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THE HIGH COURT
The Four Courts
Dublin 7.
Fax: (01) 872 5669

20th April 2022

Central Bank of Ireland,
North Wall Quay,
Dublin 1.

Re: Integrity of Registration of Land Title,
Ownership of collateral in securitisation,

Dear

Greetings from the Four Courts.

Many collateral recovery cases where the loan originator has sold its nonperforming loan portfolio are throwing into sharp relief an issue regarding the accuracy of title to land, and burdens specifically, recorded in the LRA's Register. As you will appreciate, the integrity of land title registration is of systemic importance, and it is threatened when there are unanswered questions. This is collateral damage caused by securitisation.

In a single sentence, the following is the query:

Is there any form of asset based securitisation in which ownership of the asset is NOT transferred as collateral ?

If it's a true sale, the fact that the loan originator remains on the Register as owner of the "burden" would be of concern to the SSPE investors. Of even greater concern, I would think, would be the insistence by lawyers for the loan originator (after securitisation, only a mere manager) that the registration aforesaid is "conclusive evidence" of ownership, and good against all claimants to the contrary.

For a proxy for the SSPE to make such a claim would undermine the essential bankruptcy remoteness of the securitisation. I'm sure securitisation investors want a bankruptcy remote construct, and I'm sure that's what they've bought. But the transaction documents come to us heavily redacted, and we don't know what we should be looking for.

If, in law, only the mortgagee can sue for foreclosure (possession or "repossession", in colloquial terms), and only the mortgagee can give good receipt to a redeeming mortgagor, we have a problem. Who is the mortgagee ? (A proxy for the mortgagee cannot make the claim on its own behalf; to do so involves deceiving the court.)

In a true sale, it is not open to the loan originator to claim (as frequently happens) to be "conclusive" owner of the charge SOLELY on the basis that the burden, as registered, refers to it as the party claiming the benefit. The loan originator's status as registered owner of the charge is consistent with a true sale securitisation ONLY in the sense that it is only recorded as such in the register, and where such registration as *evidence of ownership* is not conclusive.

There's a tension between shadow banking's understanding of ownership of collateral, on the one hand and, on the other, the law's view as asserted by loan originators. The SSPE investors think their vehicle (the one which receives the receivables) owns the mortgage. The loan originators tell the court they are still "entitled" to collect because their registration as owner is "conclusive." If the former is correct, the formal statutory registration of title is corrupted by a false assertion, and is no longer accurate.

1. *Can a loan originator validly claim "conclusive "ownership of collateral after a true sale securitisation ?*

2. *Will the books of the loan originator, completed to IAS 39, reveal the truth ? (And is there any awareness of non-compliance with the registration requirements set out in Section 7 (1)(f) of the Credit Reporting Act, 2013 ?),*

3. *Doesn't the Asset Covered Securities Act, 2001 define "Commercial Property" as excluding Agricultural land ? What, then, are the consequences when farmland collateral is securitised ? Is the true sale void ?*

4. *Is it only since Regulation 2017/2402 that non-performing loans may be included in securitisation ? Section 35(2) of the 2001 Act was applicable up to that point ?*

5. *What will the effect on our land titles be when synthetic securitisation is included in the EU's STS ?*

Can you please clarify and/or elaborate and could you please release your response into the public domain ? There is only one way that a court can be kept abreast of your expert views, and that is if and when a litigant is able to exhibit your written, and published, response to the queries raised.

I am enclosing a copy of the case documents in [redacted] which was in my list recently, and was the subject of some press coverage, including reference to my comment to the effect that [redacted] As it happens, the angle the media picked out was [redacted] It was not my intention to ask for your reaction to that part of the story, but only in regard to the general concerns in regard to the integrity of the Register. Anyhow, one way or another, the case is no longer *sub iudice*, as I struck out the Summons last month.

Also enclosed is a copy of my Decision in the case which you may find useful in understanding the issues raised in this letter.

Kind regards,

[redacted]

[redacted] of the High Court

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[redacted]

The High Court

The Four Courts

Dublin 7.

9 June 2022

Dear [redacted]

I refer to your correspondence dated 20 April 2022, relating to: (i) the integrity of registration of land title, (ii) ownership of collateral in security, and (iii) [redacted], addressed to the Governor of the Central Bank of Ireland (the Central Bank). The Governor has asked me to respond on his behalf.

