CHAPTER 7

Islamic Finance Under Irish Law

Edana Richardson

7.1 Introduction

Over the last decade, Irish authorities have taken certain accommodative measures to clarify and legislate for Islamic finance activity under Irish law. When discussing the introduction of guidance and legislative amendments aimed at accommodating Islamic finance in Ireland, the Irish Department of Finance (the **Department of Finance**) outlined certain "opportunities" for Ireland that could arise from this accommodation: (a) encouraging investment into Ireland in the form of wholesale Islamic finance activity and the establishment of Islamic financial institutions; (b) the provision of ethical investment opportunities for Irish investors; and (c) the opportunity for Muslims to participate in the financial sector in a manner that is consistent with their religious beliefs.[1] Such statements suggest that the Irish government's focus of accommodation is on both retail and

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[1] Department of Finance, *Islamic Finance in Ireland: An Information Note*, (Dublin: Department of Finance, 2010), 4.

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wholesale Islamic finance activity. In line with this, the legislative amendments and guidance introduced in Ireland cover financing structures that could be used in retail and in wholesale Islamic finance transactions.

Notwithstanding the Irish government's generally favourable approach to Islamic finance, there remain gaps in the legislative regime applicable to Islamic finance activity in Ireland, particularly at a retail level. As a result, issues surrounding the regulation of Islamic finance activity and institutions, as well as questions of consumer protection, remain unaddressed. At the same time, while the Republic of Ireland's Muslim population of just over 63,000 people increased by 28.9 per cent between 2011 and 2016,[2] it nevertheless remains small, potentially impacting on short-term demand for domestic retail Islamic finance products and services.

Nevertheless, steps taken to date by the Irish government to accommodate Islamic finance activity are to be welcomed and they go some way towards positioning Ireland as an economy in which Islamic finance activity is encouraged. This chapter will consider some of the specifics of Irish law that are relevant to Islamic finance. It will outline the approach to accommodating Islamic finance taken by the Irish government and the applicable legislative and regulatory framework. It will then discuss the current position under Irish law of three Islamic finance products: *ṣukūk*; Islamic investment funds; and Islamic mortgage alternatives.

7.2 Legislative and Regulatory Framework

Islamic finance transactions offered in global financial markets are often structured to comply with the financial principles of Islamic Law, while at the same time replicating the economic substance of conventional interest-based finance products. The economic result of these Islamic finance transactions is, therefore, similar to conventional finance products; the methodology and legal structure used to achieve this result are distinct.[3] In countries that have not introduced legislative frameworks dealing specifically with Islamic finance transactions, these transactions may be subject to regulatory and tax laws based on their legal structure, rather than

[2] Central Statistics Office, *Religion*, Central Statistics Office, Dublin, 2017, 72, available at: http://www.cso.ie/en/media/csoie/releasespublications/documents/population/2017/Chapter_8_Religion.pdf (last accessed: February 22, 2019).

[3] Jonathan Ercanbrack, "The Regulation of Islamic Finance in the United Kingdom", *Ecclesiastical Law Journal*, 13 (2011), 69, 70.

their economic substance. Islamic finance participants could, therefore, be taxed and regulated differently to participants in conventional finance transactions. Where the purpose of an Islamic finance product is to replicate the economic substance of conventional finance products in a *sharī'ah*[4]-compliant manner,[5] differing (and often less favourable) regulatory and tax treatment may make these products less attractive or potentially unviable. In light of this, some jurisdictions have introduced legislative and institutional reforms to establish a more level playing field in the regulation and taxation of certain Islamic finance products and their conventional alternatives.[6]

In October 2009, the Irish Revenue Commissioners (the **Revenue**) published a Tax Briefing focused on Islamic finance (the **2009 Tax Briefing**).[7] The 2009 Tax Briefing did not introduce any legislative amendments into Ireland's tax laws, but rather confirmed that three Islamic finance products—*Takāful* (Islamic insurance), *ijārah* (Islamic leasing), and Islamic investment funds—would be subject to the same tax regimes as conventional insurance, leasing, and investment funds, respectively.[8] Shortly after the publication of the 2009 Tax Briefing, the Finance Act 2010 was enacted introducing amendments to Ireland's existing tax laws (that is, the Taxes Consolidation Act 1997 (the **TCA 1997**)[9] and the Stamp Duties Consolidation Act 1999 (the **SDCA 1999**)[10]). These amendments were designed to facilitate greater equality of tax treatment between certain Islamic and conventional finance products in Ireland.[11]

[4] There is no single correct means of expressing Arabic terms and sounds in the Latin alphabet. Throughout this chapter, quotations and the official names of products and organisations, which contain a transliteration of Arabic terms and use of italicisation which are different from that used in this chapter, will be reproduced without adjustment.

[5] Yusuf Talal DeLorenzo, "Introduction to Understanding Riba", in *Interest in Islamic Economics: Understanding riba*, Abdulkader S. Thomas (ed.), (Oxford: Routledge, 2006), 1, 6.

[6] Over the last 15 years, for example, the UK has introduced comprehensive reforms in this area. See generally, HM Treasury, *The Development of Islamic Finance in the UK: The Government's Perspective*, (London: HM Treasury, 2008).

[7] Irish Revenue Commissioners, *Islamic Finance, Tax Briefing Issue 78*, Revenue Commissioners, Dublin, October 2009, available at http://www.revenue.ie/en/tax-professionals/historic-material/tax-briefing/2009/tax-briefing-78-2009.pdf (last accessed: February 22, 2019).

[8] Ibid.

[9] Taxes Consolidation Act 1997 (No. 39 of 1997) (Irl.).

[10] Stamp Duties Consolidation Act 1999 (No. 31 of 1999) (Irl.).

[11] For more recent Irish government discussions on Islamic finance in Ireland, see Department of Finance, *IFS2020: A Strategy for Ireland's International Financial Services sector 2015–2020*

S39 and s137 of the Finance Act 2010 deal with "specified financial transactions"[12] and insert Part 8A[13] into the TCA 1997 and s85A[14] into the SDCA 1999, respectively. While Part 8A TCA 1997 and s85A SDCA 1999 do not refer to Islamic finance explicitly, the stated aim of these sections is to "extend tax treatment applicable to conventional finance transactions to Shari'a compliant or Islamic financial products which achieve the same economic result in substance as comparable conventional products".[15] This absence of reference to religious compliance in the legislation means that any finance transaction that fulfils the relevant criteria could technically fall within Part 8A TCA 1997 and s85A SDCA 1999. However, in order to benefit from the tax treatment in Part 8A TCA 1997, market participants must positively elect for their transaction to be treated as a specified financial transaction.[16]

As a result of amendments to Ireland's existing tax laws, three Islamic finance structures are now addressed in the TCA 1997: "deposit transactions" (Islamic deposits); "credit transactions" (Islamic financing transactions—covering *murābaha* and diminishing *mushāraka*); and "investment transactions" (*ṣukūk*).[17] Subsequent Finance Acts have introduced clarifications to Part 8A TCA 1997;[18] however, the scope of the accommodations has remained unchanged since they were introduced by the Finance Act 2010.

