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

20th April 2022

Dr. Gabriel Makhlouf,
Governor,
Central Bank of Ireland,
North Wall Quay,
Dublin 1.

Re: Integrity of Registration of Land Title,
Ownership of collateral in securitisation,
Promontoria v Gethins.

Dear Governor Makhlouf,

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 ?*

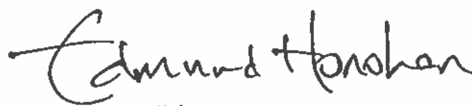
5. *What will the effect on our land titles be when synthetic securitisation is included in the EU's STS ?*

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 Promontoria v Gethins which was in my list recently, and was the subject of some press coverage, including reference to my comment to the effect that I intended to refer the papers to you. As it happens, the angle the media picked out was in regard to the plaintiff's claim to recover a portion of the folio which had not actually been mortgaged. 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,



Edmund Honohan
The Master of the High Court

Central Bank of Ireland - RESTRICTED

Banc Ceannais na hÉireann
Central Bank of Ireland
Eurosystem

T +353 (0)1 224 6000

Bosca PO 559
Baile Átha Cliath 1

PO Box 559
Dublin 1

www.centralbank.ie

Edmund Honohan
The High Court
The Four Courts
Dublin 7.

9 June 2022

Dear Mr. Honohan,

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) Promontoria v Gethins, 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 Promontoria, as the Central Bank is bound by strict confidentiality obligations as set out in Section 33AK of the Central Bank Act 1942. The Central Bank can, however, confirm that we have, further to your correspondence, engaged with Promontoria in relation to this matter.

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

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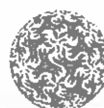
[2] That is, whether the credit risk of the transaction is segmented into different tranches with various levels of seniority (e.g. senior, mezzanine, junior) which dictate how losses are distributed to investors in such tranches.

[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

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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,

Gina Fitzgerald
Head of Division (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.

AN ARD CHÚIRT
(The High Court).
BAILE ATHA CLIATH 7
(Dublin 7).

26.1.2023

Dr. Gabriel Makhlouf,
Governor,
Central Bank of Ireland,
North Wall Quay,
Dublin 1

Re: Integrity of Registration of Land Title;
Ownership of collateral in securitization

Dear Governor Makhlouf,

First, I must, of course, acknowledge the letter to me of 9th June last, and thank you for same.

The issue of loan originators (or loan holders "in due course") as plaintiffs, notwithstanding a "true sale" securitisation, continuing to assert legal ownership employing the status of registered owner of the mortgage charge, has again been receiving attention in the Courts, and I have been asked to release my correspondence with you on the subject. comprising my letter to you of 20th April last, and your reply (from Gina Fitzgerald, Head of Division, Financial Risks and Governance Policy Division), dated 9th June.

The sole purpose of this letter is to request that you would permit me to release the June letter, which is marked "restricted".

In particular. the secretariat of the Oireachtas Finance Committee has deferred consideration of the issue raised by me (and any decision to list same on the Committee's agenda) until they have had an opportunity to read the Central Bank's reply, which I have not copied to them.

I am sending a copy of this letter to Paul Ng, Clerk to the Committee, (Paul.Ng@oireachtas.ie, or at the address below), and wouldask that you contact him to confirm clearance as requested. Indeed, you might think of sending him a copy of the June letter just to prove the point !

However, that said, it has occurred to me that, as this letter is likely to be included in briefing material for the members of the Committee, if it is decided to examine the issue in open session at a later date, I can perhaps usefully add a few additional observations which may be of use to them in understanding the problem.

So what follows is addressed to them, and is being included as a part of my letter to you only as a courtesy, and not at all in the expectation that you might respond with further written comments. Where the Committee choses to go with this is entirely for them to decide. It is, of course,

always possible that they might raise it at your next live session with them. Perhaps useful, therefore, for you to have had prior notice!

In the same way that borrowers think that they "own" their home, even though the bank has the title deeds, most TDs (and journalists) are only dimly aware of the workings of "securitisation" and shadow banking. They remember mutual building societies. What's changed? I haven't come across a more succinct description of the modern process in the liquidity marketplace than this passage in Anatole Kaletsky's 2010 book "*Capitalism 4.0*" at page 134 :

"This build-up of financial debt can be illustrated by contrasting two situations. The first situation is an old-fashioned home mortgage transaction, whereby a homeowner borrows $1m dollars from a commercial bank such as J.P.Morgan. The second is a borrowing chain, which works like this: The homeowner (0) borrows $1 million from a mortgage bank (1), which borrows from an SIV (2) which borrows from a hedge fund (3), which borrows from a prime broker (4), which borrows from an investment bank (5), which borrows from a bank (6) such as J.P.Morgan. As a result of this borrowing chain, a $1 million mortgage loan has created $6 million in total debt: $1 million in debt in the household sector plus $5 million of purely financial debt."

