii) the assignment must be in writing, (iii) express notice in writing must be given to the debtor from whom the assignor would have been entitled to receive or claim the debt or chose in action. In addition, Irish case law has established that a legal assignment must be of the whole of the debt or chose in action and not part only.

Until all of the statutory criteria referred to above have been met with respect to the transfer of a receivable an assignment will be an equitable assignment, only, and:

- the debtor in respect of such receivable will be entitled to continue to make payments in respect of the receivable to the seller and obtain discharge of the debt represented by the receivable thereby;
- defences, equities, cross-claims and rights of set-off may continue to arise between the debtor and the seller which will be binding on the purchaser;
- the claims, with respect to such receivable, of (i) a subsequent assignee or (ii) an encumbrancer of the payment obligations owed in respect of the relevant receivable, who gives notice to a debtor first may obtain priority over the rights of the purchaser; and
- the purchaser would need to join the seller as a party to any court proceeding or action which it wished to take against a debtor in order to recover the debt represented by the relevant receivable.

It should also be noted that Irish law requires that the assignment of an equitable interest in a debt must be effected pursuant to a written instrument of transfer which must be signed by the transferor.

It is very common for transfers of assets in structured finance transactions in Ireland to be structured to take effect as an equitable assignment. This is largely due to issues relating to the giving of notice to obligors (both from a practical perspective and, with regard to the Originator, from a customer perspective).

Generally, the SPV and any security trustee will be precluded from notifying the underlying obligors of the transfer until such time as certain events occur (the “Perfection Events”), at which point notice will

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1. A chose in action means a thing that can be sued for. It is an intangible personal property right enforceable by legal process, that has no existence apart from the recognition given by the law, and that confers no present possession of a tangible object.
be given and the transfers will take effect as legal assignments. DBRS expects that all transactions providing for equitable assignments contain clear provisions enunciating the Perfection Events (which DBRS expects to be adequate to ensure, insofar as practicable, that notification of the assignment to the underlying obligors occurs prior to the commencement of any insolvency process with respect to the Originator) and a mechanism (such as a power of attorney) by which the SPV and/or security trustee can notify the underlying obligors of the transfer. The continued validity and effectiveness of this mechanism on and following an insolvency of the Originator should be confirmed in the transaction legal opinion.

DBRS expects the representations, warranties and covenants of the Originator in the transaction documents to mitigate the risks of proceeding by way of equitable rather than legal assignment and that these issues are considered by legal counsel to the transaction.

It should be noted that the position under Irish law\(^2\), is that it is impossible, even in equity, to assign a debt which has not yet come into existence; only when the debt comes into existence can the assignment attach and the interest pass. Until such time, the contract purporting to assign a future debt will only operate as a contract to assign (as opposed to an assignment) which would be enforceable like any other contract, only if given for value. Such a contract, assuming its validity as a general matter, should in principle be enforceable through an insolvency of the Originator, but may be vulnerable to being set aside as a consequence of any of the issues discussed further below under the heading ‘Insolvency, examinership and enforcement issues’. DBRS expects counsel to confirm the enforceability, as a general matter, of any agreement for the assignment of future receivables and to address the risk of any such agreement being set aside on the insolvency of the Originator.

**TRUE SALE**

Where the SPV gains an interest in the assets by way of a transfer of either the equitable or legal title to such assets (as opposed to a structure under which the SPV gains an interest in the assets through an originator trust), DBRS expects a true sale analysis to be completed and a true sale opinion to be included in the transaction legal opinions.

Under Irish law, if the transfer is not considered a true sale, the transfer may be vulnerable to being recharacterised as a security assignment. Although there is limited Irish authority on the issue of true sale, English case law on the matter is relatively settled (see further the UK Commentary in this regard) and is likely to be of persuasive, although not binding, authority before the Irish courts.

Where a transfer is recharacterised as an assignment by way of security, and such security requires registration under Irish law (see ‘Insolvency, examinership and enforcement issues – Enforcement of the Security – Perfection of Security’ below), if such registration has not been carried out within the required time frame, the security would be void. In this scenario, upon the insolvency of the Originator, the SPV would likely rank only as an unsecured creditor of the Originator.

In order to ensure that the transfer is effected as a true sale and that a clean opinion is given, a number of matters will need to be considered and analysed (including those set out in the EU Legal Criteria) by counsel to the transaction. Where the opinion regarding true sale is subject to certain assumptions, DBRS expects to see these assumptions verified through representations made by the relevant parties in the documentation. DBRS expects the representation provider to be in an informed position with

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2. Per the Irish Supreme Court in Law Society of Ireland v O’Malley [1999] 1 IR 162
respect to its ability to provide such representation. This representation may also be coupled with an indemnity to facilitate the recovery of a breach of representation.

AVOIDANCE OF TRANSFER
In Ireland, there are certain circumstances in which a transaction can be set aside by the courts, as further described in ‘Insolvency, examinership and enforcement issues – Clawback’ below. Owing to the complexity of this matter, DBRS usually requests that counsel appointed to the transaction conduct a thorough analysis of this risk and provide a clear legal opinion that the transfer of assets to the SPV or the creation of security by the SPV could not be set aside.