Unlike the UK government's accommodation of Islamic finance, where both the tax *and* regulatory aspects of Islamic finance transactions have

(Dublin: The Stationery Office, 2015), in which it was noted that "Islamic Finance will continue to feature in the sectoral and regional strategies outlined in IFS2020", 20.

[12] Defined in Part 8A TCA 1997 (Irl.) as meaning a "credit transaction", a "deposit transaction" or an "investment transaction".

[13] Inserted by s39 Finance Act 2010 (No. 5 of 2010) (Irl.). See also, Oireachtas, *Finance Bill 2010, Explanatory Memorandum*, 10, available at: https://data.oireachtas.ie/ie/oireachtas/bill/2010/9/eng/memo/b0910d-memo.pdf (last accessed: February 22, 2019).

[14] Inserted by s137 Finance Act 2010 (Irl.).

[15] Department of Finance, *Islamic Finance in Ireland; An Information Note*, *op. cit.*, 5.

[16] See, s267U TCA 1997 (Irl.).

[17] Department of Finance "Publication of Finance Act", *Press Release* (Dublin: Department of Finance, 2010) noting that the aim of the provisions was to increase the "attraction of Ireland for the development of Islamic finance".

[18] See s37 Finance Act 2012 (No. 9 of 2012) (Irl.) and s24 and s75 Finance Act 2013 (No. 8 of 2013) (Irl.).

been addressed under English law, in Ireland the focus of accommodation has been on the taxation of these transactions. The regulation of Islamic finance transactions and the institutions that engage in Islamic finance activity has not been the subject of tailored accommodation under Irish law.[19] As a result, the Central Bank of Ireland (the **Central Bank**), as Ireland's financial conduct and prudential regulator, must continue to apply existing regulatory rules to Islamic finance activity and institutions in Ireland. Reflecting this, there has been limited provision of Islamic finance products by Irish-registered entities and no Islamic banks have been established in Ireland.

Particularly in the years following the Finance Act 2010, a small body of academic and industry commentary centred on Islamic finance in Ireland has developed with a number of academic[20] and industry[21] articles and theses[22] written on aspects of Islamic finance in Ireland. The focus of this commentary has rested largely on issues of law, regulation, and tax and, reflecting the trend in Islamic finance in Ireland, has focused principally on wholesale finance transactions and products.

[19] s73 Central Bank (Supervision and Enforcement) Act 2013 (No. 26 of 2013) (Irl.) introduced an amendment to the Central Bank Act 1971 (No.24 of 1971) (Irl.) to allow banks established in non-EEA countries to open branches in Ireland. This could potentially assist with the opening of an Islamic bank in Ireland.

[20] See, for example, Edana Richardson, "Islamic Finance Disputes in Ireland: A comparative study of dispute resolution in Islamic finance contracts" *Irish Jurist* 57 (2017), 35, Edana Richardson, *The Integration of Islamic Finance into the Irish Legal System: Current Issues and Future Challenges*, PhD Thesis, Trinity College Dublin, 2012. Edana Richardson, "The Accommodation of Islamic Finance in Ireland's financial legislation: A Comparative Study of Wholesale Islamic Financial Products" *Dublin University Law Journal*, 34 (2011), 127, Edana Richardson, "Islamic Finance for Consumers in Ireland: A Comparative Study of the Position of Retail-level Islamic Finance in Ireland" *Journal of Muslim Minority Affairs*, 31(4) (2011), 534, Faiza Ismail, "Islamic financing in Europe: recent developments in Ireland", *The Company Lawyer* 38(2) (2017), 48.

[21] Simon O'Neill, "The Islamic finance industry in Ireland", *Islamic Finance News* (December 2015), 84.

[22] Tarek Elbay, *How successful has the Irish government been in promoting Islamic finance in Ireland? An exploratory analysis of the level of awareness of Islamic finance among employees in financial services in Ireland*, Master's Thesis, National College of Ireland, 2014, Faiza Ismail, *Legal uncertainties in the global IF industry as explored in the Irish context*, PhD Thesis, University College Dublin, 2016 and Noorizzati Aini binti Zainal Aalam, *Can Ireland become a "Centre of excellence" for Islamic finance? A study of what is needed, what has been done and what else can be done*, Master's Thesis, Dublin Business School, 2013.

7.3 Islamic Finance Structures

7.3.1 Ṣukūk

Ṣukūk[23] are one of the more high-profile forms of contemporary Islamic financing. Within Ireland, the primary growth of the *ṣukūk* market has been seen in the increasing number of *ṣukūk* programmes and issuances of *ṣukūk* certificates that are listed on the Irish Stock Exchange plc, trading as Euronext Dublin (**Euronext Dublin**).[24] Since the first issuance of *ṣukūk* certificates was listed on Euronext Dublin in 2006,[25] Ireland has become a key jurisdiction for *ṣukūk* listings.[26]

When listed on Euronext Dublin, *ṣukūk* certificates can be admitted to trading on the regulated or unregulated market. In both cases, the process for approval and listing of these *ṣukūk* certificates is identical to that used for conventional bonds and applies to *ṣukūk* issued by Irish or by non-Irish incorporated entities.

In the case of *ṣukūk* certificates that are admitted to trading on Ireland's regulated market (the **Main Securities Market**), the underlying prospectus must be approved by the Central Bank, as the competent authority under Directive 2003/71/EC (as amended, the **Prospectus Directive**).

[23] Plural of *sakk*, Financial Conduct Authority (previously the Financial Services Authority) and HM Treasury, *Consultation on the legislative framework for the regulation of alternative finance investment bonds (sukuk)*, December 2008, 3, available at: http://www.fsa.gov.uk/pubs/cp/sukuk.pdf (last accessed: February 22, 2019).

[24] For consistency, this chapter refers to the Irish Stock Exchange plc as Euronext Dublin, including when referring to listings of bonds and *ṣukūk* certificates that occurred prior to Euronext's acquisition of the Irish Stock Exchange plc in March 2018.

[25] NICBM Ṣukūk Limited US$100,000,000 Trust Certificates due 2011 (the **2006 NICBM *ṣukūk***). Some commentators have indicated that the first *ṣukūk* was listed in Ireland in 2005; however, the author has found no concrete evidence of this. The 2006 NICBM *ṣukūk* referenced above is the earliest listed *ṣukūk* on Euronext Dublin that the author is aware of, see also, Gerard Scully, "Sector set for continued growth", *Finance-Magazine*, 2007, available at: http://www.finance-magazine.com/supplements/abs2007/display_article.php?i=7477 (last accessed: February 22, 2019).

