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Derivatives 2025

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1 Documentation and Formalities

1.1 Please provide an overview of the documentation (or framework of documentation) on which derivatives transactions are typically entered into in your jurisdiction. Please note whether there are variances in the documentation for certain types of derivatives transactions or counterparties; for example, differences between over-the-counter ("OTC") and exchange-traded derivatives ("ETD") or for particular asset classes.

In Ireland, derivatives transactions are typically entered into using standard form documents.

For OTC derivatives, the documents to be entered into consist of the 1992 Master Agreement or 2002 Master Agreement, as published by ISDA (the "**ISDA Master Agreement**"), along with the relevant ISDA Schedule, a Credit Support Annex for collateral arrangements and trade confirmations for individual transactions. Furthermore, protocols as well as product-specific definition booklets published by ISDA can be incorporated into the documents.

For ETDs, the documents to be entered consist of the relevant exchange's standardised contracts and clearing arrangements.

1.2 Are there any particular documentary or execution requirements in your jurisdiction? For example, requirements as to notaries, number of signatories, or corporate authorisations.

In Ireland, there are no particular documentary or execution requirements for entering into derivatives transactions. Documents for derivatives transactions are typically entered into as agreements and the usual requirements for signing agreements should be complied with. There is no Irish law requirement as to notaries or the number of signatories. Typically, the agreements can be signed in counterparts and may be signed electronically. Any specific execution requirement will depend on a party's constitution and internal corporate governance rules.

The key requirement is that such agreements are signed by an authorised signatory. In determining whether a signatory has authority, it is important to check the party's constitution, a copy of its board resolutions and, if required for the particular transaction, a corporate certificate of the party certifying, among other things, a list of specimen signatures of those authorised to sign documents on its behalf.

If there is an Irish law security deed to be entered into in connection with a derivatives transaction, it will be required to be executed as a deed (i.e. by affixing the company's seal and being signed by two directors or a director and the company secretary, in accordance with the Companies Act 2014 of Ireland (the "**Companies Act**"), or under an appropriately drafted power of attorney).

1.3 Which governing law is most often specified in ISDA documentation in your jurisdiction? Will the courts in your jurisdiction give effect to any choice of foreign law in the parties' derivatives documentation? If the parties do not specify a choice of law in their derivatives contracts, what are the main principles in your jurisdiction that will determine the governing law of the contract?

ISDA Master Agreements are generally expressed to be governed by English law, French law, Irish law or New York law, or may be governed by another law, and parties submit to the jurisdiction of the chosen governing law's courts accordingly. In Ireland, English law or Irish law are most often specified as the governing law.

The incorporation of the laws of a jurisdiction other than Ireland as the governing law of an ISDA Master Agreement would, in respect of contractual obligations that are within the scope of Council Regulation (EC) No 593/2008 ("**Rome I**"), be valid in accordance with Article 3(1) of Rome I and accordingly, subject to and in accordance with Rome I, the laws of the chosen jurisdiction would, upon proof of the relevant provisions of the relevant laws, be applied by the Irish courts if any claim to enforce such contractual obligations under such ISDA Master Agreement came under their jurisdiction. The chosen law may also be disapplied if its application would be manifestly incompatible with Irish public policy.

If the parties do not specify a choice of law in their derivatives contracts, the Irish courts might, in accordance with the principles of Rome I, determine that the applicable governing law is the law of the jurisdiction with which the contract is most closely connected. For example, if some or all of the parties are domiciled in Ireland, the Irish courts may apply Irish law.

2 Credit Support

2.1 What forms of credit support are typically provided for derivatives transactions in your jurisdiction? How is this typically documented? For example, under an ISDA Credit Support Annex or Credit Support Deed.

In Ireland, credit support is typically provided in the form of margin collateral arrangements to reduce credit risk under an

ISDA Master Agreement. These arrangements can be documented using either Irish law or English law governed credit support documents published by ISDA. For parties who are not subject to mandatory regulatory margin requirements, this is usually achieved through the 1995 ISDA Credit Support Annex (Transfer – Irish Law), the 1995 ISDA Credit Support Annex (Transfer – English Law), or, less commonly, the 1994 ISDA Credit Support Annex (Security Interest – New York Law) or the 1995 ISDA Credit Support Deed (Security Interest – English Law).

Where the parties are obliged by applicable regulations (such as the European Market Infrastructure Regulation (EU) No 648/2012 ("**EMIR**")) to exchange margin, ISDA has developed supplementary credit support documents, including the ISDA 2016 Credit Support Annex for Variation Margin ("**VM**") (Transfer – Irish Law), the ISDA 2016 Credit Support Annex for Variation Margin (Transfer – English Law), and the 2018 Credit Support Deed for Initial Margin ("**IM**") (Security Interest – English Law), among others.