Special Purpose Vehicles

FORMS OF SPVS
The predominant vehicle used in structured finance transactions involving an Irish SPV is a private company limited by shares. In circumstances where retail securities are to be offered to the public, a public company limited by shares is the preferred vehicle. In the case of transactions involving an SPV in a form other than a private or public limited company, these should be presented to DBRS as early as possible and DBRS will likely request additional matters to be analysed and included in a legal opinion. Regardless of the structure chosen, bankruptcy remoteness is a prerequisite of any SPV used in a structured finance transaction.

Similar to SPVs in other jurisdictions, an Irish SPV is typically managed by a professional corporate service provider who will provide the SPV with a majority (if not all) of the directors of the SPV.

HOLDING STRUCTURE OF SPV
Where the SPV is a company, DBRS expects to see the shares of the SPV either held by a share trustee on trust for discretionary charitable purposes, or be held by a holding company which is itself structured as a special purpose vehicle. The shares of the holding company would then be held by a share trustee on trust for discretionary charitable purposes.

LIMITED POWERS
SPVs used in Irish structured finance transactions will generally not have a limitation on activities codified in their constitutional documents, at least not to the extent common in the case of SPVs incorporated in other jurisdictions. This is due to the existence of the doctrine of ultra vires in Irish law, under which acts carried out by the SPV beyond the scope of the powers granted in the SPV’s constitutional documents will be void. Rather than risking that an aspect of a structured finance transaction could be determined to be void by a court for this reason, DBRS does not expect an Irish SPV’s powers under its constitutional documents to be limited. However, DBRS expects the exercise of powers of the SPV to be subject to covenants, warranties and representations in the transaction documents.

3. Securities with a minimum denomination of less than EUR 100,000 or its equivalent in another currency.
BANKRUPTCY REMOTENESS

Utilising an SPV in an Irish structured finance transaction will not by itself result in the structure achieving bankruptcy remoteness. Rather, the SPV is expected to make certain representations, warranties and covenants in the transaction documents in order to ensure that the SPV will be treated as bankruptcy remote and other transaction parties are expected to agree to limited recourse and non-petition provisions. These are addressed further in the EU Legal Criteria.

Consolidation risk

As a general principle, Irish law does not have a concept of substantive consolidation. Irish courts are generally reluctant to disregard the separate legal entity of a company. However, Irish corporate insolvency law contains certain statutory exceptions to this principle. Section 140 of the Companies Act 1990 as amended provides that the courts may order that any Irish company that is or has been related to a company which is being wound up in Ireland shall pay to the liquidator of that company an amount equivalent to the whole or part of all or any of the debts provable in that winding up. Section 141 of the Companies Act 1990 as amended further provides that where two or more related companies are being wound up in Ireland the courts may provide that both companies be wound up together as one company.

In cases where the Originator is incorporated in Ireland or is otherwise likely to be subject to insolvency proceedings in Ireland, DBRS expects transaction counsel to address the risk of the SPV being deemed to be related to the Originator for the purposes of the above provisions.

A company is related with respect to another company if, among other circumstances:

- more than half the nominal value of a company’s “equity share capital” is held by another company, and companies related to that other company; or

- more than half the nominal value of the equity share capital of two companies are held by members of the other; or

- that other company or a company or companies related to that other company or that other company together with a company or companies related to it are entitled to exercise or control more than one half of the voting power at any general meeting of the company; or

- the business of the companies has been so carried on that the separate business of each company, or substantial part thereof, is not readily identifiable; or

- it is a subsidiary or holding company of that company.

DBRS expects points (a), (b), (c) and (e) to be verified in a legal opinion and expects a reasoned analysis of any points arising from (d) to be included in such opinion.

Independent director

As with SPVs in other jurisdictions, in Irish structured finance transactions an Originator should not be in a position to control the activities of the SPV. This is especially important with respect to any decision by the SPV voluntarily to enter into winding-up, liquidation or other formal insolvency or solvent liquidation proceedings. There may be an incentive for an Originator experiencing financial difficulty to have an SPV which it controls make such a voluntary entry into proceedings in order to gain access to the SPV’s assets.
In order to protect against this possibility, DBRS expects that the board of directors of an Irish SPV contains at least one independent director, and that equivalent safeguards are included for any other form of SPV entity.

**CORPORATE BENEFIT**

Directors of an Irish SPV will need to be satisfied that the assumption by the SPV of the liabilities under the terms of the securities and entering into the related transaction documentation has a corporate benefit for the SPV. In order to support analysis on this point, generally a fee will be paid to the SPV out of the issue proceeds (which may be retained until the SPV is wound up). In addition, certain limited recourse and other protections are included in the transaction documents to shield the SPV against the risk of insolvency.

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**Security and Bond Documentation**

As in the case of UK transactions, in an Irish structured finance transaction, typically two trusts are established under the transaction documents. The trustee of these trusts is generally the same corporate trustee house (the “ABS Trustee”). Under the first trust, the ABS Trustee holds on behalf of the holders of the Rated Securities (the “Noteholders”) the SPV’s covenant to pay. This is generally considered the “note trust”. A second trust will also be established (the “security trust”) whereby the ABS Trustee (in this capacity, the “Security Trustee”) holds the security granted by the SPV on trust for the benefit of the Noteholders and other specified secured creditors (the “Secured Creditors”). Any enforcement of the security is pursuant to the security trust (albeit that it generally will require an instruction from the ABS Trustee on this matter).