[26] See, for example, Irish Stock Exchange plc (as it was then), *ISE lists world's largest ever sukuk issuance with $9bn Saudi Arabia bonds*, available at: http://www.ise.ie/Media/News-and-Events/2017/ISE-lists-world-s-largest-ever-sukuk-issuance-with-$9bn-Saudi-Arabia-bonds.html (last accessed: February 22, 2019) referring to KSA Sukuk Limited Series 1 (US$4.5 billion 2.894% Trust Certificate due 2022) and Series 2 (US$4.5 billion 3.628% Trust Certificate due 2027) issued under the KSA Sukuk Limited Trust Certificate Issuance Programme.

As is the case for bonds admitted to trading on the Main Securities Market, these *ṣukūk* prospectuses must comply with the requirements of the Prospectus Directive and reflect the same investor protection legends and disclosure standards as other regulated market prospectuses.[27] Once the prospectus is approved, the *ṣukūk* certificates that are issued are admitted to the official list of Euronext Dublin and to trading on the Main Securities Market.[28] Such *ṣukūk* certificates then benefit from the same passporting rights as regulated market bonds.[29]

For unregulated market *ṣukūk* listings, the Central Bank does not approve the underlying offering document (often referred to in the unregulated context as a "listing particulars"). *Ṣukūk* certificates issued pursuant to such listing particulars are listed on the official list of Euronext Dublin but are admitted to trading on Ireland's unregulated market (the **Global Exchange Market**).[30] As is the case for bonds admitted to trading on the Global Exchange Market, the listing particulars for unregulated market *ṣukūk* are not subject to the Prospectus Directive.

7.3.1.1 Regulation of Ṣukūk *Under Irish Law*

The Central Bank has taken a relatively pragmatic approach to the regulation of *ṣukūk* issuances under Irish law. With respect to reviewing and approving regulated market *ṣukūk* prospectuses, the Central Bank has consistently treated these prospectuses as analogous to prospectuses used for bond issuances and has not sought to impose any additional registration or regulatory

[27] See, for example, the Mumtalakat Sukuk Holding Company US$1,000,000,000 Multicurrency Trust Certificate Issuance Programme, which provides at 2 that, "[t]he Central Bank of Ireland only approves this Base Prospectus as meeting the requirements imposed under Irish and European Union … law pursuant to the Prospectus Directive".

[28] See, for example, BBG Sukuk Ltd. US$2,000,000,000 Trust Certificate Issuance Programme, which was updated on May 4, 2017. BBG Sukuk Ltd. is a Cayman Islands incorporated special purpose vehicle established by Barwa Bank Q.S.C., a bank incorporated in Qatar. The base prospectus for this programme was approved by the Central Bank of Ireland and the *ṣukūk* certificates issued under the programme can be listed on the official list and admitted to trading on the regulated market of Euronext Dublin.

[29] Dillon Eustace, *Shari'ah compliant securities listing on the Irish Stock Exchange*, April 2017, 2, available at: http://www.dilloneustace.com/download/1/Publications/Listings/Shari-ah%20compliant%20securities%20listing%20on%20the%20ISE.pdf (last accessed: February 22, 2019).

[30] See, for example, Dana Gas Sukuk Limited, US$425,040,000 Exchangeable Certificates due 2017 and US$425,040,000 Ordinary Certificates due 2017. Page 1 of the Listing Particulars for these *ṣukūk* certificates notes that "[t]he Global Exchange Market is not a regulated market for the purposes of Directive 2004/39/EC".

requirements on *ṣukūk* issuers. As such, the Central Bank has approved *ṣukūk* offering documents as "prospectuses" (in the context of a standalone issuance)[31] or "base prospectuses" (in the context of a *ṣukūk* programme)[32] for the purposes of the Prospectus Directive in the same way that it approves bond offering documents. The Central Bank has also stated that it will generally require the disclosure in regulated market *ṣukūk* prospectuses to adhere to the requirements set by Annexes IX[33] and XIII[34] of the Prospectus Regulation (Commission Regulation 809/2004, as amended), each of which relates to debt securities.[35] While the Central Bank has noted that the requirement that *ṣukūk* prospectuses comply with the same disclosure standards as bond prospectuses does not indicate "any judgement as to whether [*ṣukūk*] are debt instruments",[36] the nature of the disclosure required represents a strong indication that the Irish authorities will look to exercise a level of regulatory oversight over *ṣukūk* certificates that is analogous to their oversight over bonds. Consistent with this, at listing and admission to trading stage, Euronext Dublin has adopted an approach that aligns the treatment of *ṣukūk* certificates with bonds. As a result, the *ṣukūk* certificates issued by Ṣukūk Funding (No. 3) Limited,[37] CBB International Ṣukūk Company 5 S.P.C.,[38] and Saudi Electricity Global Ṣukūk Company 3[39] (by way of example) have all been approved by Euronext Dublin for listing and admission to trading under the category of "debt security".[40]

[31] See, for example, Alpha Star Holding III Limited, US$500,000,000 Trust Certificates due 2022, issued on April 20, 2017.

[32] See, for example, MAR Sukuk Limited US$1,000,000,000 Trust Certificate Issuance Programme, established on November 15, 2016.

[33] Annex IX (Minimum Disclosure Requirements for the Debt and Derivative securities Registration Document) EU Prospectus Regulation (Commission Regulation 809/2004).

[34] Prospectus Directive – Annex XIII (Minimum Disclosure Requirements for the Securities Note for Debt Securities with a Denomination per Unit of at Least EUR 100,000) EU Prospectus Regulation (Commission Regulation 809/2004).

[35] Central Bank of Ireland, *Address by Head of Markets Policy, Martin Moloney at the IFLC at the UCD School of Law*, 14 May 2015, available at: https://www.centralbank.ie/news-media/press-releases/martin-moloney-at-iflc-at-the-ucd-school-of-law (last accessed: February 22, 2019).

[36] Ibid.

[37] Sukuk Funding (No.3) Limited, US$750,000,000 Trust Certificates due 2018.

[38] CBB International Sukuk Company 5 S.P.C., US$1,000,000,000 Trust Certificates due 2024.

[39] Saudi Electricity Global Sukuk Company 3, US$1,500,000,000, 4.00 per cent. Certificates due 2024 and US$1,000,000,000, 5.50 per cent. Certificates due 2044.

[40] This applies to admission to trading on both the regulated and unregulated market. See, for example, Aktif Bank Sukuk Varlik Kiralama A.S. US$118,000,000 Asset-Backed Trust Certificates due 2024.

The Irish authorities' approach of applying the same regulatory treatment to economically comparable *ṣukūk* certificates and bonds reflects the dominance in the *ṣukūk* market of *ṣukūk* structures that operate in substance like conventional debt securities. The entry into force of the Alternative Investment Fund Managers Directive (Directive 2011/61/EU) as implemented in Ireland through the European Union (Alternative Investment Fund Managers) Regulations 2013[41] (as amended, the **AIFM Regulations**) does, however, raise some uncertainty as to the regulatory treatment of any special purpose vehicle (**SPV**) that operates as an issuer and trustee in a *ṣukūk* issuance.[42] An "alternative investment fund" (or **AIF**) is defined in the AIFM Regulations as "a collective investment undertaking, … which (a) raises capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors…".[43] An Alternative Investment Fund Manager (**AIFM**) cannot manage an AIF unless it is authorised to do so and complies with conditions attached to such authorisation.[44] As contemporary *ṣukūk* structures often involve a separately incorporated SPV issuer that uses the proceeds of an issuance of *ṣukūk* certificates to purchase income-generating assets from the entity ultimately looking to raise funds (referred to in this chapter as the "originator"), such SPV issuers could arguably fall within the scope of the AIFM Regulations. This would result in the imposition of onerous authorisation and disclosure requirements over and above those applying to conventional vanilla bond issuers.

