COUNTRY COMPARATIVE GUIDES 2022

The Legal 500 Country Comparative Guides

Ireland

BANKING & FINANCE

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This country-specific Q&A provides an overview of banking & finance laws and regulations applicable in Ireland.

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IRELAND
BANKING & FINANCE

1. What are the national authorities for banking regulation, supervision and resolution in your jurisdiction?

The European Central Bank (ECB) is now the competent authority in Ireland for granting banking licenses. All applications for authorisation are submitted through the Central Bank of Ireland (Central Bank), which acts as national "gatekeeper" for the licensing process. The licensing process involves intensive review by both the Central Bank and ECB to ensure that the application is in accordance with both EU and national law.

Since the European Single Supervisory Mechanism (SSM) was introduced in November 2014, the Central Bank has been the home state prudential regulator for "less significant" institutions headquartered in Ireland (LSIs), as defined in accordance with Council Regulation (EU) No 1024/2013 (the SSMR). The ECB is the primary prudential regulator for "significant institutions" (SIs) and works alongside the Central Bank through the Joint Supervisory Teams (JSTs) in their supervision. The Central Bank remains exclusively responsible for conduct of business supervision of credit institutions that operate in the Irish market.

Responsibility for resolving banks is shared between the Central Bank, as national resolution authority (NRA), and the Single Resolution Board (SRB), an EU agency based in Brussels. The SRB works in close cooperation with NRAs, including via institution-specific 'internal resolution teams' (IRTs) comprising SRB and NRA staff. The SRB leads the resolution of banks that are considered SIs, while the Central Bank leads the resolution of LSIs.

2. Which type of activities trigger the requirement of a banking licence?

A person is prohibited from doing any of the following, unless that person is a holder of a licence (*section 7(1), Central Bank Act 1971 (as amended)*):

- Carrying on banking business;
- Holding themselves out or representing themselves as a banker or as carrying on banking business (including if the word 'bank' is used in the name of the entity); and
- Accepting deposits or other repayable funds from the public.

Banking business is defined as any business that consists of or includes:

- Receiving money on the person's own account from members of the public, either on deposit or as repayable funds; and
- The granting of credit on own account.

The definition goes on to list a number of activities specifically excluded from the definition of banking business. The main concept in the definition is deposit-taking, that is, receiving money from members of the public, either on deposit or as repayable funds.

3. Does your regulatory regime know different licenses for different banking services?

Short of a full banking license, Irish law also permits entities formed and licensed as credit unions under the Credit Unions Act 1997 to act as deposit-takers. The Building Societies Act 1989, which allows entities to be formed to raise funds for the making of housing loans, remains on the statute book although there are no surviving Irish authorized building societies. Under the Central Bank Act 1971, Irish branches of third-country banks can be licensed to carry on banking activities in Ireland, although this license cannot be passported into other EU / EEA countries on a cross-border basis. Finally, under the Asset Covered Securities Act 2001, entities licensed as banks under the Central Bank Act 1971 can be registered to issue asset covered securities (covered bonds) and are referred to as "designated credit institutions" for that purpose.

Non-deposit taking activities typically carried on by

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banks, such as payment services and the issuance of electronic money, can be carried on by non-banks that hold other categories of license, such as payments or e-money licenses issued under Directive 2015/2366 (EU) (PSD 2) and Directive 2009/110/EC (EMD).

4. Does a banking license automatically permit certain other activities, e.g., broker dealer activities, payment services, issuance of e-money?

In addition to deposit-taking and the granting of credits on own account, as referred to in the Central Bank Act 1971, an Irish banking license permits an Irish headquartered bank to provide the full range of services listed in Annex I to Directive 2013/36/EU (CRD IV) on a cross-border basis throughout the EU and EEA. Irish headquartered banks can also provide the investment services and activities listed in Annex I to Directive 2014/65/EU (MiFID II) that are subject to mutual recognition under CRD IV. These investment services and activities can also be carried on by non-banks that are appropriately licensed under MiFID II as implemented in Ireland.