**TYPE OF SECURITY**

As with English law, under Irish law security can be granted through a charge or an assignment by way of security. There are two categories of charges: a fixed charge and a floating charge. Although a number of Irish cases and English cases (which are of persuasive, although not binding, authority in Ireland) have sought to clarify the parameters of a fixed charge, there is still an element of uncertainty as to when a charge which, although expressed to be a fixed charge, may be vulnerable to being recharacterised as a floating charge. The distinction between a fixed and floating charge may have implications with regards to the priority of payments on the enforcement of the security. This issue is considered further under “Insolvency, examinership and enforcement issues” below.

Generally, the security package over the assets of the SPV in an Irish structured finance transaction will be structured as follows:

- a first-ranking security interest over specific assets (such as the assets subject to the transfer, accounts, eligible investments and contractual rights) either by way of a charge or through an assignment by way of security; and

- a floating charge over any of the SPV’s assets which are not effectively charged by (a) above.
DBRS notes that the nature of the security being taken will depend on the specifics of a transaction, and as such DBRS acknowledges that there is no “hard and fast” rule regarding the nature of the security interest to be given by the SPV. However, DBRS expects legal counsel to the transaction to analyse this issue and that the nature of the charge be considered in the transaction legal opinion. In certain circumstances DBRS may determine that the taking of security by way of fixed, rather than floating, security is consistent with the contemplated ratings.

The efficacy of the security package on the insolvency of the SPV is also fundamental in any structured finance transaction in Ireland. DBRS expects a legal opinion to confirm that the granting of security under the security documents is effective and binding and incapable of being set aside on the insolvency of the SPV.

**ENFORCEABILITY BY NOTEHOLDERS**

In Irish structured finance transactions, the transaction documents require enforcement rights to be exercised by the Security Trustee on behalf of the Noteholders. The only time that this will not be the case is where the Security Trustee has become bound to take enforcement steps and fails to act within a reasonable time. As noted above, it is also typical for the ABS Trustee to be required to instruct the Security Trustee before the latter will enforce the security interests it holds on behalf of the Secured Creditors, and Secured Creditors will usually have no unilaterally exercisable rights of enforcement except in exceptional circumstances.

The transaction documents typically contain a provision setting out an order pursuant to which each payment in the payment order is effectively subordinated to each payment ranking above it in the order of priorities. This provision is often referred to as the payment priorities provision or the “waterfall”. The waterfall should ensure that essential payments required to maintain the structure are paid first.

The waterfall should also specify the priority in which creditors are paid upon the enforcement and realisation of the security.

The priority in which Noteholders are paid is an essential consideration in the credit rating process. It is important to ensure that in a default scenario, the Security Trustee and/or the ABS Trustee has access to the funds required to pay costs of enforcement. This is usually addressed by having such costs rank senior in the waterfall. DBRS typically anticipates that amounts payable to service providers to the SPV that rank senior in priority of payment to the Rated Securities must either be for clearly identifiable or pre-determined amounts, or be capped. In cases where payable amounts are variable and not subject to a cap, DBRS reviews the transaction’s sensitivity to estimated increases to determine consistency with the contemplated rating.

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**Insolvency, Examinership and Enforcement Issues**

The legal opinions for an Irish structured finance transaction will need to consider a number of matters relating to Irish insolvency law. These include the ability to set aside the transfer of the assets on the insolvency of the SPV, the circumstances on which an examiner may be appointed to the SPV and the implications of the appointment of an examiner to the SPV.
EXAMINERSHIP

Examinership is a court/moratorium protection procedure. Where an Irish incorporated 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. The effect of the appointment of an examiner is to suspend the rights of the security trustee for the protection period (70 days, subject to extension by a further 30 days). Subject as set out below, the appointment does not affect the security itself or the rights of the secured creditor.

The court is empowered to authorise an examiner of a company:

(a) in the case of property of a company subject to a security which as created was a floating charge, to exercise his powers in relation to it or to dispose of it as if it were not subject to the security; and

(b) in the case of property which is subject to a fixed charge to dispose of it as if the property were not subject to the security,

in each case provided that the court is satisfied that such disposal by the examiner or (in the case of property subject to a floating charge) exercise by him of his powers would be likely to facilitate the survival of the whole or any part of the company.

Where property the subject of a security which as created was a floating charge is disposed of by the examiner, the holder of the security is to have the same priority in respect of any property directly or indirectly representing the property disposed of as he would have had in respect of the property subject to such security. In relation to property the subject of a fixed charge, it is a condition of any court order allowing the disposal of such property that the net proceeds of the disposal of such property (plus, where those proceeds are less than the market value of the property, the sum required to make up the deficiency taken from the other assets of the company, if any) must be applied towards discharging the sums secured by such security.

The court is empowered to sanction payment of the remuneration, costs and expenses properly incurred and certified by the examiner, which are to be paid in priority to other claims, meaning that the costs and expenses of the examiner must be paid prior to the claims of a secured creditor (whether holding the benefit of a fixed/specific security or floating charge).