In her 2019 book, "*The Code of Capital*", (Princeton University Press), Katharina Pistor of Columbia, havingoutlined at page 94 that *"In 1968, an amendment to the US Federal Housing Act empowered the GSEs (Fannie Mae and Freddie Mac) to securitize loans backed by mortgages they bought from private banks and that...when private players took over the market for residential mortgage backed securities (RMBS) the GSEs also assumed the role of buyers of tranches in securitization structures private parties had created*, observes that *"The fact that the securitization of mortgages took off, notwithstanding legal obstacles in the way, is remarkable."*

She goes on to observe at page 95 that *"Land law was designed to leave little doubt about who owns a given piece of land at any moment in time, or who might hold a quasi-property right, such as a mortgage, against it. These rules were not made for a mass market in tradable MBS. The private sector used stopgap measures to get around these obstacles....*

And at page 97: *"The finance industry accused the courts of being overly formalistic and of failing to understand that modern markets for debt finance require different rules....In effect, the conflict boils down to the fundamental question: Who should guard the credibility of legal priority rights"?*

"The finance industry devised its own solution: it created a dummy company to pose as the mortgage holder from beginning to end, even as the loans themselves switched hands."

Pistor comments: *"As much as the financial industry needs "clear property rights" to sustain a market in MBS, this can hardly mean that it gets to set the rules for who might claim a collateral or title to the land."*

Now let us look at Professor Adam Levitin's hilarious 2013 article *"The Paper Chase: Securitization, Foreclosure and the Uncertainty of Mortgage Title,"* Duke Law Journal, volume 63 (98 thrilling pages describing hit and miss), which may be accessed at the link below, and which I will produce for perusal if requested. Levitin, Professor of Law at Georgetown University Law Centre, had made a presentation to the US Congress in 2010 which I referred to in an earlier Decision. Skip to page 648 of the 2013 article for its essence. Read onwards from the mid-660s. Check out footnote 144.

And note that in the abstract heading of the article Levitin refers to the controversies as a *"too big to fail"* problem for the courts ! The problem for MBS is the cardinal rule of property law: only the legal owner of the collateral may foreclose.

In Ireland, the problem for the "repossession" plaintiffs was "solved" not by the creation of a dummy company, but by chicanery around an alleged ambiguity in Registration of Title to Land legislation. Instead of having to prove title, a plaintiff, whether he had title as loan originator or successor owner, simply points to his registration as chargeholder, and asserts that the law declares him to be the owner, because the Registrar has registered him as such "conclusively."

A plaintiff, knowing that title has long since passed to the next player in the chain, but who still claims the benefit of the (alleged) conclusivity of the Register, is deceiving the court. He is also in breach of the Statutory requirement that changes of ownership be registered. (Failure to do so is an offence. Otherwise, the great scheme of registration of title fails, destroyed by the existence of incorrect ownership registration).

But this isn't a "barefaced" lie. It is not a failure to tell the truth; it is a failure to tell the *whole* truth. It is obvious that no lawyer, knowing his "instructions" could not be true, would still attempt to push on with the case. However, few lawyers know enough about the securitization paper trail and its financial DNA to question the instructions he is given. And there is no incentive to question.

Furthermore, none of the judges have any past experience in practice, or training, in the mechanisms employed in shadow banking. Does any judge know that after Basel 11 liquidity cannot be "manufactured" other than by a "true sale" securitisation ? This is (I am led to believe) because of the rigour of a strict condition of *"significant and effective risk transfer"* in order to exclude exposure from risk-weighted assets, a condition imposed, not for legal reasons, but in the interest of prudential regulation. In other words, a Central Bank concern.

So, if the investor loses direct contact with the collateral because of a "conveyancers' artifice," it points to a regulatory breach which cannot be tolerated by the regulator. (It is the "true sale" principle which ensures that the securitisation is Basel 11 compliant !) Conversely, compliance with Basel 11 confirms that legal title rests with the note holder "in due course," even though the Register of Charges on the Title states otherwise.