5. Is there a "sandbox" or "license light" for specific activities?

No. The Central Bank has not introduced a form of "sandbox" although it has an "innovation zone" for FinTech which encourages industry operators to engage in dialogue with the regulator regarding digital innovation.

6. Are there specific restrictions with respect to the issuance or custody of crypto currencies, such as a regulatory or voluntary moratorium?

Currently, under Irish law, there is no bespoke regulatory framework for crypto-assets or crypto-currencies. The operation of crypto-assets and crypto-currencies may fall to be regulated under existing legislation. For crypto-assets and crypto-currencies, MiFID II, PSD2, EMD, Regulation (EU) 2017/1129 (the Prospectus Regulation) and Directive 2011/61/EU (AIFMD) and the related Irish regulations could all potentially be relevant, depending on the characteristics of the crypto-assets themselves and the particulars of each chosen business model.

The fifth Money Laundering Directive (Directive (EU) 2018/843) (AMLD 5) has, for the first time, brought crypto-currency exchanges and wallet providers within the scope of EU anti-money laundering/counter-terrorist financing legislation. AMLD 5 requires Ireland to ensure that providers of exchange services between virtual currencies and fiat currencies and custodian wallet providers are "designated persons" and implement AML/CFT policies and procedures normally expected of other regulated financial service providers. The EU (Anti-Money Laundering: Beneficial Ownership of Trusts) Regulations 2021 implemented AMLD 5 in Ireland and came into effect on 24 April 2021.

7. Do crypto assets qualify as deposits and, if so, are they covered by deposit insurance and/or segregation of funds?

The appropriate classification of crypto assets is based on the economic function of the asset and arrangement rather than the technology used. A key aspect of crypto-assets, from a regulatory perspective, is that they do not represent a financial claim on any identifiable entity and do not constitute a proprietary right against an entity. Such crypto assets are not considered as 'deposit' within the meaning of the Deposit Guarantee Scheme Directive ("**DGSD**").

On the other hand, stablecoins are units of monetary value that are stored electronically to represent a claim on the issuer or on the underlying funds (and hence are not crypto-assets). Such stablecoins could qualify as electronic money and consequently may fall within the definition of a deposit under the DGSD and be subject to rules regarding segregation.

8. What is the general application process for bank licenses and what is the average timing?

As previously mentioned in practice bank license applications are initially submitted to the Central Bank as national "gatekeeper". The application process for a banking licence is very detailed. It consists of three principal stages: preliminary meeting, submission of the application, and a decision by the ECB on whether to grant the licence:

- A preliminary meeting takes place with the Central Bank to determine the scope of the application.
- Applications are initially framed as a proposal. Having reviewed the proposal, the Central Bank provides a preliminary view on whether the application should be submitted.
- The application incorporates the Central Bank's checklist for completing and

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submitting bank licence application forms and includes a detailed business plan and programme of operations.
- The application process is iterative, and involves comments from, and responses to, the Central Bank after submission of a draft application.

It can take several months for an application to be considered complete by the Central Bank. This will depend on the complexity and quality of the application. A decision must be taken within 12 months of submission of the complete application, though in practice the Central Bank does not permit a license application to be formally "submitted" until it has engaged in a thorough review of the draft license application and provided detailed comments thereon. Once the Central Bank review process is completed and the license application is formally submitted, the Central Bank will make a recommendation to the ECB, which must then decide whether to approve the license. An applicant seeking a full banking license would be well advised to allow 18 months from start to finish of the entire process.

9. Is mere cross-border activity permissible? If yes, what are the requirements?

A bank authorised in another EEA member state (the home state) can, by making the necessary notifications, passport its services through establishing a branch (freedom of establishment) in Ireland, or by providing services in Ireland on a freedom of services basis. The home state EEA regulator retains responsibility for the prudential supervision of the bank, while the Central Bank will supervise the bank's conduct of business in Ireland.