Irish regulatory authorities have not confirmed that *ṣukūk* SPV issuers will not be caught by the AIFM Regulations. The Central Bank has, however, suggested that a financial vehicle engaged "solely in activities where economic participation is by way of debt or other corresponding instruments which do not provide ownership rights in the financial vehicle as are

[41] European Union (Alternative Investment Fund Managers) Regulations 2013, SI 2013/257, as amended by European Union (Alternative Investment Fund Managers) (Amendment) Regulations 2014, SI 2014/379.

[42] Bob Penn, *Unintended consequences: application of the Alternative Investment Fund Managers Directive (AIFMD) to SPVs*, Allen & Overy LLP, July 15, 2013, available at: www.allenovery.com/publications/en-gb/Pages/Unintended-consequences-application-of-the-Alternative.aspx (last accessed: February 22, 2019).

[43] Regulation 5(1) AIFM Regulations (Irl.).

[44] Regulation 7(1) AIFM Regulations (Irl.).

provided by the sale of units or shares"[45] will not be required to register as an AIF in the absence of further guidance by the European Securities and Markets Authority (**ESMA**). In practice, in order for *ṣukūk* certificates offered to investors in Ireland to benefit from the same tax and regulatory treatment as bonds, they must reflect the same economic substance as those bonds and so operate like an "economic participation … by way of debt". While *ṣukūk* certificates may represent a holder's ownership interest in underlying assets, returns paid to holders of *ṣukūk* certificates are often based on a pre-agreed repayment profile with no recourse to the underlying assets on default. To the extent *ṣukūk* certificates offered in Ireland are economically comparable to bonds, therefore, an SPV issuing those *ṣukūk* certificates should not be regarded as an AIFM. However, without further guidance from the Central Bank, this remains an area of regulatory uncertainty for *ṣukūk* in Ireland.

7.3.1.2 Taxation of Ṣukūk *Under Irish Law*

The focus of legislative accommodation of *ṣukūk* in Ireland has been with respect to tax. This accommodation was driven by the fact that structural differences between bonds and *ṣukūk* raised uncertainty as to whether *ṣukūk* returns would be treated by Irish tax law as fully taxable profit distributions or as equivalent to interest payable on a bond, which is tax deductible.[46] The amendments to Ireland's tax laws introduced by the Finance Act 2010 sought to address this distinction by incorporating s267R into the TCA 1997. S267R TCA 1997 applies to "investment certificates", which are certificates that are a financial liability of the issuing entity, establish an investor's claim over the rights and obligations represented by the certificate and entitle the investor to an amount equivalent to a share in the profits or losses derived from underlying assets.[47] Such investment certificates produce an "investment return" representing periodic payments of profit derived from the underlying assets and any excess amounts payable on redemption of the certificates.[48] Though religiously

[45] Central Bank of Ireland, *AIFMD Questions and Answers*, 30th Edition – 4 May 2018, Question ID 1065.

[46] As distributions in Ireland are not tax deductible for corporation tax purposes while interest payments are.

[47] See s267N TCA 1997 (Irl.) definition of "investment certificate" (Finance Act 2010 as amended by s24 Finance Act 2013 (Irl.)).

[48] See s267N TCA 1997 (Irl.) definition of "investment return".

neutral in its terminology,[49] s267R TCA 1997 is designed to accommodate *ṣukūk* certificates issued by Irish-incorporated entities.[50]

S267R TCA 1997 provides that "the Tax Acts[51] shall apply to an investment return as if that investment return *were interest on a security*".[52] In order to ensure that only "investment returns" that are economically comparable to interest (as opposed to taxable distributions) are treated as interest, s267R TCA 1997 is explicitly subject to s130 TCA 1997.[53] S130 TCA 1997 covers "matters to be treated as distributions" and defines a "distribution" as any payment by a company the level of which is "dependent on the results of the company's business or any part of the company's business".[54] As such, while investment certificates may represent a holder's right to "share in the profits *or losses* derived from"[55] underlying assets, only where the investment returns constitute periodic payments of *profit* derived from those assets, and such investment returns are not dependent on the results of the issuer's business, will they be treated by Irish tax law as equivalent to interest payable on a bond.[56] This approach was most recently confirmed in the November 2018 update of the Tax and Duty

[49] Irish Revenue Commissioners, "Tax Treatment of Islamic Financial Transactions", *Tax and Duty Manual* (Part 08A-01-01), Irish Revenue Commissioners, Dublin, November 2018, [1.3]. See also, Revenue, *Guidance Notes on the Tax Treatment of Islamic Financial Transactions*, Irish Revenue Commissioners, Dublin, October 2010, 6 (the *Tax and Duty Manual* (Part 08A-01-01) replicates almost exactly the content of the original *Guidance Notes on Tax Treatment of Islamic Financial Transactions*).

[50] Irish Revenue Commissioners, "Tax Treatment of Islamic Financial Transactions", *Tax and Duty Manual* (Part 08A-01-01), *op. cit.*, [8]; Irish Revenue Commissioners, *Guidance Notes on the Tax Treatment of Islamic Financial Transactions*, *op. cit.*, 33. See s267N TCA 1997 (Irl.) definition of "qualifying company" which provides that one of the criteria for being a qualifying company is being "resident in the State".

[51] Defined as the Corporation Tax Acts (enactments relating to corporation tax in the TCA 1997 and in any other enactment, together with the enactments relating to income tax in the TCA 1997 and in any other enactment insofar as those enactments apply for the purposes of corporation tax) and the Income Tax Acts (enactments relating to income tax in the TCA 1997 and in any other enactment).

[52] Emphasis added. Read in conjunction with existing provisions of the TCA 1997, this exemption would appear to apply only to those payments which "represent[] a reasonable commercial return for the use of [the] principal" (s130(2)(d)(iii)(II) TCA 1997 (Irl.)) thus ensuring that only those transactions whose economic implications are similar to conventional bonds will actually benefit from parity of treatment.

[53] s267R TCA 1997 (Irl.).

[54] s130(2)(d)(iii)(I) TCA 1997 (Irl.).

[55] s267N TCA 1997 (Irl.).

[56] s267R TCA 1997 (Irl.).