I am adding at the foot of this letter the link to a 2015 paper by Allessandro Scopelliti of Warwick and Reggio Calabria Universities, (only 48 pages plus addenda – see link below) which, as far as I can understand it, explores the various banking capital requirements set for prudential purposes, and describes the variety of uses and abuses which abode in this area. Nowhere in it is there any suggestion that risk transfer by collateralisation (even if there is partial retention) can co-exist with the asset remaining as the legal property, and on the balance sheet, of the loan originator.

Of passing interest, perhaps, and especially after the Minister has recently invited comments on the transposition of the 2019 EU Directive on Debt Servicers, is the question of whether the Central Bank

here is in any sense guarantor for US investors in a US investment vehicle that Irish law will be followed when receivables are being collected here. By that I mean to include the behaviour of the entity which purports to appoint the debt servicer, by the debt servicer as (soon-to-be) regulated under the EU Directive, and by receivers who are frequently appointed by entities who are not entitled to trigger the mechanism which is provided for in the deed of mortgage.

In Neil Barofsky's interesting 2012 book about TARP, "*Bailout: how Washington abandoned Main Street while rescuing Wall Street*," the author, who was then Inspector General of the quantitative easing largesse starting in the US in 2008 (you should read what he has to say about Ireland's friend Timothy Geithner !) comments, at page 125, that "*though there is a good chance that investors will lose a significant amount of money in the foreclosure of a home, the servicers are in a much better position to recoup their fees and expenses. In that way, the economic interests of the investors and the servicers often clash. Though it may be better*
for an investor if a mortgage is modified, the servicer may be better off if a home goes into foreclosure."

(Perhaps we need to look more closely at the basis of the CB's concerns about contagion starting in MBS trading. Is there much exposure of regulated banks to dangerous leverage, even in facilities extended to Irish investors?)

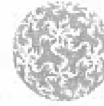
Kind regards,

Edmund Honohan

https://dlj.law.duke.edu/article/the-paper-chase-securitization-foreclosure-and-the-uncertainty-of-mortgage-title/

https://www.eba.europa.eu/sites/default/documents/files/documents/10180/1018121/b29b8d37-65df-4054-99b5-87481e6ea724/Scopelliti%20-%20Securitisation%2C%20Bank%20Capital%20and%20Financial%20Regulation.%20Evidence%20from%20European%20Banks%20-%20Paper.pdf?retry=1

c.c. Paul Ng.
Clerk to the Committee on Finance, Public Expenditure and Reform, and Taoiseach,
Kildare House,
Kildare Street,
Dublin 2, D02XR20



Banc Ceannais na hÉireann
Central Bank of Ireland
Eurosystem

T +353 (0)1 224 6000

Bosca PO 559
Baile Átha Cliath 1

PO Box 559
Dublin 1

www.centralbank.ie

Mr. Edmund Honohan
The High Court
The Four Courts
Dublin 7.

20 March 2023

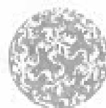
Dear Mr. Honohan,

I refer to your correspondence dated 26 January 2023, relating to the integrity of registration of land title and ownership of collateral in security, as well as the release of previous correspondence with the Central Bank of Ireland on such matters. The Governor has asked me to respond on his behalf.

In your letter, you requested permission to provide the Central Bank's letter dated 9 June 2022 ("the Letter") to the Oireachtas Committee on Finance, Public Expenditure & Reform and Taoiseach. Following a separate request submitted to the Central Bank under the Freedom of Information Act 2014, the Central Bank has released redacted versions of the Letter and your original letter dated 20 April 2022. These versions of the letters are now published on the Media Requests section of the Central Bank website at the below address. As such, these versions of the letters are now in the public domain and can be freely distributed. As requested, we are also sending a copy of this current letter to the clerk of the Oireachtas Committee (Mr. Paul Ng), so that he is aware of where to access the above correspondence on the Central Bank website if needed.

https://www.centralbank.ie/about/freedom-of-information/freedom-of-information-publication-scheme/foi-disclosure-log/media-requests

In addition to the above, your letter raised issues in relation to legal clarity regarding the registration of title of securitised loans and the potential interaction of same with certain regulatory rules such as those governing "significant risk transfer"[1]. As advised in our correspondence on 9 June 2022, questions as to ownership of title by reference to land registration laws fall outside of the competence of the Central Bank. Insofar as such matters impact on the so-called "true sale" of loans to a securitisation special purpose vehicle (SPV), we would also reiterate that 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 test. 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. Where the Central Bank becomes



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aware of any breaches of the Securitisation Regulation (2017/2402) or Capital Requirements Regulation (575/2013) (as well as related requirements) by market participants, the Central Bank will investigate the issue as a matter of priority and take all appropriate steps within its power to address any breaches.