2.2 Where transactions are collateralised, would this typically be by way of title transfer, by way of security, or a mixture of both methods?

When entering into margin collateral arrangements, this would typically be by way of title transfer. It is less common to create a security interest over collateral as this usually gives rise to public filing requirements in Ireland.

2.3 What types of assets are acceptable in your jurisdiction as credit support for obligations under derivatives documentation?

If the parties are subject to regulatory margin arrangements, EMIR specifies that qualifying assets can be admitted as eligible collateral for use as VM or IM. In order to be eligible, collateral must be sufficiently liquid and not exposed to excessive credit, market or FX risk. Eligible collateral includes, for example, cash, allocated gold, certain debt securities, certain covered bonds, corporate bonds, certain equities, the most senior tranche of certain securitisations and, in certain circumstances, shares or units in UCITS. Additional requirements apply in respect of certain such types of assets.

Otherwise, the parties can mutually agree on the types of assets to be provided as credit support.

2.4 Are there specific margining requirements in your jurisdiction to collateralise all or certain classes of derivatives transactions? For example, are there requirements as to the posting of initial margin or variation margin between counterparties?

EMIR sets out specific margining requirements that apply in Ireland to non-cleared OTC derivatives contracts entered into by financial counterparties ("**FCs**") and non-financial counterparties above the clearing threshold ("**NFC+s**"). The requirements in relation to posting of VM and IM between counterparties is as follows:

(a) VM is required to be exchanged daily to reflect the current exposure resulting from changes in the market value of the derivative. The requirement to post VM applies broadly to all FCs and NFC+s.

(b) IM must be provided by the most systemically important FCs and NFC+s to cover the potential exposure in the collateral between the last collection of margin and the potential liquidating or hedging following a counterparty default. IM must be segregated from the collecting party's proprietary assets and held by a third-party custodian or under another legally binding arrangement to ensure that it is protected from the default or insolvency of the collecting party.

There are some limited exemptions under EMIR to these VM and IM requirements.

2.5 Does your jurisdiction recognise the role of an agent or trustee to enter into relevant agreements or appropriate collateral/enforce security (as applicable)? Does your jurisdiction recognise trusts?

Ireland recognises both the role of an agent and the role of a trustee to enter into relevant agreements and to appropriate collateral/enforce security (as applicable).

Ireland, as a common law jurisdiction, recognises the concept of a trust. In finance transactions, it is common to see a security trustee hold legal title to secured assets for and on behalf of a lending group (which may include hedge providers) and for the security trustee itself to be party to the security documents.

2.6 What are the required formalities to create and/or perfect a valid security over an asset? Are there any regulatory or similar consents required with respect to the enforcement of security?

In Ireland, the creation of certain types of charges must be registered with the Companies Registration Office in Ireland within 21 days of creation in order to be valid. Failure to register renders the charge void against a liquidator, receiver and creditors of the company creating the charge.

With respect to the enforcement of security, generally, there are no consents required to enforce such security, but this will depend on the type of asset over which security has been created. For example, it might be necessary to obtain consent in the context of enforcement of security over shares, which results in a direct or indirect change of control of a regulated business. Similarly, in the case of real property, it may be necessary to obtain a court order for possession if the security holder wishes to go into direct possession.

3 Regulatory Issues

3.1 Please provide an overview of the key derivatives regulation(s) applicable in your jurisdiction and the regulatory authorities with principal oversight.

The key derivatives regulations applicable in Ireland are EMIR and MiFID II (Directive No 2014/65/EU) ("**MiFID II**"), as implemented by the European Union (Markets in Financial Instruments) Regulations 2017.

As an EU Regulation with EEA relevance, EMIR has direct effect in Member States of the EEA. It imposes obligations on derivatives market participants operating within the EEA in three principal areas, i.e. the clearing, reporting, and employment of certain risk mitigation techniques in respect of certain derivatives contracts, with its provisions taking effect on a phased basis. EMIR imposes certain obligations on, and leaves certain discretions to, EEA Member States. The EMIR Regulations were made by the Minister for Finance to discharge those obligations and exercise those discretions; they designate the Central Bank of Ireland (the "**CBI**") as Ireland's national competent authority for EMIR purposes, afford to the CBI the supervisory and investigatory powers considered by the Minister to be necessary for the exercise by the CBI of its functions as Ireland's national competent authority, and establish Ireland's sanctions regime for infringements of obligations imposed by EMIR and the EMIR Regulations. The obligations applicable to an entity will depend on its categorisation for the purposes of EMIR, and certain exemptions apply.