The appointment of an examiner to a company may result in restrictions on the powers of any attorney appointed by the company.

DBRS expects the above issues to be covered in a legal opinion. In the case of a structured finance transaction involving an Irish Originator, DBRS may request that the legal opinion address the likelihood of the appointment of an examiner to the SPV as a related company of such Irish Originator. In order to protect against this possibility DBRS expects the business of the SPV and the Irish Originator be carried on separately and that the SPV and the Irish Originator not have an equity relationship or be under common control and that this be supported by structural features of the transaction and be supported by covenants and representations where appropriate.

Although there is no restriction on a special purpose company availing of the examinership procedure, a petitioner would be asking a court to give protection to, and appoint an examiner to investigate the

4. As to the meaning of “related company”, see “Bankruptcy Remoteness - Consolidation Risk” above.
affairs of, a company with no employees, no business or purpose other than to play a specifically
designed role as part of a chain in a complex commercial transaction freely negotiated and entered into
by commercial people. DBRS expects transaction counsel to confirm that these factors reduce the
likelihood of an examiner being appointed to the SPV.

CLAWBACK
regime under which certain transactions may be set aside in certain circumstances. In an Irish
structured finance transaction there are generally two transactions which need to be analysed for
vulnerability to challenge under this regime, namely (i) (where the Originator is Irish) the transfer of
assets between the Originator and the SPV and (ii) the granting of security by the SPV to the Security
Trustee.

Improperly transferred assets
Under section 139 of the Companies Act 1990, if it can be shown, on the application of a liquidator,
creditor or contributary of a company which is being wound up, to the satisfaction of the High Court
that any property of such company was disposed of (which would include by way of transfer, security
or mortgage) and the effect of such a disposal was to “perpetrate a fraud” on the company, its creditors
or members, the High Court may, if it deems it just and equitable, order any person who appears to
have “use, control or possession” of property or the proceeds of the sale or development thereof to
deliver it or pay a sum in respect of it to the liquidator on such terms as the High Court sees fit.

Fraudulent preference
Section 286 of the Companies Act 1963 provides that any conveyance, mortgage, delivery of goods,
payment, execution or other act relating to property made or done by or against a company, which is
unable to pay its debts as they become due to any creditor, within six months of the commencement of
a winding up of the company with a view to giving such creditor (or any surety or guarantor of the debt
due to such creditor) a preference over the other creditors, shall be deemed to be a fraudulent preference
of its creditors and be invalid accordingly. Where the conveyance, mortgage, delivery of goods,
payment, execution or other action is in favour of a “connected person” the six month period is
extended to two years. In this regard, it is noted that the SPV will not generally be a creditor of the
Originator and accordingly it is unlikely that any transfer between the Originator and the SPV could be
challenged as a fraudulent preference. Equally, prior to the granting of the security to the Security
Trustee, the Security Trustee and persons represented by it should not be creditors of the SPV and
accordingly the granting of the security should be unlikely to be capable of challenge as a fraudulent
preference. However, DBRS expects this to be confirmed by counsel in all cases.

Fraudulent disposition
Section 74(3) of the Land and Conveyancing Law Reform Act 2009 provides that any conveyance
(which includes an assignment, charge or mortgage) of property made with the intention of defrauding
a creditor or other person is voidable by any person thereby prejudiced. DBRS expects counsel to
analyse the risk of any transfer by an Irish Originator to the SPV or the security granted by the SPV
being rendered void under this provision.

Disclaimer of onerous contracts by the liquidator
Section 290 of the Companies Act 1963 confers power on a liquidator, with leave of the court, at any
time within 12 months after the commencement of the liquidation, to disclaim any property of the
company being wound up which consists of, amongst other things, (a) unprofitable contracts or (b) any
property which is unsaleable or not readily saleable by reason of its binding the possessor to the
performance of any onerous act or to the payment of money. DBRS expects to see a legal opinion
analysing the risk of the transaction documents being disclaimed by a liquidator of the Originator (in the case of an Irish Originator) or the SPV (in the case of an Irish SPV).

Invalidity of floating charges
Section 288 of the Companies Act 1963 renders invalid (except to the extent of monies actually advanced or paid or the actual price or value of the goods or services sold or supplied to the company at the time of or subsequently to the creation of the charge, together with interest on that amount at the rate of 5% per annum) floating charges on the property of a company created within twelve months before the commencement of the winding up unless it is proved that the company immediately after the creation of the charge was solvent. DBRS expects to see a legal opinion analysing the risk of any floating charge granted by the SPV being rendered invalid. DBRS also expects to see a certificate from an authorised officer of the SPV confirming that at the time of the creation of the floating charge the SPV was solvent and will not cease to be solvent as a result of the entry into of the transaction documents.

Avoidance of property dispositions after commencement of winding-up
Section 218 of the Companies Act, 1963 provides that where a company is being wound up by the Court, any disposition of the property of the company made after the commencement of the winding up is, unless the court orders otherwise, void.