Your letter also raises broader concerns in relation to securitisation practices, linked to the role of securitisation in the global financial crisis 2008/2009. On this point, it is worth noting that the regulatory framework for securitisation in the EU has been comprehensively overhauled since the global financial crisis, notably via two EU regulations: the Securitisation Regulation (as referenced above) and Amending CRR Regulation (2017/2401). The latter implemented relevant Basel Committee standards related to securitisation[2] in the EU and substantially increased prudential capital requirements related to securitisation exposures on bank balance sheets. A broader set of rules is contained in the Securitisation Regulation including requirements that originating entities have 'skin in the game' in relation to their securitisation transactions, by retaining 5% of the risk. Resecuritisation has also been banned in the EU, subject to limited carve outs, and investor transparency rules have been strengthened, notably regarding the provision of loan-level data via European Securitises and Markets Association (ESMA) authorised and supervised data repositories. Finally, the introduction of the Simple, Transparent and Standardised (STS) securitisation framework creates a segment of the market that is clearly distinguished from other forms of more innovative or exotic securitisation, through the application of detailed rules in relation to eligible securitised loans and the structuring of transactions.

Finally, your letter refers to the EU Directive on Credit Servicers and Credit Purchasers (2021/2167) ("the Directive"). In January, the Department of Finance launched a public consultation on the transposition of this Directive into Irish law. The Central Bank continues to assist the Department of Finance with the transposition and implementation of this Directive. It is worth noting that there is an existing regime for the regulation of credit servicing under the Central Bank Act, 1997 ("the Act"). The Act was amended by the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015 to introduce a regulatory regime in respect of Credit Servicing Firms bringing such firms within scope of regulation by the Central Bank. The Consumer Protection (Regulation of Credit Servicing Firms) Act 2018 further amended the Act to expand the activity of credit servicing, as defined in the Act, to include holding the legal title to credit granted under a credit agreement and associated ownership activities.

We hope the above information will be useful to you in your consideration of these issues.

Yours Sincerely,

Gina Fitzgerald
Head of Division (Financial Risks and Governance Policy Division)

AN ARD CHÚIRT
Na Ceithre Chúirt
Baile Átha Cliath 7
☎ (01) 888 6000

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Fax: (01) 872 5669

Paul Ng,
Clerk to the Committee on Finance, Public Expenditure and Reform, and Taoiseach,
Kildare House,
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Dublin 2. D02XR20

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

Dear Mr. Ng,

As of March 20th, the Central Bank has cleared for circulation to your committee its letter of last June to me. In writing to confirm that to me,(attached) the Bank advised me that they had also written to like effect to your goodself. To be precise, the Bank has released a redacted version of its letter, namely the version posted on the net.

Moving on, and with apologies for yet another substantive letter from myself to the Committee, I now enclose the Bank's letter to me of 20th March. You will see that, although I had ventured some observations to them when requesting their permission to release their first letter, and although I had advised that I was not inviting any response to such observations, the Bank has, in fact, developed some points, presumably to assist the Committee in further exploration of the issues I have raised. In similar vein, can I comment further ?

Here is the nub of my argument:
unless SPV ownership of the charge is registered, there is no "true sale"
...... and the securitisation is therefore void ab initio.

Not to put too fine a point on it, originating lenders (or their successors in title) have been coming to Court and *concealing* the fact that their loan book has been the subject of securitisation. They seek possession of the collateral and point to their original registration as owners of the charge as prima facie evidence. And of course that *is* what is registered, but it's not the *whole* truth.

Because if it *was* the whole truth, the MBS SPV investors would not have bankruptcy remote collateral, and could unwind the securitisation.

There is no Delaware-style collateral title "safe harbor" here for ABS investors !

There are other practices of questionable legality on the part of so-called "credit purchasers" (colloquially, "vulture" mortgagees) which should be of concern. I could list them. One example: claims by their agents, the "credit servicers" to be owners, not agents, are often encountered. Surely a case for the regulatory "comply or explain" memo ?

Could it also be the case that some loan originators have opted to retain title to collateral (while securitising nominally on a true sale basis) in order in due course to prosecute money claims for the unpaid residue after sale of collateral *without* allowing for the 90% writedown and limitation of recourse to 10% only of the balance, as would be the case if a true sale had been properly transacted? A double dip ? The securitization counterparty will never know!

