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Luxembourg

SECURITISATION

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This country-specific Q&A provides an overview of securitisation laws and regulations applicable in Luxembourg.

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LUXEMBOURG
SECURITISATION

1. How active is the securitisation market in your jurisdiction? What types of securitisations are typical?

Since the adoption of the Securitisation Law (see definition under paragraph 3 below) in 2004, Luxembourg has been a very active market for the set-up of securitisation vehicles and the structuring of securitisation transactions and has become one of the major hubs for securitisation transactions in Europe. The Securitisation Law is very flexible and allows any type of securitisation transaction, with private placement or offer to the public, true sale or synthetic, tranched or untranched. Securitisation vehicles may be regulated or unregulated (see paragraph 9 below) and can create compartments to ring fence the assets and liabilities of a securitisation transaction from the ones of other transactions of the same securitisation vehicle. Of more than ca. 1,350 securitisation vehicles (ca, 6,000 compartments) active in Luxembourg as of today, only 33 are regulated.

2. What assets can be securitised (and are there assets which are prohibited from being securitised)?

The Securitisation Law does not provide for any limitation with respect to the assets that may be securitised. The Luxembourg Commission for the Supervision of the Financial Sector (*Commission de Surveillance du Secteur Financier*) (the **CSSF**) issued frequently asked questions on securitisation (the **CSSF FAQ**) that are generally used as guidance also for unregulated securitisations. According to the CSSF FAQ, various types of securitisation transactions can be contemplated, provided they comply with the legal definition of securitisation (see paragraph 3 below) and the spirit of the Securitisation Law. Based on the CSSF FAQ and market practice, securitisation vehicles may not hold directly real estate assets, though the real estate risk may be otherwise securitised indirectly.

3. What legislation governs securitisation in your jurisdiction? What transactions fall within the scope of this legislation?

The Luxembourg law of 22 March 2004 on securitisation undertakings, as amended (the **Securitisation Law**) and the Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation (the **EU Securitisation Regulation**) govern securitisation in Luxembourg.

The Securitisation Law is very flexible and allows any type of securitisation transaction. Art. 1 of the Securitisation Law defines securitisation as *the transaction by which a securitisation undertaking acquires or assumes, directly or through another undertaking, risks relating to claims, other assets, or obligations assumed by third parties or inherent to all or part of the activities of third parties and issues securities, whose value or yield depends on such risks*.

4. Give a brief overview of the typical legal structures used in your jurisdiction for securitisations and key parties involved.

Given the flexibility provided under the Securitisation Law, there is no typical legal structure. Securitisation can be completed (i) on a true sale basis, whereby the securitisation vehicle acquires full legal title in relation to the underlying assets, or (ii) by the synthetic transfer of the risk pertaining to the underlying assets through the use of derivative instruments including double layer structures with an acquisition and an issuing vehicle. The notes issued by the securitisation vehicle may be untranched, i.e., all noteholders' claims will rank *pari passu* or tranched, with junior and senior noteholders. Single asset securitisation is also possible, whereby the securitisation vehicle securitises a risk pertaining to a single asset.

The securitisation vehicle may be set up as a company or as a securitisation fund (see paragraph 14 below) – which latter form is regaining practical attention in the Luxembourg market as a result of the ATAD framework, which was introduced in 2019.

Based on the structure of the securitisation, including the governing law of the notes, there may be few or many key parties involved depending on the transaction structure. Typical parties would be the arranger, the originator, the account bank and the paying agent. Additional parties may be the management company (in case of a securitisation fund), the lead manager, the security agent or trustee, the selling agent, the liquidity provider, the servicer, the back-up servicer, the placement agent, etc.

5. Which body is responsible for regulating securitisation in your jurisdiction?

Securitisation transactions, where notes are issued to the public on a continuous basis (see paragraph 9 below) and securitisation transactions governed by the EU Securitisation Regulation, are subject to the supervision of the CSSF.

6. Are there regulatory or other limitations on the nature of entities that may participate in a securitisation (either on the sell side or the buy side)?

There are no general regulatory or other limitations in the nature of entities that may participate in a securitisation on the sell side. Certain structures require the involvement of regulated entities, e.g., loans to be securitised by a vehicle issuing to the public on a continuous basis would need to be originated by a financial institution.