ENFORCEMENT OF THE SECURITY
Perfection of security
Most security interests created by an Irish company require a security filing to be made to the Companies Registration Office within 21 days of the creation of the security interest, failing which the security is void. DBRS expects transaction counsel to confirm that they will make all required security filings within the requisite period. Certain asset classes may entail additional perfection requirements and legal opinions should address this.

Method of Enforcement
Consideration will also need to be given to the position of the SPV in default and how best to ensure that the security trustee is able to direct enforcement actions over the assets of the SPV.

Under Irish law, security can be enforced through a number of methods, including the sale of the assets or the appointment of a receiver. In an Irish structured finance transaction, DBRS expects that the security trustee is able to control the enforcement process. A receiver is appointed under Irish law by the chargee in respect of the assets the subject of the charge. The main function of a receiver is to realise the assets subject to the charge at the best price reasonably obtainable at the time of realisation. The Security Trustee should have the ability to appoint a receiver under the security documents. The provisions of the Land and Conveyancing Law Reform Act 2009 which may affect the Security Trustee’s powers of enforcement should be modified or dis-applied in the security documents so as to optimise the Security Trustee’s powers of enforcement. DRBS reviews proposed transactions to determine the rights available to the Security Trustee (which may require pursuit of rights through judicial means) and the potential impact of the exercise of those rights on foreclosure and recovery timelines.

Section 1001
DBRS notes, in the case of a fixed charge over book debts, the priority afforded to the Irish Revenue Commissioners under section 1001 of the Taxes Consolidation Act 1997, as amended (the “TCA”) and that the amounts over which this priority applies may be limited by a notification of the relevant fixed
charge to the Revenue Commissioners. DBRS expects transaction counsel to confirm that they will make all appropriate notifications in this regard to the Revenue Commissioners.

Section 571
DBRS notes that Section 571 of the TCA imposes a liability to pay capital gains tax or, where appropriate, corporate tax on chargeable gains, on persons designated in the section as "accountable persons", that is, liquidators, receivers (whether appointed under a fixed or a floating charge), mortgagees or any other persons entitled to assets by means of security. The accountable person is assessable to the tax referable to the chargeable gain and that tax is recoverable from the accountable person. The tax must be paid by the accountable person out of the proceeds of disposal, effectively reducing the proceeds of disposal available for satisfaction of other liabilities, including liabilities secured by a fixed charge.

EFFECT OF FIXED/FLOATING CHARGE DISTINCTION ON ENFORCEMENT OF SECURITY
On the insolvency of a company, the holder of a floating charge is in a subordinate position to the holder of a fixed charge. This is due to the fact that there are certain claims which rank in point of priority after a fixed charge holder but before the floating charge holder with regard to proceeds from liquidation. In an insolvent winding up, preferential creditors are entitled to be paid first from assets subject to a charge which at the time of creation was floating, regardless of whether the floating charge has crystallised at the commencement of the winding up. DBRS may request an opinion confirming that a charge which is expressed to be a fixed charge will take effect as such, as well as confirmation from the relevant parties that the controls created by the transaction documents with respect to the fixed charge assets will be operated in practice.

Servicing and Collections

As with UK transactions, the concept of a trust is fundamental to Irish structured finance transactions. As noted above, there generally are two trusts in most transactions, a security trust and a note trust.

In Irish structured finance transactions, the obligors generally continue to make their periodic payments into an account in the name of the Originator, until such time as a Perfection Event occurs. However, as these accounts are often used to collect receivables originated/collected by the Originator related to both securitised and non-securitised assets, a risk of commingling arises. In order to mitigate this risk, DBRS typically expects the Originator (or, where the account is not in the name of the Originator, the entity in whose name the collection account is held) to declare a trust over the amounts received into the collection account in favour of the SPV. The effect of this declaration is that such amounts are excluded from the assets of the Originator should the Originator enter into insolvency proceedings. DBRS expects a legal opinion to confirm the validity of any such trust (including on the insolvency of the Originator or such other entity in whose name the collection account is held) in any transaction which features such a mechanism.

5. Where the Originator is itself a bank at which the collection account is held, however, a trust declared over the account is unlikely to be effective to ensure that funds credited to the collection account will be available to the beneficiary of any trust declared over the account following the insolvency of the Originator.
A declaration of trust over a collection account is not without limitations. In particular, on the insolvency of the Originator, it will not result in the funds subject to the trust automatically being transferred to the SPV. Rather, there is an inherent liquidity risk in this structure, as any insolvency proceedings are still likely to take considerable time to identify and distribute the trust property (i.e. the amounts received on behalf of the SPV into the collection account) where such receipts are commingled with other receipts in the collection account.

One mitigant for this risk is the establishment of clear procedures at the outset of the transaction for identifying amounts received by the Originator and serviced by the servicer (who often is the Originator) on behalf of the SPV. Further, a reserve fund may also be appropriate to provide the SPV with sufficient funds to meet its ongoing debt service obligations (depending on their frequency) under the terms and conditions of the securities to cover the anticipated period until the trust property is distributed.