I believe it is not open to the Central Bank only to say that they will deal with any regulatory breach to which their attention is drawn. This, at a time when the courts are taking mortgagees' paperwork at face value relying, in effect, on the Central Bank to intervene if the paperwork is irregular on an institutional and/or industrial scale, in regard to those specialised matters which are the purview of the Bank. Even a defendant with full legal team is unlikely to probe behind the initial concealment.

Nationally – as a nation – we are in a most unsatisfactory position if some legal infringement can have consequences both regulatory AND in civil law, and the authorities enforcing one is content to leave it to the other, and vice versa.

Some have usefully characterised regulatory requirements as scoping the legal "capacity" of the regulated entity. I can see merit in viewing regulatory infringement as the key to avoidability on simple civil law ultra vires grounds, but the court will not often discern the small print in, for example, the relevant Statutory Instruments or in third party contracts and deeds (and will often have refused discovery of documents anyway) and, even if discerned, may be inclined to default to some vague "justice and equity" basis for enforcement (without any Statutory basis here along the lines of the UK's FSMA 2000 Section 28(3) – a "harbor", perhaps, but not quite "safe".) "Equity" cannot supplement capacity.

Certainly, to the extent that Irish regulated banks have exposure to MBS lending settlement risk (whether in proprietary trading, in off-balance sheet subsidiaries, or loans either to leverage SPV own capital or individual SPV investors) the Central Bank should not default to regulation activated only on receipt of a complaint. The high-level principles of EU securities directives should inform regulation on a case-by-case basis.

Is there not also a direct regulatory concern for the Central Bank in regard to regulated banks' capital adequacy, measurement of VAR (value at risk, or its current iteration), etc., when the regulated banks MBS SPV related lending is for assets which are not bankruptcy remote (effectively unsecured) because the underlying securitisation is not "True Sale"? I think there is. Perhaps the Governor is thinking along the same lines ? One can only imagine the contagion which might envelope the banks if the securitisation business model here is found to be flawed.

The Credit Purchasers' and Credit Servicers' Directive

In the Bank's letter to me of 20th March, above referred to, the Bank notes that the Consumer Protection (Regulation of Credit Servicing Firms) Acts 2015 and 2018 describe the existing scheme of regulation of such firms by the Bank, and confirms that the Bank

"continues to assist the Department of Finance with the transposition and implementation of the Directive."

Full disclosure here. I, myself, have written to the Minister concerning the public consultation exercise in regard to transposition, and perhaps it is as well for me to let you have a copy of this letter together with the Minister's reply. (both attached)

In case this matter is under discussion in the Committee, I might, with respect, suggest that you could do worse than review the submission on the subject prepared by Professor McKenna in UCG (at my urging, I should point out) which ranges well beyond the issues mentioned in my letter to the Minister. I am attaching this also: it's 45 pages long, but a mine of information and comment which the Committee members will appreciate.

Professor McKenna is particularly concerned at our ability (perhaps even our reluctance ?) to follow through on the new "passporting" arrangements. We have a poor history of regulating passported entities operating out of Dublin. I have no hesitation in mentioning in this context the handling of the Jonathan Sugarman disclosures.

Coming now to Article 28a (the amendment to the 2014 Directive), while the Department is correct in inviting comments about the discretion to extend or be more prescriptive of the listed factors - a sovereign, member state discretion – it is clear that, come December, it will be EU law that the State must "require creditors to exercise reasonable forbearance", and that, as a matter of logic, compliance with the "policies and procedures" will have to be monitored by the State so that the State's compliance with its new role may be demonstrated. Non-compliance would be actionable.

It is to be hoped that the obligation to take the consumer's circumstances into account (perhaps a new obligation to assess an SFS) will, in the case of vulture mortgagees, result in the correction of the mortgage "prisoner" issue.

As for the discretion to further develop the "elements" of forbearance, the law's approach – unconscionability - would allow for the introduction of a review of the credit purchaser's "circumstances" and to correct for extractive supernormal profits, the "risk" of which never featured in the consumer's calculations at the time of contract. Failure by the credit purchaser (or its agent, the credit servicer) to engage bona fide with the consumer in "fresh start" restructure and/or partial debt forgiveness should in future be a good defence against foreclosure/possession.

With apologies for the length of this letter,

Kind regards,

Edmund Honohan