With respect to placement of notes to investors, the frameworks set out by the Markets in Financial Instruments (**MiFID II**) – Directive 2014/65/EU (MiFID II) and by the Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public (the **Prospectus Regulation**), and the Regulation (EU) No. 1286/2014 on key information documents for packaged retail and insurance-based investment products (the **PRIIPs Regulation**) should be taken into account, in particular when securitised notes are offered to the public.

7. Does your jurisdiction have a concept of "simple, transparent and comparable" securitisations, following the BCBS recommendations?

The concept of "simple, transparent and standardised" securitisations was introduced for the first time in Luxembourg by the EU Securitisation Regulation.

8. Does your jurisdiction distinguish between private and public securitisations?

Offer of securitised notes are typically structured as private placement or offer to the public. Private securitisations are not subject to disclosure requirements (unless they fall under the definition of securitisation for the purpose of the EU Regulation Securitisation). Public securitisations are subject to the disclosure requirements of the Prospectus Regulation and, under certain circumstances, may be subject to the prudential supervision of the CSSF (see paragraph 9 below).

9. Are there registration, authorisation or other filing requirements in relation to securitisations in your jurisdiction (either in relation to participants or transactions themselves)?

Upon the creation of a securitisation vehicle, a distinction should be made between regulated and unregulated vehicles. This distinction will be relevant notwithstanding the form of the vehicle, either as a company or as a securitisation fund. Under Article 19 of the Securitisation Law, a Luxembourg securitisation vehicle which intends to issue securities to the public on a continuous basis must be authorised by the CSSF. Based on the CSSF FAQ, it is generally considered that on a continuous basis means in the administrative practice of the CSSF more than three issues of securities to the public per year. There is no public offering provided the securities are issued only to professional investors, or with a minimum subscription amount of EUR 125,000 per investor or as a private placement. In practice, vehicles which are intended to have an unregulated activity only will be advised to clarify this in their corporate objects clause. Conversely, vehicles which are intended to be regulated by the CSSF should refer to such activity in their articles of association and their incorporation will be conducted in close discussion with the CSSF. The incorporation of a regulated vehicle will require the filing of documents with the CSSF for the purpose of authorisation, a list of which is provided by an annex to the CSSF FAQ. These relate mainly to the vehicle, its management and shareholding structure, the various types of securities to be issued, the financing and auditing of the vehicle and at least a three-year business plan and an overview of the contemplated commissions, charges and projected income of the vehicle. The regulated securitisation vehicle must also provide the CSSF with the information and documents listed under the CSSF FAQ 17, such as the issue documents, financial reports, information on any change of service provider, half-year reports with the listing of the issued notes and must obtain the prior approval of the CSSF before changing the management, the external auditors and the shareholding structure. On the contrary, the creation of an unregulated securitisation vehicle in the form of a company or of a fund will not imply any specific registration or filing in addition to the registration and filing of its articles of association with the trade and companies register in Luxembourg nor any authorisation procedure with the CSSF.

During the life of the securitisation vehicle, the "transparency" reporting obligations provided by article 7 of the EU Securitisation Regulation will apply to those transactions, which qualify as a securitisation for the purpose of, and as defined in, Article 2 (1) of the EU Securitisation Regulation. From a Luxembourg law perspective, the most distinctive criterion, being the existence of tranching defined under the EU Securitisation Regulation as the feature that "*the subordination of tranches determines the distribution of losses during the ongoing life of the transaction or scheme*" entails that some vehicles, which are carrying out a securitisation activity under the broader definition of the Securitisation Law, will not fall within the ambit of the filing requirements under the EU Securitisation Regulation because they do not constitute a securitisation as defined in such EU Securitisation Regulation. The EU Securitisation Regulation was complemented by the Luxembourg law dated 16 July 2019 (the **2019 Law**) which, though it does not create any further transparency requirements, designates the CSSF as the competent Luxembourg authority to receive the information required under Article 7 of the EU Securitisation Regulation. As per the EU Securitisation Regulation, "securitisation special purposes entities" must make available to the competent authority, on a quarterly basis, information on their qualifying securitisations with regard to the underlying exposures, the underlying documentation that is essential for the understanding of the transactions, the transaction summaries, investor reports, inside information and significant events. These transparency obligations are set out in article 7. 1 of the EU Securitisation Regulation, which applies in all Member States.