Manual (Part 08A-01-01)[57] in which the Revenue confirmed that "[i]n general, Revenue will not regard the return as being dependent on the results of the business"[58] as long as the amount of the expected return equates in substance to a commercial return on an investment, the return is determined at the outset of the transaction, it is equivalent to the rate of interest, *and* it is not altered during the course of the transaction except where such alteration follows interest rates.[59]

Stamp duty burdens imposed on *ṣukūk* issuances in Ireland have also, in part, been alleviated by s137 of the Finance Act 2010 through the incorporation of s85A into the SDCA 1999. S85A SDCA 1999 brings the stamp duty treatment of *ṣukūk* certificates in line with that of bonds by providing that stamp duty is not chargeable on the issue, transfer, or redemption of investment certificates.[60] However, s85A SDCA 1999 only relieves stamp duty liability that would otherwise apply to *ṣukūk* certificates themselves, not the assets underpinning those *ṣukūk* certificates. As some *ṣukūk* transactions based on real property may involve multiple transfers of that property (from the originator to the issuer (on behalf of holders of the *ṣukūk* certificates) at the time the *ṣukūk* certificates are issued and then back to the originator on redemption of the *ṣukūk* certificates), *ṣukūk* issuances may result in multiple impositions of stamp duty. Unlike the UK, where this double stamp duty charge has been specifically addressed,[61] Irish tax reforms have not yet addressed this aspect of *ṣukūk* issuances. This may put certain *ṣukūk* transactions at a financial disadvantage as compared to conventional bonds.[62]

[57] Irish Revenue Commissioners, "Tax Treatment of Islamic Financial Transactions", *Tax and Duty Manual* (Part 08A-01-01), *op. cit.*

[58] Ibid., [8.3].

[59] Ibid.

[60] s85 SDCA 1999 (Irl.) exempts the issue and transfer of "loan capital" which refers to any debenture stock, bonds, or funded debt, by whatever name known, or any capital raised which is borrowed or has the character of borrowed money, whether in the form of stock or in any other form.

[61] s5 of schedule 61 of this Finance Act 2009 (UK). The provision was reinforced by the Stamp Duty Land Tax (Alternative Finance Investment Bonds) Regulations 2010 (No. 814 of 2010) (UK) which further extended the scope of alternative finance investment bond (that is, *ṣukūk*) stamp duty land tax relief.

[62] The *Tax and Duty Manual* (Part 08A-01-01) does note, however, that *ṣukūk* "have evolved such that it is not uncommon that they grant an ownership interest to the holder of the investment certificate not in the underlying assets of the qualifying company but instead

Ireland's position as a venue for the listing and admission to trading of international *ṣukūk* continues to strengthen with Ireland being chosen as the listing venue for a number of market leading *ṣukūk* issuances over the last five years.[63] A sensible approach to regulatory oversight and a partially tailored tax regime highlight the Irish government's interest in encouraging the issue and listing of *ṣukūk* in Ireland. Unlike the UK, however, which has seen engagement with the *ṣukūk* market by UK-based entities,[64] the domestic market in *ṣukūk* originated in Ireland has been slower to develop.[65] Some remaining tax issues and uncertainty with respect to certain regulatory aspects of contemporary *ṣukūk* may continue to impact on the further development of this market in Ireland.

7.3.2 Islamic Investment Funds

Islamic investment funds represent a strong segment of the global Islamic finance market.[66] Like conventional investment funds, these funds are structured to spread investment risk and protect returns through the pooling of investor capital. Islamic investment funds do not, however, invest in *haram* or forbidden industries and business.

in an underlying asset which is a financial liability of the counterparty that ultimately underpins the *ṣukūk* arrangement and its related cash flows", Irish Revenue Commissioners, "Tax Treatment of Islamic Financial Transactions", *Tax and Duty Manual* (Part 08A-01-01), *op. cit.* [8.1].

[63] See, for example, Saudi Electricity Global Sukuk Company 3 US$2,500,000,000 Certificates issued in two series (US$1,500,000,000 4.00 per cent. Certificates due 2024 and US$1,000,000,000 5.50 per cent. Certificates due 2044.

[64] See, for example, HM Treasury UK Sovereign Sukuk PLC issue of £200,000,000 Certificates due 2019. Both the Royal Bank of Scotland PLC and HSBC Bank plc have previously established *sharī'ah*-compliant certificate programmes but have not issued listed *ṣukūk* certificates under these programmes. See, The Royal Bank of Scotland PLC Crescent Trust Certificates LaunchPAD Programme and the HSBC Bank plc Programme for the Issuance of Shari'ah-Compliant Certificates.

[65] A press release published on April 5, 2018 indicated that an Irish-incorporated company issued *ṣukūk* certificates. However, no publicly available information on this issuance is available as at the time of writing this chapter, Matheson, *News and Insights, Matheson Advises on the First Irish Issuance of a Sukuk Bond Under Irish Tax Law*, April 5, 2018, https://www.matheson.com/news-and-insights/article/matheson-advises-on-the-first-irish-issuance-of-a-sukuk-bond-under-irish-ta (last accessed: February 22, 2019).

[66] Department of Finance, *IFS2020: A Strategy for Ireland's International Financial Services sector 2015–2020, op. cit.*, 20.

7.3.2.1 Regulation of Islamic Investment Funds Under Irish Law

Ireland has sought to benefit from the global growth in Islamic investment funds and this sector has witnessed considerable development in Ireland over the last decade.[67] Reflecting this, the Central Bank has authorised a number of Irish-domiciled investment companies offering Islamic investment funds. In 2003, Oasis Global Management Company (Ireland) Limited received approval from the Central Bank for the establishment of the Oasis Crescent Global Investment Fund (Ireland) plc investment company. This investment company, which is stated to be "managed in accordance with Shari'ah principles",[68] is authorised in Ireland as an undertaking for collective investment in transferable securities (**UCITS**) pursuant to the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011.[69] More recently, the Central Bank has authorised the establishment of CIMB-Principal Islamic Asset Management (Ireland) Plc as a UCITS.[70] This was the first Malaysian-based Islamic investment fund platform to be domiciled in Ireland[71] and it has since gone on to establish two Islamic sub-funds, the Islamic ASEAN Equity Fund (launched in 2012) and the Global Ṣukūk Fund (launched in 2016), both of which have shares listed on Euronext Dublin.

In authorising Islamic investment companies and the funds that they offer, the Central Bank has adopted a "no special treatment" approach to this authorisation. These companies have so far been authorised as one of the two main categories of funds in Ireland, UCITS or Alternative Investment Funds, in the same authorisation process as conventional funds.[72] This classification determines to whom the funds can be pro-

[67] Ibid.

[68] Oasis Crescent Global Investment Fund (Ireland) plc, Prospectus dated April 8, 2016, 12.

[69] European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011, SI 2011/352 (Irl.). Other Islamic investment funds established and authorised in Ireland include Old Mutual Global Islamic Equity Fund, Deutsche Noor Islamic Funds plc, Mashreq-Al-Islami Arab Tigers Fund, and CIMB - Principal Islamic Asset Management (Ireland) plc (which runs the Islamic ASEAN Equity Fund and the Global Sukuk Fund).