In contrast, a non-EEA bank seeking to operate in Ireland would need to establish an Irish subsidiary or branch which would then have to apply to the Central Bank to obtain either a banking license or a third country branch bank licence under the Central Bank Act 1971. There is no legal regime for third country banks to operate on a cross-border services basis into Ireland and careful advice must therefore be taken regarding the applicable regulatory "perimeter" for any particular service that a third country bank may wish to offer.

10. What legal entities can operate as banks? What legal forms are generally used to operate as banks?

Irish law recognizes three main forms of limited liability companies. Of these, Designated Activity Companies (DACs) and Public Limited Companies (PLCs) can operate as banks. Private companies limited by shares (LTDs) are prohibited from carrying on the activity of a credit institution.

11. What are the organizational requirements for banks, including with respect to corporate governance?

The Corporate Governance Requirements for Credit Institutions 2015 (Corporate Governance Requirements) impose minimum core standards on all credit institutions licensed or authorised by the Central Bank, and additional requirements on credit institutions designated as "High Impact" by the Central Bank.

Compliance with the Corporate Governance Requirements is mandatory and there is no scope for departures from it. Boards must have at least five directors, and credit institutions designated as High Impact by the Central Bank must have at least seven.

In addition to the Central Bank's Corporate Governance Requirements, banks are required to follow CRD IV principles on internal governance and all applicable EBA and ECB guidance in relation thereto.

12. Do any restrictions on remuneration policies apply?

The Central Bank applies the remuneration principles at EU level under CRD IV and CRR, and adheres to the EBA Guidelines on Sound Remuneration Policies (EBA/GL/2015/22). In general terms, the transposing Irish regulations adhere closely to the text of CRD IV, and the regulations provide for flexibility for the 100% cap on variable remuneration under Article 94 of CRD IV to be increased, with Central Bank approval, to 200%.

In Irish banks that are under state ownership or that have benefited from state support that has not yet been fully repaid, there are strict limits on executive pay which is capped at Euro 500,000 per annum, not including pension contributions, and there is also a so-called "super tax" on any annual bonus payments exceeding Euro 20,000 per annum. These pay caps have been heavily criticised as inhibiting the potential for Irish state-owned banks to move back into private ownership but the Irish Government has to date shown no enthusiasm for relaxing the rules.

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13. Has your jurisdiction implemented the Basel III framework with respect to regulatory capital? Are there any major deviations, e.g., with respect to certain categories of banks?

As Ireland is a member of the EU and the Eurozone, the degree to which elements of the Basel III framework have been implemented mirrors that in the EU / Eurozone as a whole. The EU Commission is reported to be preparing the third banking "package" (CRD 6 / CRR 3) which would, once adopted, implement the final elements of Basel III as approved by the BCBS in December 2017.

In January 2021, the Irish government enacted the European Union (Capital Requirements) (Amendment) Regulations 2020 and the European Union (Capital Requirements) (No. 2) (Amendment) Regulations 2020. This legislation implements Directive 2019/878 ("**CRD V**"), which deals, among other matters, with the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements.

14. Are there any requirements with respect to the leverage ratio?

The leverage ratio was introduced in Ireland under CRR and CRR leverage ratio requirements apply to all banks on a solo and consolidated basis. Banks must comply with certain generally applicable principles in disclosing their leverage ratio, including that disclosure must be public. Such disclosure is required annually. Binding requirements in respect of the leverage ratio (i.e. going beyond requiring disclosure and requiring maintenance of a specified ratio) will be introduced under the EU's amended CRR2 package with effect from 31 March 2022.

15. What liquidity requirements apply? Has your jurisdiction implemented the Basel III liquidity requirements, including regarding LCR and NSFR?

CRR introduced the Liquidity Coverage Ratio (LCR) and the Net Stable Funding Ratio (NSFR) in the EU (including Ireland).

The LCR measures whether a firm holds an adequate level of unencumbered, high-quality liquid assets to meet net cash outflows under a stress scenario lasting for 30 days. COVID related LCR relief expired on 31 December 2021.