MiFID II, as implemented by the European Union (Markets in Financial Instruments) Regulations 2017, regulates the provision of investment services and activities, including trading in derivatives. The CBI is the national competent authority responsible for the supervision and enforcement of derivatives regulation in Ireland.

3.2 Are there any regulatory changes anticipated, or incoming, in your jurisdiction that are likely to have an impact on entry into derivatives transactions and/or counterparties to derivatives transactions? If so, what are these key changes and their timeline for implementation?

On 24 December 2024, the package of proposals amending EMIR seeking to make derivatives clearing in the EU more attractive ("**EMIR 3.0**") entered into force.

EMIR 3.0 introduced amendments to the rules on clearing, transaction reporting and mandatory margining. These include an obligation on FCs who exceed the clearing thresholds ("**FC+s**") and NFC+s who exceed a threshold of €3 billion when all OTC interest rate derivatives denominated in euro and/or Polish złoty and short-term interest rate derivatives denominated in euro ("**SSI Derivatives**") are aggregated at group level to hold at least one active account for SSI Derivatives in an EU authorised central clearing counterparty.

In relation to the active account requirement, on 20 November 2024, the European Securities and Markets Authority ("**ESMA**") released a consultation paper on the draft Regulatory Technical Standards ("**RTS**") specifying the operational conditions and the representativeness obligations. The consultation period closed on 27 January 2025. ESMA aims to submit final draft RTS to the European Commission within six months following the entry into force of EMIR 3.0.

3.3 Are there any further practical or regulatory requirements for counterparties wishing to enter into derivatives transactions in your jurisdiction? For example, obtaining and/or maintaining certain licences, consents or authorisations (governmental, regulatory, shareholder or otherwise) or the delegating of certain regulatory responsibilities to an entity with broader regulatory permissions.

Depending on the derivatives transaction in question, the circumstances in which it is transacted and the availability of applicable exemptions, the Irish counterparty may be required to be authorised as an "investment firm" for the purpose of MiFID II. Such authorisation is granted by the CBI. The specific permissions granted to a firm, including the authority to engage in the relevant types of derivatives transactions, are detailed on the Financial Service Provider Register maintained by the CBI.

3.4 Does your jurisdiction provide any exemptions from regulatory requirements and/or for special treatment for certain types of counterparties (such as pension funds or public bodies)?

EMIR 3.0 introduced an exemption from the clearing obligation where an FC+ or NFC+ enters into a transaction with a pension scheme arrangement established in a third country and operating on a national basis, provided the scheme is authorised, supervised and recognised under national law and within the scope of a clearing exemption in its home jurisdiction.

There are also additional exemptions under EMIR, such as exemptions from the clearing obligation for certain public sector entities and distinct intra-group exemptions, provided specific conditions are satisfied. A description of such exemptions is beyond the scope of this publication.

4 Insolvency / Bankruptcy

4.1 In what circumstances of distress would a default and/or termination right (each as applicable) arise in your jurisdiction?

In the circumstances where a party or its credit support provider or specified entity, as applicable, is dissolved, becomes insolvent or unable to pay its debts, or faces a resolution or petition for its winding up or liquidation, a bankruptcy event of default will arise. For an Irish company, this could encompass scenarios where the company is placed into liquidation or examinership, is the subject of a petition to appoint a liquidator or examiner, or enters into a scheme of arrangement with its creditors.

Certain other events of default may also be relevant, such as failure to pay, if not remedied within a specified time period, if applicable.

4.2 Are there any automatic stay of creditor action or regulatory intervention regimes in your jurisdiction that may protect the insolvent/bankrupt counterparty or impact the recovery of the close-out amount from an insolvent/bankrupt counterparty? If so, what is the length of such stay of action?

Under the Companies Act, once a petition seeking the appointment of an examiner has been filed, certain enforcement actions against the company are barred unless the court grants permission. This restriction remains in effect throughout the examiner's tenure. The examiner's appointment can last for up to 100 days, during which time the examiner is required to prepare a report outlining proposals for a compromise or arrangement regarding the company's affairs. After this report is submitted to the court, the court has the discretion to extend the examiner's period of appointment for any additional time it deems necessary in order to reach a decision on whether to approve the examiner's proposed scheme. If approved by the court, the examiner's scheme becomes binding on the company and its creditors.