[70] CIMB-Principal Islamic Asset Management (Ireland) Plc, Prospectus dated September 7, 2016, 3.

[71] CIMB, *CIMB-Principal Islamic Asset Management establishes three Islamic investment funds to attract global investors*, 16 January 2012, available at: www.cimb.com/en/news/news/2012/cimb-principal-islamic-asset-management-establishes-three-islamic-funds-to-attract-global-investors.html (last accessed: February 22, 2019).

[72] Central Bank of Ireland, *Address by Head of Markets Policy, Martin Moloney at the IFLC at the UCD School of Law*, *op. cit.*

moted and the applicable regulatory regime. Islamic investment funds in Ireland are, therefore, required to meet the same regulatory and disclosure standards as comparable conventional investment funds. In practice, this has resulted in Islamic investment funds providing disclosure on the types of investments that are prohibited by the fund's investment objectives, the process applied to cleanse any non-Islamic returns, and details of the *sharī'ah* supervisory board's role (to the extent one is appointed).[73]

While the Central Bank will require Islamic investment funds to provide adequate disclosure to investors, it will not look to determine whether the activities of an Islamic investment fund are carried out in accordance with Islamic legal principles, nor will it require the appointment of a *sharī'ah* supervisory board.[74] Nevertheless, the Central Bank has acknowledged the role of these *sharī'ah* supervisory boards in Islamic finance transactions. In doing so, the Central Bank has set out three principles guiding its on-going interaction with *sharī'ah* supervisory boards in Islamic investment funds. First, the Central Bank has confirmed that it would not be appropriate for it to adopt a view on the quality of a *sharī'ah* supervisory board or their suitability to make the judgements they make. Second, it is not for the Central Bank to verify any claim that an Islamic finance transaction is *sharī'ah*-compliant or that it has been approved by a *sharī'ah* supervisory board. Finally, the Central Bank will not subject Islamic investment funds to surveillance in order to check on-going compliance with the terms of any *sharī'ah* supervisory board's approval.[75] The Central Bank's approach to *sharī'ah* supervisory boards aligns with its treatment of Islamic investment funds generally and reflects the fact that a secular regulator is not in a position to determine matters of religious compliance.

[73] Ibid. See, for example, the prospectus for CIMB-Principal Islamic Asset Management (Ireland) Plc, which discloses the restrictions on investing in non-Islamic investments that apply to the funds established by CIMB-Principal Islamic Asset Management (Ireland) Plc [12], divestment of non-Islamic investments, [18] and details of the "Shari'ah Advisor", [9].

[74] Irish authorities have confirmed that it is "a matter for each individual entity wishing to market Islamic finance products to have a Shari'a Board available", Department of Finance, *Islamic Finance in Ireland; An Information Note*, *op. cit.*, 7.

[75] Central Bank of Ireland, *Address by Head of Markets Policy, Martin Moloney at the IFLC at the UCD School of Law*, *op. cit.*

7.3.2.2 Taxation of Islamic Investment Funds Under Irish Law

Ireland's favourable tax environment for investment funds also applies to funds offered by Irish-incorporated Islamic investment funds.[76] Islamic investment funds were not dealt with specifically in the Finance Act 2010; however, the 2009 Tax Briefing confirmed that Islamic investment funds would be subject to the same tax regime as conventional investment funds.[77] As a result, if an Islamic investment fund is structured so that it falls within Chapter 1A, Part 27 of the TCA 1997,[78] a gross-roll-up tax regime will be applied eliminating annual tax on the profits of the fund but requiring the fund to deduct and account for tax when unit holders are paid.[79] Such withholding does not apply in circumstances where as a result of an exemption (such as non-Irish residence) the amounts are to be paid gross.[80] As such, for both Islamic and conventional investment funds, there is no withholding tax on distributions made to non-Irish resident unit-holders[81] or unit-holders classified as exempt Irish domiciled entities.[82] Like a conventional investment fund, no stamp duty liability arises on the issuance or redemption of units in an Islamic investment fund.[83]

[76] s110 TCA 1997 (Irl.), as amended by the Finance Act, 2003 (No. 3 of 2003) (Irl.). See also, Omer Khan and Ken Owens, "A greater understanding brings new opportunities" *Islamic Finance Review*, (2009/2010), 53, 53.

[77] Irish Revenue Commissioners, *Islamic Finance, Tax Briefing Issue 78*, *op. cit.*, 8.

[78] Introduced by s58 Finance Act 2000 (No. 3 of 2000) (Irl.).

[79] Chapter 1A Part 27 TCA 1997 (Irl.). Irish Revenue Commissioners, "Tax Treatment of Islamic Financial Transactions", *Tax and Duty Manual* (Part 08A-01-01), *op. cit.*, [2.2.1].

[80] Irish Revenue Commissioners, "Tax Treatment of Islamic Financial Transactions", *Tax and Duty Manual* (Part 08A-01-01), *op. cit.*, [2.2.1].

[81] The requirement for non-Irish resident investors to make a declaration of non-residence in order to avoid taxation of redemption payments from an Irish domiciled fund has been removed.

[82] Irish Revenue Commissioners, *Revenue Technical Guidelines*, "Investment Undertakings, General Guidelines for Calculating Tax Due and for Completing Declaration Forms", Part 27-01A-02, 6–7, see also, Dillon Eustace, *Taxation of Collective Investment Funds and Availability of Treaty Benefits*, 2010, 7, available at: www.dilloneustace.com/download/1/Taxation%20of%20Collective%20Investment%20Funds%20and%20Availability%20of%20Treaty%20Benefits.pdf (last accessed: February 22, 2019).

[83] See, for example, the CIMB-Principal Islamic Asset Management (Ireland) Plc, Prospectus dated 7 September 2016, 59, which notes that "[unit holders] who are neither resident nor ordinarily resident in Ireland in respect of whom the appropriate declarations have been made … will not be subject to tax on any distributions from the Company or any gain arising on redemption, repurchase or transfer of their shares provided the shares are not held through a branch or agency in Ireland". It also provides that "[n]o Irish stamp duty will be payable on the subscription, transfer or redemption of Shares provided that no application for Shares or re-purchase or redemption of Shares is satisfied by an in specie transfer of any Irish situated property". Irish Revenue Commissioners, "Tax Treatment of Islamic Financial Transactions", *Tax and Duty Manual* (Part 08A-01-01), *op. cit.*, [2.2.3].

The existence of a straightforward, favourable tax regime that does not distinguish between Islamic and conventional investment funds represents a significant advantage for Islamic investment funds in Ireland.[84] From a regulatory and tax standpoint, therefore, parity of treatment between Islamic and conventional investment funds and their investors has to date required no tailored modification of Ireland's existing laws. Reflecting this, the Islamic investment funds industry in Ireland already represents a defined sector of Ireland's financial market.