For statistical purposes, Luxembourg securitisation vehicles have an obligation to perform a quarterly and annual reporting of their total assets and of their transactions to the Luxembourg central bank (*Banque centrale du Luxembourg*). This obligation, which is further set out in the circulars n°2009/224 and 2014/236 issued by the Luxembourg central bank, will not apply provided (i) the vehicle complies with its obligations to publish its financial statements and (ii) its total assets (*total du bilan*) are lower than a certain threshold (set since 2017 at EUR 70 million).

There are no other registration, authorisation or filing requirements for other participants of securitisation transactions.

10. What are the disclosure requirements for public securitisations?

If the public securitisation falls under the scope of the Prospectus Regulation and it is not subject to an exemption therein, then a prospectus should be drawn and approved in accordance with the framework set out by the Prospectus Regulation. In particular, the prospectus should provide disclosure of the information required under Annex 9 and Annex 19 of the Commission Delegated Regulation (EU) 2019/980 supplementing the Prospectus Regulation (the **PR Regulation**).

There are no disclosure requirements under the Securitisation Law.

11. Does your jurisdiction require securitising entities to retain risk? How is this done?

There are no risk retention requirements under the Securitisation Law.

Article 5 of the EU Securitisation Regulation requires that the originator, sponsor or original lender of a "securitisation" (as defined therein) shall retain, on an ongoing basis, a material net economic interest in the securitisation transaction of no less than 5%.

12. Do investors have regulatory obligations to conduct due diligence before investing?

The Securitisation Law does not provide a regulatory obligation for investors to conduct due diligence before investing in a securitisation position. However, in practice, such obligation will arise in the following circumstances.

First, in relation to securitisation transactions, which qualify as a securitisation under the EU Securitisation Regulation, institutional investors are required by Article 6 of the EU Securitisation Regulation to perform a minimum due diligence involving several verifications. Prior to holding the securitisation position, institutional investors must verify that the originator or original lender has established and actually applies "sound and well-defined criteria" in the granting of the credits, which constitute the underlying exposures and that it is compliant with the risk retention and transparency requirements imposed by the EU Securitisation Regulation for all qualifying securitisations. They must also carry-out a due diligence assessment which enables them to assess the risks involved. Once they are holding the securitisation position, institutional investors are also bound by ongoing due diligence requirements (i) to establish appropriate written procedures that are proportionate to the risk profile of the securitisation position, (ii) to perform stress tests on the cash flows, the collateral of the underlying and the liquidity of the sponsor, as the case may be, (iii) to ensure internal management reporting and (iv) to be able to demonstrate to the CSSF upon request that they have a comprehensive and thorough understanding of the securitisation position and exposures and of the credit quality of the sponsor, as the case may be.

Second, some further due diligence obligations may arise as a result of an investment strategy or specific guidelines agreed between the investor and its clients on behalf of whom the investment is made. They may also arise as a result of the regulatory status of the investor itself.

13. What penalties are securitisation participants subject to for breaching regulatory obligations?

Article 18 of the 2019 Law, implementing articles 32 to 34 of the EU Securitisation Regulation, provides the administrative sanctions that may be imposed by the CSSF in case of breach by a sponsor, an originator or a securitisation vehicle of the requirements applicable to it under the EU Securitisation Regulation. Article 32 of the EU Securitisation Regulation provides for minimum sanctions that the Member States had to introduce in their national law. The 2019 Law implements this minimum level of sanctions, being the issue of a public statement specifying the identity of the person concerned and the nature of the infringement, a temporary ban on management functions for the management of the legal person, administrative pecuniary sanctions up to twice the amount of the advantage gained from the breach, or up to EUR 5,000,000 or, for a legal person, up to ten per cent of its net turnover of the last financial statements and a temporary ban for an entity not notifying securitisations constituting EU Securitisation securitisations. In addition, the CSSF can impose administrative pecuniary sanctions against persons, who obstruct the exercise of its supervisory powers.