The Central Bank serves the public interest by maintaining monetary and financial stability while ensuring that the financial system operates in the best interests of consumers and the wider economy. The Central Bank is also a competent authority with responsibility for prudential and conduct regulation of regulated financial service providers.

Our responses below, to the questions raised in your correspondence, speak to those areas where the Central Bank acts as a competent authority and/or falls within the Central Bank's mandate. The Central Bank cannot comment on the contents of your correspondence as it relates to [redacted] as the Central Bank is bound by strict confidentiality obligations as set out in Section 33AK of the Central Bank Act 1942. [redacted]

By way of a general remark, I note that your letter refers to two separate legal frameworks that apply to different financial instruments under Irish and European law. The Asset Covered Securities Act 2001 (the 2001 Act) regulates the issuance of asset covered securities (ACS) in Ireland (also known as "covered bonds").[1] ACS are a distinct form of collateralised funding instrument, and are subject to a range of requirements in the 2001 Act. Most notably, ACS can only be issued by specialist credit institutions that are authorised by the Central Bank. The use

[1] The 2001 Act has been amended by way of the European Union (Covered Bonds) Regulations 2021 (the 2021 Regulations) in order to give effect to Directive (EU) 2019/2162 of the European Parliament and of the Council of 27 November 2019 on the issue of covered bonds and covered bond public supervision. The 2021 Regulation will commence on 8 July 2022.

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of Special Purpose Vehicles (SPVs) is not a feature of ACS issuance in Ireland and the loans that collateralise ACS (generally residential mortgages, per current market practice) are usually originated directly from the balance sheet of the specialist ACS bank. As such, the question of "true sale" would not typically arise in the context of ACS issuance activity in Ireland, although it remains possible for parent credit institutions to transfer loans from their balance to that of their subsidiary specialist ACS bank.

By contrast, Regulation (EU) 2017/2402, which lays down a general framework for securitisation and creates a specific framework for simple, transparent and standardised (STS) securitisation (the Securitisation Regulation), regulates a separate (albeit similar) collateralised funding instrument known as securitisation. The scope of the Securitisation Regulation is set with reference to the definition of securitisation in Article 2(1) of the Securitisation Regulation, and a crucial feature for determining whether a financial instrument constitutes a securitisation in this context is whether there is "tranching" of credit risk in the structure[2]. This contrasts with covered bonds/ACS, where no such tranching is present and hence such instruments do not fall under the scope of the Securitisation Regulation in Ireland. In addition, securitisations are generally structured in a manner whereby an SPV[3] is set up to isolate the securitised loans from the originating bank. Where this practice is present in a transaction, then considerations around true sale will be relevant for the transacting parties.

Turning to the specific questions outlined in your correspondence.

1. *Can a loan originator validly claim "conclusive" ownership of collateral after a true sale securitisation?*

We would note that the transfer of loans can take a number of forms such as securitisation or a non-securitised loan sale. Securitisations are contractual agreements between the relevant parties and accordingly need to be considered on a case-by-case basis to determine the applicable terms. The Securitisation Regulation is the EU regulatory framework for securitisation.

As you are aware, a true-sale analysis is a legal test developed by the courts to determine whether a transaction is properly characterised as a sale or secured loan. Where necessary, originators will need to consider with their legal advisors whether a relevant transaction satisfied the true-sale legal tests. A true-sale analysis is most relevant to transactions where there is a sale of the relevant assets from the originator to a special purpose vehicle. As each securitisation can be structured differently and take different forms, the question of the conclusive ownership of assets after a true-sale securitisation must be assessed on a case-by-case basis. Questions as to ownership of title by reference to land registration laws fall outside of the competence of the Central Bank.

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[2] That is, whether the credit risk of the transaction is segmented into different tranches with various levels of seniority (e.g. senior, mezzanine, junior) which dictate how losses are distributed to investors in such tranches.

[3] Defined as an SSPE per Article 2(2) of the Securitisation Regulation.