7.3.3 Islamic Mortgage Alternatives

A number of Islamic mortgage alternatives have been developed by the contemporary Islamic finance industry based on contractual forms that do not involve the payment of interest. These instruments may be structured on the basis of a *murābaḥa* contract (sale of the property to the customer with the purchase price paid on a deferred and marked-up basis),[85] an *ijārah wa-iqtina* contract (lease of the property to the customer ultimately resulting in a transfer of the property's title to the customer),[86] or a diminishing *mushāraka* contract (shared ownership of the property between a financial institution and customer, lease of that property to the customer and ultimately a transfer of the property's title to the customer).[87] In each case, the economic substance of the relevant Islamic mortgage alternative is consistent with an interest-based mortgage, while structurally they are distinguishable from their conventional alternatives.

[84] Deloitte, *Corporate Sukuk in Europe – Alternative financing for investment projects*, (n.d.), 9, available at: https://www2.deloitte.com/content/dam/Deloitte/xe/Documents/financial-services/me_Islamic-finance_corporate-sukuk-in-europe.pdf (last accessed: February 22, 2019).

[85] Under the *murābaḥa* model, the financier buys the property and sells it immediately to the borrower for the original purchase price plus an agreed mark-up (the financier's profit) to be paid in instalments.

[86] Under the *ijārah wa-iqtina* model, the borrower undertakes to purchase the property at the end of the rental period with the purchase price spread out over the duration of the lease—the bank remains owner of the property for the lease term and the rent paid by the borrower represents the banks profit, H. A. Dar, "Islamic House Financing in the United Kingdom: Problems, Challenges and Prospects", *Review of Islamic Economics*, 12 (2002), 47, 51.

[87] Under the diminishing *mushāraka* model, the financier and the customer enter into a joint ownership of a property, the financier leases its share back to the borrower who also progressively purchases the financier's equity in the property until the financiers share in the property is reduced to zero. Michael Ainley, Ali Mashayekhi, Robert Hicks, Arshadur Rahman, and Ali Ravalia, *Islamic Finance in the UK: Regulation and Challenges*, (London: Financial Services Authority, 2007), 20.

7.3.3.1 *Regulation of Islamic Mortgage Alternatives Under Irish Law*

In Ireland, consumer protection in the context of mortgages is established in the Consumer Credit Act 1995 (the **CCA 1995**).[88] The CCA 1995 defines a "housing loan" as including "an agreement for credit [or refinancing credit] on the security of a mortgage of a freehold or leasehold estate or interest in land"[89] for the purpose of the construction, improvement or purchase of a house, and a mortgage is defined as including a charge.[90] In order to ensure Ireland's consumer protection regime applies to Islamic mortgage alternatives, the structures developed by the Islamic finance industry must be brought within the existing regulatory regime. In the case of *murābaḥa*-based mortgage alternatives, this would seem to be a relatively straightforward process, as these structures involve the transfer of property to the customer who then repays the purchase price over a period of time and grants a charge over the property to the financial institution.[91] *Ijārah wa-iqtina-* and diminishing *mushāraka*-based mortgage alternatives, on the other hand, raise more difficulties. In both of these arrangements, the financial institution assumes full or partial ownership of the property for the duration of the transaction. Only at maturity of the financing arrangement will title to the property be transferred to the customer in full. As such, structurally there is no credit extended to the customer and, as the financial institution maintains all or some ownership interest in the property, there is limited scope for the customer to charge the property in favour of that financial institution.[92] It is arguable, therefore, that other than in the case of structures based on a *murābaḥa* contract, Islamic mortgage alternatives fall outside of Ireland's consumer protection regime. UK authorities faced a similar issue, which they addressed by the creation of a new category of

[88] Consumer Credit Act 1995 (No. 24/1995) (**CCA 1995**) (Irl.).

[89] Interpretation, CCA 1995, (Irl.) as amended by s 33 of, and Part 12 of Schedule 3 to, the Central Bank and Financial Services Authority of Ireland Act 2004 (No. 21 of 2004) (Irl.).

[90] s2(1) CCA 1995 (Irl.), as substituted by s33 of, and Part 12 of Schedule 3 to, the Central Bank and Financial Services Authority of Ireland Act 2004 (Irl.).

[91] Currently, Community Finance Ireland is developing a *murābaḥa*-based product to be used to finance the acquisition of properties by Muslim community groups or social enterprises, although not by individuals directly; see further, Philip Lee, "Ireland's First Islamic Financing Product: The First Of Many", 2018, available at: https://www.philiplee.ie/irelands-first-islamic-financing-product-the-first-of-many/ (last accessed: February 22, 2019).

[92] *Secretary of State for Work and Pensions v UP* [2010] UKUT 262 (AAC), [13].

regulated activity relating to "Home Purchase Plans"[93] and by amending the Financial Conduct Authority's "Mortgage and Home Finance: Conduct of Business Sourcebook" (**MCOB**) to cover Islamic mortgage alternatives.[94] This extended the disclosure, treatment of arrears, repossessions, and responsible lending[95] provisions of MCOB to *sharī'ah*-compliant finance activity.

Lack of regulatory clarity in Ireland, particularly when compared with the regulatory changes introduced in the UK, may lead to inconsistent regulation of Islamic and conventional home financing products and uncertainty as to who is authorised to offer these products in Ireland.

7.3.3.2 Taxation of Islamic Mortgage Alternatives Under Irish Law

The amendments to the TCA 1997 that were introduced by s39 of the Finance Act 2010 provided some legislative accommodation in terms of the taxation of Islamic mortgage alternatives. Following the Finance Act 2010, the TCA 1997 now provides for a number of "credit transactions" that are structurally similar to *murābaḥa*[96] and diminishing

[93] Financial Conduct Authority (previously the Financial Services Authority), *Regulation of Home Reversion and Home Purchase Plans*, (London: Financial Services Authority, 2006), 6.

[94] MCOB 1.2.1 (1) noting that: "This sourcebook applies to every firm that: (a) carries on a home finance activity (subject to the business loan application provisions); or (b) communicates or approves a financial promotion of qualifying credit, of a *home purchase plan* or of a home reversion plan" (emphasis added).

[95] MCOB 4.10 (advertising and selling standards), MCOB 5.8 (pre-application disclosure), MCOB 6.8 (Disclosure at the offer stage), MCOB 7.8 (Disclosure at start of contract and after sale), MCOB 11 (Responsible lending and responsible financing of home purchase plans), MCOB 12.7 (Charges), MCOB 13.8 (Arrears and repossessions).