However, the best structural mitigant to the risk of Originator insolvency is to have the shortest possible commingling period, so that upon the Originator’s insolvency there is the lowest possible balance belonging to the SPV in the collection accounts. As such, balances in the collection accounts should be frequently swept or otherwise required to be separated and paid to a transaction account in the name of the SPV over which a trust or first-ranking security interest is taken. For the mitigation of the risk of collection accounts and commingling generally reference is made to ‘Transaction Parties’ – ‘The Servicer: Collection Accounts and Commingling’ in the EU Legal Criteria.

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**Irish Consumer Credit Transactions**

The provision of credit (including housing loans) to consumers is regulated in Ireland, including by the Consumer Credit Act 1995 as amended (the “Consumer Credit Act”), the European Communities (Consumer Credit Agreements) Regulations 2010 (the “Consumer Credit Regulations”) and the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 to 2000. In addition, a Consumer Protection Code, a Code of Conduct on Mortgage Arrears and a Code of Conduct on Business Lending to Small and Medium Enterprises have been issued by the Central Bank of Ireland. In any transaction backed by Irish consumer loans, DBRS expects counsel to address in detail the implications of the foregoing.

**The Consumer Credit Act**

The Consumer Credit Act imposes a range of restrictions on consumer lenders. The Consumer Credit Act prohibits a creditor from putting into any agreement terms which go beyond the provisions of the Act and provides for the unenforceability of agreements (other than agreements relating to housing loans) which breach this prohibition. The Consumer Credit Act also provides that breaches of certain of its terms results in an offence (punishable by fine and/or criminal sanction). DBRS expects the implications of the Consumer Credit Act to be addressed and requires an opinion (i) confirming, in the case of an RMBS transaction, that the SPV is not a mortgage lender for the purposes of the Consumer Credit Act, (ii) confirming, in the case of an RMBS transaction, that the fact that the SPV is not a mortgage lender would not render the loans unenforceable under the Consumer Credit Act, (iii) addressing the implications for the SPV and the enforceability of the loans of any breach by the
Originator of the Consumer Credit Act, (iv) confirming that the transfer of the loans to the SPV will not affect their enforceability, (v) confirming that the transfer of the loans to the SPV does not require it to be authorised or registered, whether under the Consumer Credit Act, the Central Bank Act 1997, or otherwise and (vi) confirming that any offences committed under the Consumer Credit Act by the Originator with respect to the loans prior to the transfer of the loans to the SPV would not transfer to or become the responsibility of the SPV.

DBRS notes that the rights of the SPV and the security trustee may be or may become subject to the direct rights of the borrowers against the Originator. Such rights may include the rights of set-off existing prior to the notification to the borrowers of the sale of the loans and the related security to the SPV. Furthermore, there is a risk that the service of such a notice of sale to a borrower would not terminate the rights of set-off as section 40 of the Consumer Credit Act provides that where a creditor’s rights under an agreement are assigned to a third person, the consumer is entitled to plead against the third person any defence which was available to him against the original creditor, including set-off. DBRS expects the foregoing issues to be addressed.

**European Communities (Consumer Credit Agreements) Regulations 2010 (the “Consumer Credit Regulations”)**

In addition to the requirements of the Consumer Credit Act highlighted above, the Consumer Credit Regulations may also apply to unsecured personal lending for amounts less than €75,000. Although breach of the requirements of the Consumer Credit Regulations should not, prima facie, go to enforceability, breaches of certain terms of the Consumer Credit Regulations result in an offence (punishable by fine and/or criminal sanctions). As the Consumer Credit Regulations do not apply to secured personal lending (e.g. home loan mortgages), a less extensive opinion than that required for the Consumer Credit Act should be required. However, DBRS expects the implications of the Consumer Credit Act to be addressed and requires an opinion (i) confirming that the transfer of the loans to the SPV will not affect their enforceability, (ii) confirming that the transfer of the loans to the SPV does not require it to be authorised or registered, whether under the Consumer Credit Act, the Central Bank Act 1997, or otherwise and (iii) confirming that any offences committed under the Consumer Credit Regulations by the Originator with respect to the loans prior to the transfer of the loans to the SPV would not transfer to or become the responsibility of the SPV.

**Unfair Terms In Contracts Regulations**

In addition, consumer loans are subject to the terms of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 to 2000 (the “UTCCR”). Under the UTCCR, where a contractual term has been concluded between a seller of goods or a supplier of services and a consumer and has not been individually negotiated, such term will not be binding on the consumer if that term is unfair within the meaning of the UTCCR (“Unfair”); however, under the UTCCR, a contract which contains one or more Unfair terms will continue to bind the parties if it is capable of continuing in existence without the Unfair term(s). DBRS expect transaction counsel to address the implications for the transaction of the UTCCR. In particular, DBRS expects counsel to have conducted a review of the Originator’s contractual documentation which creates/governs the securitised receivables/loans and for counsel to confirm that such documentation complies with the UTCCR or to identify any deficiencies in this regard and to analyse the consequences thereof.
**Consumer Protection Code (The “CPC”)**

In any transaction backed by Irish consumer loans, DBRS expects the implications of the CPC (in particular in relation to any breach thereof by the Originator) to be considered by transaction counsel. The Central Bank of Ireland has the power to administer sanctions for contraventions of the CPC.