For small and micro companies availing of the rescue process under the Companies Act, a process adviser is appointed for up to 70 days to develop and propose a rescue plan to the company's members and creditors for approval. This period can be extended if objections to the plan arise from any affected member or creditor.

Finally, certain Irish counterparties, such as credit institutions and investment firms, may be subject to the EU Bank Recovery and Resolution Directive (as transposed into Irish law), which permits regulators in certain circumstances to impose a stay on enforcement against such counterparties.

4.3 In what circumstances (if any) could an insolvency/bankruptcy official render derivatives transactions void or voidable in your jurisdiction?

In Ireland, an insolvency or bankruptcy official may render derivatives transactions void or voidable under certain circumstances, primarily governed by the provisions of the Companies Act:

- For certain types of corporate entity, transactions that are *ultra vires* (i.e. outside the corporate capacity of the entity) may not be enforceable.
- Transactions that unfairly prefer one creditor over others can be challenged and potentially voided.
- Transactions entered into with the intent to defraud creditors or for any fraudulent purpose can be declared void. This includes derivatives transactions that were executed with the knowledge that the company was insolvent and intended to deceive creditors.
- If the transaction involved a breach of fiduciary duty by the directors, it may be voidable. This includes situations where directors acted in their own interest rather than the interest of the company and its creditors.

4.4 Are there clawback provisions specified in the legislation of your jurisdiction that could apply to derivatives transactions? If so, in what circumstances could such clawback provisions apply?

In Ireland, clawback provisions are primarily found within insolvency and bankruptcy legislation. These provisions are designed to allow an insolvency or bankruptcy official to recover certain transactions made by a company or individual prior to insolvency with the aim of protecting creditors from unfair or preferential treatment. While there are no clawback provisions that specifically target derivatives transactions, such transactions can nonetheless be subject to clawback under the general insolvency framework.

4.5 In your jurisdiction, could an insolvency/bankruptcy-related close-out of derivatives transactions be deemed to take effect prior to an insolvency/bankruptcy taking effect?

At present, there are no rulings from the Irish courts specifically addressing whether clauses that seek to automatically terminate or close out derivatives transactions before the commencement of insolvency or bankruptcy proceedings are effective. However, the general view is that the Irish courts would likely recognise and enforce such clauses.

4.6 Would a court in your jurisdiction give effect to contractual provisions in a contract (even if such contract is governed by the laws of another country) that have the effect of distributing payments to parties in the order specified in the contract?

On the basis that such provisions are not contrary to Irish insolvency law, the Irish courts would typically be expected to enforce such contractual provisions. The Companies Act sets out the procedure for distributing a company's assets upon winding up, with unsecured creditors generally sharing equally among themselves. Secured creditors may agree between themselves on the order in which the proceeds from the enforcement of their security are to be applied in respect of their secured claims. It should also be highlighted that certain company liabilities, such as costs associated with examinership or liquidation, as well as certain taxes, rates, and employee claims, take precedence over both unsecured liabilities and those secured by a floating charge.

5 Close-out Netting

5.1 Has an industry-standard legal opinion been produced in your jurisdiction in respect of the enforceability of close-out netting and/or set-off provisions in derivatives documentation? What are the key legal considerations for parties wishing to net their exposures when closing out derivatives transactions in your jurisdiction?

Yes, an industry-standard legal opinion has been prepared on the enforceability of close-out netting in the ISDA Master Agreement.

The close-out netting and set-off provisions contained in the ISDA Master Agreement should be enforceable where both parties are solvent. In the event that an Irish counterparty becomes insolvent, the enforceability of the close-out netting and/or set-off provisions will depend on whether such derivatives contract is a "financial collateral arrangement" for the purposes of the European Communities (Financial Collateral Arrangements) Regulations 2010 or a "netting agreement" for the purposes of the Netting of Financial Contracts Act 1995.

5.2 Are there any restrictions in your jurisdiction on close-out netting in respect of all derivatives transactions under a single master agreement, including in the event of an early termination of transactions?

Generally, there are no restrictions in Ireland on close-out netting.

5.3 Is Automatic Early Termination ("AET") typically applied/disapplied in your jurisdiction and/or in respect of entities established in your jurisdiction?

Typically, AET is disapplied in Ireland.

5.4 Is it possible for the termination currency to be denominated in a currency other than your domestic currency? Can judgment debts be applied in a currency other than your domestic currency?

Yes, it is possible for the termination currency to be denominated in a currency other than euro. Similarly, a judgment or order granted by the Irish courts can be stated in a currency other than euro, although it is possible that such a judgment or order will be issued in euro, calculated according to the official exchange rate in effect on the date the judgment or order is issued.