[96] Paragraph (a), definition of "credit transaction", s267N TCA 1997 (Irl.), which provides as follows:

(a) an arrangement whereby a finance undertaking acquires an asset for the purpose of disposing of the full interest in that asset to a borrower in circumstances where—
  (i) the consideration paid or payable by the borrower exceeds the consideration paid or payable by the finance undertaking for the asset,
  (ii) all or part of that consideration is not required to be paid until a date later than the date of the disposal, and
  (iii) the excess of the consideration paid or payable to the finance undertaking by the borrower in respect of the asset over the consideration paid or payable by the finance undertaking for the asset is equivalent to the return on a loan of money at interest.

mushāraka[97] transactions.[98] As long as certain conditions are met, the provisions of Part 8A TCA 1997 seek to treat these credit transactions as if they establish a loan relationship between a financial institution and a customer. Pursuant to s267O TCA 1997, therefore, the return payable to a financial institution pursuant to a credit transaction shall be treated for the purposes of the Tax Acts as if it were interest paid or payable on a loan and chargeable to tax accordingly.[99] The financial institution's return will not be treated for the purposes of the Tax Acts as expenditure on an asset.[100]

[97] Paragraph (c), definition of "credit transaction", s267N TCA 1997 (Irl.), which provides as follows:

(c) an arrangement whereby—
  (i) a finance undertaking and a borrower jointly acquire an asset or
  (ii) a finance undertaking acquires an interest in an asset from a borrower, in circumstances where the borrower retains an interest in that asset,

on terms whereby—

I. the borrower—
  A. in the circumstances referred to in subparagraph (i) has exclusive use of the asset immediately and, in the circumstances referred to in subparagraph (ii), retains exclusive use of the asset immediately, as the case may be,
  B. is exclusively entitled to any income, profit or gain arising from or attributable to the asset (including any increase in the value of the asset), and
  C. agrees to make payments to the finance undertaking amounting to the aggregate of the consideration paid or payable by the finance undertaking for the acquisition of its interest in the asset and any consideration paid or payable by the borrower for the use of the asset during the period of the arrangement,
II. the excess of the consideration (including any consideration paid or payable for the use of the asset during the period of the arrangement) accruing to the finance undertaking from the borrower in respect of the interest of the finance undertaking in the asset over the consideration paid or payable by the finance undertaking for the asset is equivalent to the return on a loan of money at interest, and
III. the finance undertaking's interest in the asset passes either immediately or by the end of a specified period of time, to the borrower for a consideration which exceeds the consideration paid by the finance undertaking for the asset.

[98] While the Revenue's *Tax and Duty Manual* (Part 08A-01-01) suggest that *ijārah wa-iqtina* structures would fall within the provisions of the Finance Act 2010, it acknowledges that the provisions do "not apply to a lease *of immovable property*" (Irish Revenue Commissioners, "Tax Treatment of Islamic Financial Transactions", *Tax and Duty Manual* (Part 08A-01-01), *op. cit.*, [3.3.1.3], emphasis added).

[99] s267O(1) TCA 1997 (Irl.).

[100] This is relevant for the purposes of relief on capital expenditure and capital gains tax.

The amendments introduced by the Finance Act 2010 seek to bring these credit transactions within Irish tax law applying to loans and interest where the structure of such credit transactions would otherwise have precluded them from being treated as such. The returns paid to a financial institution pursuant to a credit transaction will now be taxed and relieved as if they were interest payments made pursuant to a conventional mortgage. This approach reflects similar accommodations introduced in UK tax law.[101]

The taxation of Islamic mortgage alternatives in Ireland has not, however, been brought completely in line with the corresponding tax framework applying to interest-based mortgages. One of the obstacles preventing comparable taxation is the multiple impositions of stamp duty liability with respect to Islamic mortgage alternatives. Each of the three forms of Islamic mortgage alternative technically involves at least two sales of the underlying property, the first when the financial institution acquires ownership of the property from the original vendor and the second when it transfers ownership of that property to the customer.[102] This two stage transfer may result in a double imposition of stamp duty.[103] UK authorities addressed this issue early in their legislative accommodation of Islamic finance transactions by eliminating the double stamp duty land tax imposed on *murābaḥa* transactions[104] in 2003 and diminishing *mushāraka* and *ijārah wa-iqtina* transactions in 2005.[105] As such, as is the case for conventional mortgages, there is now only one imposition of stamp duty land tax on Islamic mortgage alternatives in the UK.[106] In the absence of clarity with respect to the stamp duty position of Islamic mortgage alternatives in Ireland, these instruments could potentially be prohibitively expensive.

[101] HM Land Registry, *Practice guide 69: Islamic financing*, 2015, https://www.gov.uk/government/publications/islamic-financing/practice-guide-69-islamic-financing (last accessed: February 22, 2019).

[102] Fahim Uz-Zaman, *Shariah-Compliant Financial Services: A Guide to Products, Markets and Trends*, (London: VRL KnowledgeBank Ltd., 2006), 37; Reinhard Leopold Klarmann, *Islamic Project Finance; a Legal Study with Particular Reference to the Laws of Switzerland and the United Arab Emirates*, (Zurich: Schulthess, 2003), 252.

[103] The Irish Revenue Commissioners's Tax and Duty Manual, while referring to the stamp duty issue, reiterates that "stamp duty will arise under normal rules". Irish Revenue Commissioners, "Tax Treatment of Islamic Financial Transactions", *Tax and Duty Manual* (Part 08A-01-01), *op. cit.* [6.3.8].

[104] s73 Finance Act 2003 (UK).

[105] s71A Finance Act 2003 (UK), inserted by the Finance Act 2005, s94, Schedule 8 [1]–[2].

[106] Cosgrave, Barry, "United Kingdom" in *The Islamic Finance and Markets Law Review*, Andrew M Metcalf and Michael Rainey (eds.), (London: Law Business Research, 2016), 68, 73.

7.4 Conclusion

Over the last decade, the Islamic finance sector has matured and diversified. While its growth globally has perhaps not quite aligned with the lofty expectations of its early proponents, Islamic finance nevertheless represents an identifiable sector of the global financial market and offers market participants an alternative means of accessing financing and investment opportunities.

In Ireland, positive steps have been taken to legislate for, and to clarify the legal treatment of, certain Islamic finance products. These accommodative measures reflect an amenable attitude towards Islamic finance activity amongst Irish government authorities and follow similar accommodations introduced in other Western countries. In practice, however, the perceptible growth of the Islamic finance industry in Ireland today has generally taken place outside of these legislative accommodations, with only limited domestic Islamic finance activity. Ireland has increasingly become a jurisdiction for the approval and listing of *ṣukūk* certificates and programmes. The issuers of these instruments have to date generally not been Irish-incorporated entities, but are instead international entities that are not subject to the accommodative provisions of Ireland's tax laws. As such, growth in this sector has been largely unaffected by the legislative reforms introduced by the Finance Act 2010. Equally, while the number of Irish-domiciled Islamic investment funds has grown in recent years, this market sector has again developed without the need for legislative accommodation.

Since the Finance Act 2010, there have been limited further legislative amendments to accommodate Islamic finance within Irish law. Rather than a lack of support for Islamic finance amongst Irish authorities, however, this arguably suggests that market demand is not yet significant enough to justify further accommodation. The generally pragmatic and accommodative attitude of the Irish authorities to date indicates that, should the market require them, further accommodations may be introduced to build on those already laid down by the Finance Act 2010.

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