In addition, the Securitisation Law itself, being the national legal framework, contains sanctions which may be imposed by the CSSF on securitisation vehicles.

Under Article 25 of the Securitisation Law, the CSSF may take sanctions against a regulated securitisation vehicle which does not comply with the provisions of the Securitisation Law. These sanctions are administrative, non-pecuniary sanctions. In particular, these sanctions may result in the prohibition to issue securities, or the suspension of their listing, or the appointment of a provisional administrator for the securitisation vehicle and, more importantly, the withdrawal of the CSSF licence. This last sanction is in practice a significant inducement to comply with the Securitisation Law, because the CSSF will consequently remove the relevant securitisation vehicle from the list of authorised regulated securitisation vehicles and will be entitled consequently to request the public prosecutor to pursue the forced liquidation of the securitisation vehicle before the district court dealing with commercial matters (the *Tribunal d'arrondissement*) (respectively under Article 21 and Article 39 of the Securitisation Law).

The CSSF may further impose upon the directors, managers and officers of regulated securitisation vehicles (and their liquidators in case of a voluntary liquidation), a pecuniary sanction of EUR 125 to 12,500 in the event they refuse to provide the CSSF with financial reports or other requested information or where such documents prove to be incomplete, inaccurate or false, or if the existence of any other serious irregularity is established.

14. Are there regulatory or practical restrictions on the nature of securitisation SPVs?

The Securitisation Law allows securitisation vehicles to be set up either in the form of a fund or in the form of a company. For both types of securitisation vehicles, Luxembourg law offers a great deal of flexibility. Hence, there are no actual regulatory or practical restrictions on the nature of securitisation vehicles.

Securitisation funds can be legally structured either as co-ownership(s) or as fiduciary estate(s), which option will be specified in their management regulations. While securitisation funds structured as co-ownerships will, in addition, be governed by the Luxembourg civil code, the very specific civil law rules pertaining to undivided co-ownerships (*indivision*) are expressly excluded by Article 6 (4) of the Securitisation Law. The purpose of this exclusion is, in practice, to avoid the unanimous decision-making rules applying to undivided co-ownerships under the civil code. Securitisation funds which have been organised as a fiduciary estate will, in addition, be governed by a specific Luxembourg law dated 27 July 2003 on trust and fiduciary agreements, as amended. Both types of securitisation funds are managed by a management company. The only practical restriction in their respect is that their structuring will need specific attention to avoid the risk of qualification as an alternative investment fund. While solutions exist to avoid such qualification, which mainly relate to the types of securities issued, the absence of a defined investment policy and the absence of active management, a tailored and cautious drafting of the management regulations of the securitisation fund will be crucial.

Securitisation companies may, under Article 6 (1) of the Securitisation Law, be set up as a public limited liability company (*société anonyme*), a corporate partnership limited by shares (*société en commandite par actions*), a private limited liability company (*société à responsabilité limitée*) or a co-operative company organised as a public limited company (*société cooperative organisée comme une société anonyme*) only.

15. How are securitisation SPVs made bankruptcy remote?

The insolvency remoteness of securitisation vehicles is achieved through the use of statutory or contractual limited recourse and non-petition clauses in the contractual, issuance and incorporation documentation.

Limited recourse clauses provide that the rights of the investors and creditors of the securitisation vehicle or of its compartments are limited to the assets of such vehicle and compartments. These clauses are associated with non-petition clauses, whereby the investors and creditors of the vehicle or its compartments undertake not to start insolvency proceedings against the vehicle once the assets allocated to the vehicle or the relevant compartments have been realised but there is a shortfall. In practice, non-petition clauses sometimes consist in an undertaking not to make any claim for a certain period of time, rather than an absolute and permanent undertaking.