The NSFR became a binding measure under the CRR2 package on 28 June 2021. The NSFR is the amount of stable funding available to a bank as a percentage of the required amount of stable funding. The minimum NSFR is 100% which means that the amount of stable funding available has to be greater than the required amount of stable funding.

16. Do banks have to publish their financial statements? Is there interim reporting and, if so, in which intervals?

Credit institutions incorporated in Ireland are required to prepare and publish annual accounts in line with the requirements set out in the European Union (Credit Institutions: Financial Statements) Regulations 2015. Similar requirements apply to overseas credit institutions with an establishment in Ireland. Credit institutions with listed equity or debt instruments may be required to publish interim reports under the Transparency (Directive 2004/109/EC) Regulations 2007.

17. Does consolidated supervision of a bank exist in your jurisdiction? If so, what are the consequences?

Irish banks are subject to consolidated supervision in line with pan-EU approaches set out under CRD IV / CRR. The Central Bank is responsible for consolidated supervision where it has authorised an institution as a LSI which is a parent institution in Ireland or an EU parent institution. It is also, subject to exceptions, responsible for an authorised institution whose parent is a financial or mixed-financial holding company in a member state. The principal consequence of regulatory consolidation is that the requirements of CRR, Title II, Chapter 2 will apply, such that many prudential rules will then need to be complied with by the Irish bank on a consolidated basis. Where the Irish bank is designated as a SI and is therefore subject to direct ECB supervision, consolidated supervision will be the responsibility of the ECB.

18. What reporting and/or approval requirements apply to the acquisition of shareholdings in, or control of, banks?

Acquisition of a qualifying holding (i.e. a direct or indirect holding in excess of 10%) in an Irish credit institution requires regulatory pre-approval by the ECB SSM. However, the notification process is conducted through the Central Bank as "gatekeeper", whether the target

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institution is a LSI or a SI.

Note also that where merger control requirements apply it may be necessary to seek the approval of the Irish Competition and Consumer Protection Commission or of the EU Commission as applicable.

19. Does your regulatory regime impose conditions for eligible owners of banks (e.g., with respect to major participations)?

The requirements in relation to the acquisition and disposal of qualifying holdings in credit institutions are set out in the European Union (Capital Requirements) Regulations 2014. The 2016 Joint Guidelines on the prudential assessment of acquisitions and increases in holdings in the financial sector, published jointly by the European Securities and Markets Authority (ESMA), the EBA, and the European Insurance and Occupational Pensions Authority (EIOPA), have been adopted by the Central Bank and will be applied to all such approval processes.

20. Are there specific restrictions on foreign shareholdings in banks?

There is currently no distinction between domestic and foreign investment in banks under Irish law and there is no Irish law prohibition on banks being foreign-owned. In considering proposed foreign acquisitions in future, the EU Regulation on Foreign Direct Investment (Regulation 2019/452/EU) will need to be considered although no Irish domestic implementing legislation has yet been proposed.

21. Is there a special regime for domestic and/or globally systemically important banks?

There are no “Global Systemically Important Institutions” (G-SIIs) headquartered in Ireland but the Central Bank has determined that six Irish authorised banks are considered to be “Other Systemically Important Institutions” (O-SIIs). These six banks are also “significant” banks (SIs) for the purposes of the ECB SSM. “Significant” banks are automatically subject to a different supervision model and slightly different corporate governance requirements under the SSM.

O-SIIs are subject to additional regulatory capital requirements by virtue of that status. CRD IV allows the Central Bank to require O-SIIs to maintain a buffer requirement of up to 2% of risk-weighted assets. So far, O-SII buffers ranging from 0.5 to 1.5% are being applied to the six identified O-SIIs but these buffers are kept under yearly review by the Central Bank.