**Code of Conduct on Mortgage Arrears (the “CCMA”)**

The CCMA applies to mortgage lending activities of certain regulated entities and can require periods of forbearance on certain loans. In any transaction backed by Irish loans secured on residential property, DBRS expects the implications of the CCMA (in particular in relation to any breach thereof by the Originator) to be considered by transaction counsel, and for the legal opinion to confirm whether the Originator and Servicer are entities subject to the CCMA. The Central Bank of Ireland has the power to administer sanctions for contraventions of the CCMA.

**The Personal Insolvency Act 2012 (the “Act”)**

The Act, signed into Irish law on 26 December 2012, is designed to reform Irish bankruptcy law by introducing three forms of non-judicial debt settlement arrangements for individuals (Personal Insolvency Arrangements, Debt Settlement Arrangements and Debt Relief Notices) as well as shortening the bankruptcy period from 12 years to 3 years and making it a prerequisite to being declared bankrupt that reasonable efforts to agree a Personal Insolvency Arrangement or a Debt Settlement Arrangement with creditors have been demonstrated.

Most relevant from the perspective of secured creditors will be the Personal Insolvency Arrangement in respect of secured debt of up to €3,000,000 (the cap can be waived with the consent of all secured creditors) and unlimited unsecured debt. Individuals can propose these arrangements to their creditors via ‘Personal Insolvency Practitioners’ (who will be regulated by the Insolvency Service of Ireland (“ISI”) which will oversee the new regime) and, if a sufficient proportion6 of secured and unsecured creditors agree, the PIA will last 6-7 years following which (subject to the debtor’s compliance), he will be discharged from his unsecured debts, and his secured debts to the extent specified in the PIA. In this regard DBRS notes that the amount to be paid to secured creditors on the sale of a mortgaged property cannot be lower than (a) the value of the security or (b) the amount of the secured debt. DBRS also notes however that, in the context of a debtor’s principal private residence the legislation appears to treat all secured debt, including second mortgages and judgment mortgages, equally. Debtors may also not be forced to leave a principal private residence under a Personal Insolvency Arrangement.

While provisions relating to the establishment and operational set-up of the ISI were commenced on 1 March 2013, the provisions which will enable individuals to apply for one of these new arrangements, or avail of the reformed bankruptcy regime, have not yet been commenced. While the Minister for Justice has indicated that he expects approximately 15,000 applications for either a Personal Insolvency Arrangement (or its equivalent in respect of unsecured debts only, known as a Debt Settlement Arrangement) in the first full year of the Act’s operation, together with 3,000 bankruptcy applications, it is not yet possible to confirm those estimates or the length of time each process will take. Much may

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6 A majority of creditors representing not less than 65% in value of the total debt (secured and unsecured) attending and voting at the creditors’ meeting must vote in favour of a PIA as a prerequisite to it taking effect, which must include 50% in value of secured creditors attending and voting at that meeting and 50% in value of unsecured creditors attending and voting at that meeting.
depend on the numbers who seek authorisation as Personal Insolvency Practitioners. While DBRS notes features of the legislation intended to ensure that Personal Insolvency Arrangements cannot be used other than in cases in need, it is nevertheless difficult at this stage to predict the effect the new regime might have.

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**Tax**

**Qualifying company – deductible expenses**

Section 110 of the Taxes Consolidation Act 1997 as amended (“section 110”) provides that a “qualifying company” enjoys a special tax treatment which facilitates tax neutrality. In calculating the taxable profits of a qualifying company, expenses (including interest expenses) incurred by the qualifying company in connection with the structured finance transaction will be deductible in computing the taxable profits of that company for Irish tax purposes, provided certain conditions are met. Generally, the business of any Irish SPV used in a structured finance transaction is structured so that the Irish SPV can meet the criteria to be a qualifying company within the meaning of section 110. In such cases, DBRS expects to see a legal opinion confirming that the SPV is a qualifying company. Also, DBRS expects the SPV to covenant in the transaction documents that it will not prejudice its status as a qualifying company within the meaning of section 110. Further, DBRS expects to see a legal opinion confirming that all identifiable payments due from the SPV under the transaction documents will be deductible for Irish tax purposes. Such payments are likely to include interest payable by the SPV on the securities, net payments made under any swap agreement and professional fees incurred in connection with the structured finance transaction insofar as those fees are borne by the SPV.

In relation to legal opinions as to the deductibility of interest or certain other payments, DBRS expects that where assumptions are made in a legal opinion as to:

- the identity, legal status or tax residence of the recipient of interest payments or the tax treatment of interest payments in the hands of the recipient; and/or
- the SPV having no knowledge of certain arrangements,

such assumptions are supported by appropriate representations of the recipient (in the case of (a) or the SPV (in the case of (b)).