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2. *Will the books of the loan originator, completed to IAS 39, reveal the truth? (And is there any awareness of non-compliance with the registration requirements set out in Section 7 (1)(f) of the Credit Reporting Act, 2013?)*

Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards and the Companies Act 2014 require listed entities to prepare their group financial statements in accordance with International Financial Reporting Standards (IFRS) as adopted by the EU. All other entities have the option to adopt either local Generally Accepted Accounting Principles (GAAP) or IFRS as adopted by the EU or standards deemed equivalent. While the Central Bank is not the competent authority for accounting standards, the Central Bank expects all regulated entities to adhere to the law and to prepare their accounts in accordance with the applicable accounting standards.

It is worth noting that in April 2009 the G20 leaders called on "the accounting standard setters to work urgently with supervisors and regulators to improve standards on valuation and provisioning and achieve a single set of high-quality global accounting standards". In this regard the International Accounting Standards Board (IASB) issued a new accounting standard for Financial Instruments, IFRS 9, which replaces IAS 39. IFRS 9 is applicable for accounting periods starting on or after 1 January 2018. IFRS 9 introduced a new regime for impairment provisioning and imposes an Expected Credit Loss approach to provisioning as opposed to the incurred loss approach that was required by IAS 39.

In relation to Section 7(1)(f) of the Credit Reporting Act 2013, whether a credit agreement has been securitised was not included in the list of attributes collected by the Central Bank upon operationalising the Central Credit Register (CCR).

3. *Doesn't the Asset Covered Securities Act, 2001, define "Commercial Property" as excluding Agricultural land? What, then, are the consequences when farmland collateral is securitised? Is the true sale void?*

The definition of "commercial property" in the 2001 Act is only relevant in the context of the issuance of ACS/covered bonds. In this respect, Section 3(1) of the 2001 Act defines commercial property as excluding a building or part of a building that is fixed on land that is used, or is set aside to be used, primarily for the purpose of any mine, quarry or agriculture.

However, it is important to note that the 2001 Act does not regulate securitisation activity as defined by the Securitisation Regulation. As such, this definition of "commercial property", in the 2001 Act, will not dictate whether agricultural land can be "securitised", in the context of securitisation activity under the scope of the Securitisation Regulation. Furthermore, the Securitisation Regulation does not prohibit the securitisation of agricultural or farmland and, accordingly, it would not impact on the "true sale" of such collateral.

4. *Is it only since Regulation 2017/2402 that non-performing loans may be included in securitisation? Section 35(2) of the 2001 Act was applicable up to that point?*

As previously noted, the Securitisation Regulation and the 2001 Act regulate different financial instruments. Prior to the Securitisation Regulation entering into effect as of 1 January 2019, a

more limited set of EU regulatory rules applied to securitisation. These EU rules did not prohibit the inclusion of non-performing loans in securitisations.

Under Section 32(5)(b) of the 2001 Act a designated mortgage credit institution (i.e. an ACS bank) may not include a mortgage credit asset or substitution asset in a cover assets pool, in the circumstances referred to in subsection (2) or (3) of that Section, if the mortgage credit asset or substitution asset is non-performing.

The 2001 Act applies to covered bonds but does not apply to securitisations.

5. *What will the effect of our land titles be when synthetic securitisation is included in the EU's STS?*

The EU's 'Simple, Transparent, and Standardised' (STS) criteria are set out in the Securitisation Regulation[4]. Regulation (EU) 2021/557 (which entered into force on 9th April 2021) amended the Securitisation Regulation in order to create a specific framework for STS on-balance-sheet securitisations (otherwise known as synthetic securitisations). In synthetic securitisations, risk transfer is achieved via a credit protection agreement instead of a sale of the underlying assets. Assets in a synthetic securitisation remain on the balance sheet of the originator and there is typically no true-sale to an SPV.

The Central Bank is not, however, in a position to comment upon any effect of synthetic securitisation upon land titles, as questions as to ownership of title by reference to land registration laws falls outside of the competence of the Central Bank.

To reply to your question on the first page of your letter, "*Is there any form of asset based securitisation in which ownership of the asset is NOT transferred as collateral*", synthetic securitisation would take this form.

We hope the above responses will be useful to you in your consideration of these issues. Should you have any further queries on the above, please do not hesitate to contact me.

Kind regards,

(Financial Risks and Governance Policy Division)

[4] Broadly speaking, non-performing loans cannot be included in STS securitisations under strict criteria that are set out in Articles 20(11), 24(9) and 26b(11) of the Securitisation Regulation.