6 Taxation

6.1 Are derivatives transactions taxed as income or capital in your jurisdiction? Does your answer depend on the asset class?

In Ireland, derivatives are taxed according to standard taxation principles and may be taxed as both income or capital depending on the purpose of the transaction and the asset that is the subject of the transaction.

Typically, if derivatives transactions are entered into solely for the purpose of trading, any gains or losses from such derivatives may be considered as trading income or losses. Whereas, if derivatives transactions are entered into for investment purposes or in respect of a capital asset, the gains or losses are more likely to be subject to capital gains taxation.

6.2 Would part of any payment in respect of derivatives transactions be subject to withholding taxes in your jurisdiction? Does your answer depend on the asset class? If so, what are the typical methods for reducing or limiting exposure to withholding taxes?

Typically, derivatives payments are exempt from Irish withholding tax. This exemption is supported by a well-established practice published by the Irish Revenue Commissioners. However, Irish withholding tax may be applicable to other types of payments, such as interest payments, dividend payments, and what are referred to as "annual payments".

6.3 Are there any relevant taxation exclusions or exceptions for certain classes of derivatives?

There are no specific tax regulations addressing the taxation of gains, losses, income, or expenses stemming from derivatives transactions in Ireland. Instead, such transactions are governed by fundamental taxation principles in Ireland, with no particular exclusions or exemptions from direct taxation for any category of derivatives.

7 Bespoke Jurisdictional Matters

7.1 Are there any material considerations that should be considered by market participants wishing to enter into derivatives transactions in your jurisdiction? Please include any cross-border issues that apply when posting or receiving collateral with foreign counterparties (e.g. restrictions on foreign currencies) or restrictions on transferability (e.g. assignment and novation, including notice mechanics, timings, etc.).

Any material consideration will depend on the particular derivatives transactions in question. In terms of posting or receiving collateral, there are no cross-border restrictions generally. However, it is important to assess on a case-by-case basis whether specific restrictions, such as sanctions, may be relevant in relation to either party.

In terms of restrictions on transferability, so long as the parties are acting in accordance with the terms of the agreement, such as the notice or consent provisions, no restrictions should apply. Under Irish law, a contract can be assigned (i.e. the rights under the contract can be transferred) or, alternatively, a contract can be novated, which involves the transfer of rights and obligations through the creation of a new contract between the transferee and the remaining party.

8 Market Trends

8.1 What has been the most significant change(s), if any, to the way in which derivatives are transacted and/or documented in recent years?

In recent years, regulation of derivatives markets has intensified, leading to more intricate documentation requirements and necessitating the adoption of more comprehensive policies and operational procedures to ensure compliance.

8.2 What, if any, ongoing or upcoming legal, commercial or technological developments do you see as having the greatest impact on the market for derivatives transactions in your jurisdiction? For example, developments that might have an impact on commercial terms, the volume of trades and/or the main types of products traded, smart contracts or other technological solutions.

The market will need to adapt to changes resulting from the amendments to EMIR, specifically EMIR 3.0.

Regulatory divergence between the EU and the UK is becoming more pronounced. Irish counterparties with operations spanning both jurisdictions are encountering increasingly complex operational challenges, as they must comply with multiple regulatory frameworks and navigate differing obligations depending on whether their counterparties are based within or outside the EU.

There is also a heightened emphasis on the use of AI tools, smart contracts, and distributed ledger technology. ISDA has formed several working groups to explore potential advancements in these areas. In particular, ISDA has issued guidelines on the application of smart contracts and has proposed changes to collateral documentation to facilitate the use of digital assets as collateral.

Lastly, the ISDA Notices Hub, a new online platform, will significantly improve the ability of market participants to manage termination-related processes under the ISDA Master Agreement as it will facilitate instantaneous delivery and receipt of termination-related notices. The ISDA Notices Hub will be available through S&P Global Market Intelligence's Counterparty Manager platform.

Fergus Gillen focuses on a wide range of debt finance work, with an emphasis on debt capital markets (public and private), derivatives, securitisation, structured finance and asset-backed lending transactions, as well as banking transactions and regulation. He advises many Irish and international financial institutions, as well as non-financial corporates and state-owned entities. Fergus advises clients on the buy-side and sell-side of the market.

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Éamon also advises clients on a broad range of matters relevant to sustainability and the transition to net-zero, both at a corporate advisory level on matters such as corporate sustainability reporting and due diligence obligations, and at a project level advising clients on corporate power purchase agreements and other energy project documents, carbon projects and other initiatives aimed at achieving sustainability objectives.

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- Close-out Netting
- Taxation
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