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7 The application to ISI must be accompanied by a statement that the Insolvency Practitioner is of the opinion that the information in the debtor's financial statement is correct, that the debtor satisfies the eligibility criteria, that there is no likelihood of the debtor becoming solvent within the next 5 years and that it is appropriate for the debtor to apply for a Personal Insolvency Arrangement. In particular DBRS notes that the test for solvency appears to be based on a debtor’s ability to pay debts as they fall due, rather than his or her personal ‘balance sheet’, which may have been significantly affected by mortgage negative equity. In addition, where the proposed arrangement relates to mortgage debt in respect of the debtor’s principal private residence, the debtor must confirm in writing that he has cooperated with the lender’s Mortgage Arrears Resolution Process under the Central Bank’s Code of Conduct on Mortgage Arrears for at least 6 months following which an alternative repayment arrangement was not capable of being agreed, or that the lender was not prepared to offer such an arrangement.
If it is anticipated that the Irish SPV will not be a qualifying company this should be raised with DBRS at the earliest possible stage.

The taxable profits of a qualifying company will be based on the profits that would have arisen to the company had its accounts been prepared under Irish GAAP as it existed at 31 December 2004. It is possible to elect out of such treatment and such election, if made, is irrevocable. If the SPV makes such an election, then it may be possible that taxable profits or losses could arise to the SPV as a result of the application of IFRS or current Irish GAAP that are not contemplated in the cash-flows for the transaction and as such may have a negative effect on the Issuer and its ability to make payments to the holders of the securities. For this reason, DBRS expects the SPV to covenant in the transaction documents that, if its cash flows would thereby be affected adversely, no such election will be made.

**VAT**

The SPV, in exercising its rights and performing its obligations under the structured finance transaction, will generally be engaged in an activity which is exempt from Irish VAT. DBRS expects confirmation of this fact in a legal opinion. DBRS notes that this VAT exemption means that any VAT suffered by the SPV on expenses attributable to that income will generally not be recoverable except to the extent that inputs are referable to such income generated outside the European Union.

In respect of certain services, the SPV will be required to account for VAT on a self-supply basis. DBRS expects legal opinions to also address this issue.

Services regarded as collective portfolio management provided to the SPV will be exempt from VAT for so long as the SPV is a “qualifying company”. In appropriate cases, DBRS expects a legal opinion to confirm this fact and to confirm which specific services provided in connection with the transaction (e.g. collateral management/portfolio management fees, corporate services fees) fall within this exemption.

It is important to demonstrate that the impact of any VAT payable by the SPV (and which is not recoverable) has been taken into account in the cash flows of the SPV.

Separately, in a VAT group in Ireland, each member of that VAT group is jointly and severally liable for the VAT liabilities of every other member of that VAT group. For this reason, DBRS expects the SPV to covenant in the transaction documents that it will not apply to become part of any Irish VAT group.

**Withholding tax**

DBRS expects confirmation in a legal opinion that payments under all of the transaction documents may be made without withholding on account of Irish tax. Specifically, DBRS expects counsel to confirm that interest may be paid on the securities issued by the SPV without any deduction for withholding tax. DBRS also expects confirmation in a legal opinion that payments under any loan agreement or swap agreement may be made without withholding for or on account of Irish tax.

There are a number of exemptions from Irish withholding tax on interest. The most frequently relied upon of such exemptions in structured finance transactions is the “quoted Eurobond” exemption which provides that no withholding tax will apply to payments of interest on securities if the securities are listed on a recognised stock exchange (such as the Irish Stock Exchange) and are either (a) held in a recognised clearing system (such as Euroclear or Clearstream) or (b) the paying agent is not located in Ireland.

In circumstances where securities are not listed (and therefore ineligible for the “quoted Eurobond exemption”), DBRS expects counsel to confirm that an alternative withholding tax exemption applies.
In this regard, DBRS expects any assumptions made with respect to the identity, legal status, tax residence or tax treatment of interest in the hands of the Noteholder to be supported by appropriate representations of the Noteholder.

Similarly where the SPV funds itself by loans (otherwise than by way of Notes), DBRS expects confirmation that a withholding tax exemption applies to any interest on such loans. In this regard, DBRS expects any assumptions made with respect to the identity, legal status or tax residence of the lender or the tax treatment of interest in the hands of the lender to be supported by appropriate representations of the lender.

Where a payment of interest is treated as a distribution for Irish tax purposes, the payment will not be deductible for Irish tax purposes and will come within the scope of dividend withholding tax and not interest withholding tax.

For this reason, it is extremely important that interest payments made under the Notes and the transaction documents are not treated as distributions. In order to provide an opinion as to the deductibility of such payments, DBRS recognises that counsel will have had to determine that such payments are not to be characterised as distributions for Irish tax purposes. As mentioned above, any assumptions made in support of any deductibility opinion should be supported by appropriate representations.

**Stamp Duty – Asset Level**
There are a number of Irish stamp duty exemptions available in relation to the transfer of the assets to the SPV. DBRS expects a legal opinion to confirm that no Irish stamp duty arises on this transfer, or, to the extent that stamp duty is payable, the amount of such duty (which should be taken into account in the cash flows of the SPV).

**Stamp Duty – Other**
DBRS does not expect any Irish stamp duty to be payable in relation to any transaction document or on the issue or transfer of any securities. DBRS expects such matters to be confirmed in a legal opinion.

**Tax Residence**
DBRS expects to see an opinion that the SPV is resident in Ireland for the purposes of Irish tax and expects the transaction documents to include a covenant from the SPV it will at all times maintain its tax residence in Ireland and not establish a branch or agency outside Ireland.