22. What are the sanctions the regulator(s) can order in the case of a violation of banking regulations?

The main tool of enforcement used by the Central Bank is the power to impose significant monetary penalties on regulated firms and also persons concerned in the management of such firms through the administrative sanction procedure. The maximum fine for a firm is EUR10 million or 10% of turnover, while the maximum fine for persons concerned in the management of the firm is EUR1 million. The Department of Finance approved drafting of the Central Bank (Individual Accountability Framework) Bill in July 2021. This will introduce a senior managers’ regime that would provide it with enhanced powers to take direct enforcement action against individuals.

23. What is the resolution regime for banks?

The legislation governing resolution of credit institutions in Ireland is set out in the European Union (Bank Recovery and Resolution) Regulations 2015 (BRRD Regulations) which transposed Directive 2014/59/EU on Bank Recovery and Resolution (BRRD) into Irish law. The BRRD Regulations were amended in December 2020 to implement Directive 2014/59/EU (BRRD II). The BRRD Regulations provide a framework for resolving failing banks and large investment firms and enable authorities to intervene early to prevent the failure of an institution.

The Central Bank is the national resolution authority for Ireland. The Central Bank manages the national resolution funds and prepares resolution plans for credit institutions that are LSIs. Resolution planning for SIs is the responsibility of the SRB.

24. How are client’s assets and cash deposits protected?

For credit institutions conducting MiFID business, the client asset requirements under MiFID II, as implemented by the European Union (Markets in Financial Instruments) Regulations 2017, will apply.

A Deposit Guarantee Scheme is established by the *Financial Services (Deposit Guarantee Scheme) Act 2009* and the *European Union (Deposit Guarantee Schemes) Regulations 2015*. The scheme protects deposits up to

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€100,000 per person per institution and covers current accounts, deposit accounts, and share accounts in banks, building societies and credit unions.

25. Does your jurisdiction know a bail-in tool in bank resolution and which liabilities are covered?

Yes, there is a bail-in tool that enables the writing-down of creditor claims in order to absorb losses and to convert the claims of unsecured creditors into shares in order to recapitalise an institution. Under the bail-in tool, creditors of the same class must be treated equitably and no creditor should incur more losses than they would have incurred if the institution had hypothetically been liquidated. The liabilities covered by the bail-in tool are those that are not excluded from the scope of the tool, as set out under Article 44(2) of the BRRD.

26. Is there a requirement for banks to hold gone concern capital ("TLAC")?

Credit institutions to which the BRRD applies must meet a minimum requirement for own funds and eligible liabilities (MREL). MREL is set on a case by case basis in consultation with the competent resolution authority and will depend on a number of relevant factors such as size, systemic risk and the identified resolution strategy for that institution. There are no G-SIIs headquartered in Ireland and thus TLAC requirements would only apply to the extent that an Irish headquartered institution is considered to be a resolution entity or material subsidiary of a G-SII.

27. In your view, what are the recent trends in bank regulation in your jurisdiction?

The Central Bank has recently been reinforcing its approach to conduct risk regulation. It has a strong focus on the culture of firms and greater individual accountability of people who run them. There have been moves towards implementing a Senior Executive Accountability Regime similar to the Senior Managers and Certification Regime in the UK.

The Central Bank has stated its goal of enhancing confidence and trust in the financial system through high quality regulation, purposeful engagement, effective gatekeeping, assertive supervision and robust enforcement. There has been a notable increase in enforcement action by the Central Bank with high profile investigations such as the tracker mortgage investigation.

28. What do you believe to be the biggest threat to the success of the financial sector in your jurisdiction?

Ireland is a small open economy, with a significant reliance on investment by foreign multinational enterprises. As such, Ireland is particularly exposed to the impact of global economic shocks. Currently, these global risks stem from stretched valuations in global financial markets, higher levels of global indebtedness and structural shifts in the international trading environment. The domestic economy is particularly exposed to the potential adverse effects of shifts in international trading and tax arrangements.

In Ireland, more than 40% of commercial real estate is owned by property funds. Irish property funds are more leveraged than their European peers which adds to the risk of price falls and increased selling pressures in the market. The Central Bank is considering measures to mitigate this risk.

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