As limited recourse and non-petition clauses could be seen as contrary to general principles of civil law, their validity is expressly admitted and confirmed by the Securitisation Law, which Articles 62 and 64 provide respectively that "*(1) The rights of the investors and of the creditors are limited to the assets of the securitisation undertaking. Where such rights relate to a compartment or have arisen in connection with the creation, the operation or the liquidation of a compartment, they are limited to the assets of that compartment. (2) The assets of a compartment are exclusively available to satisfy the rights of investors in relation to that compartment and the rights of creditors whose claims have arisen in connection with the creation, the operation or the liquidation of that compartment.*" and that "*(1) The articles of incorporation, the management regulations of a securitisation undertaking and any agreement entered into by the securitisation undertaking may contain provisions by which investors and creditors accept to subordinate the maturity or the enforcement of their rights to the payment of other investors or creditors or undertake not to seize the assets of the securitisation undertaking nor, as the case may be, of the issuing or acquisition vehicle, and not to petition for bankruptcy thereof or request the opening of any other collective or reorganisation proceedings against them. (2) Proceedings initiated in breach of such provisions shall be declared inadmissible.*".

16. What are the key forms of credit support in your jurisdiction?

Under Luxembourg law, credit support can take various forms, from the most traditional forms of contractual undertakings pertaining to civil contract law to a more recent, highly creditor-friendly financial collateral regime.

First, the Luxembourg law dated 5 August 2005 on financial collateral arrangements, as amended provides for various techniques to grant collateral in guarantee for financial debts, namely pledges, transfers of title for security purposes (including by way of fiduciary transfer) and repurchase agreements. The collateral under these arrangements can take the form of any "*financial instruments and claims*". A variety of assets may consequently be used as financial collateral. Typical collateral will take the form of shares, bonds, intercompany receivables, bank accounts and securities accounts, without prejudice to more peculiar sorts of collateral such as insurance receivables and the capital commitments of the investors in a fund.

Second, the entire range of *in rem* securities under civil law may also be granted, such as commercial pledges, inventory pledges (*gage sur fonds de commerce*) or mortgages over real estate property.

Third, the Luxembourg civil code provides an entire regime for suretyships (*cautionnements*), but also recognises the enforceability of other personal securities such as autonomous guarantees, comfort letters or other *sui generis* personal undertakings. In addition, the law on professional payment guarantees dated 10 July 2020 (the "**Professional Guarantee Law**") introduced a new form of flexible professional payment guarantee, which may be adapted to the specific transaction, with the provisions agreed by the parties receiving full recognition under Luxembourg law, without risk of recharacterisation. The Professional Guarantee Law was introduced specifically for securitisation and structured finance transactions.

Fourth, the use of derivatives such as credit default swaps and other hedging instruments is also possible.

Finally, Luxembourg law accepts, under certain conditions, the use of subordination as a means to enhance the position of a party granting credit to another. In particular, the Securitisation Law expressly acknowledges the validity of subordination clauses in the context of securitisation transactions.

17. How may the transfer of assets be effected, in particular to achieve a 'true sale'? Must the obligors be notified?

Under Article 55 (1) of the Securitisation Law, the assignment of an existing claim to a securitisation vehicle becomes effective between the parties and against third parties as from the moment the assignment is agreed on, unless the contrary is provided for in such agreement. Under Article 56 (1) of the same law, the claim assigned to a securitisation vehicle becomes part of its property as from the date on which the assignment becomes effective. There exists, under article 1690 of the Luxembourg civil code, a requirement to notify the obligor of the assignment. However, a failure to comply with this requirement does not make the assignment void, neither between the parties nor as against third parties. Only, pursuant to Article 56 (3) of the Securitisation Law, "*the assigned debtor is validly discharged from its payment obligations by payment to the assignor as long as it has not gained knowledge of the assignment.*"

Most importantly, the assignment of future claims to a securitisation entity is possible provided that the future claim can be identified as being part of the assignment at the time it comes into existence. The Securitisation Law provides, in this respect, a very protective regime, which ensures a very high legal certainty with respect to the sale. Indeed, under Article 55 (3) of the same law, when the relevant future claim comes into existence, the assignment becomes effective between parties and against third parties *as from the moment the assignment had been agreed on*, notwithstanding the opening of bankruptcy proceedings or any other collective proceedings against the assignor before the date, on which the claim comes into existence.

It is also worth noting that under certain conditions, Article 57 of the Securitisation Law will consider the assignment as valid even though the assignment of the receivable was prohibited by the agreement, under which the receivable arose.

18. In what circumstances might the transfer of assets be challenged by a court in your jurisdiction?

As a principle, this may not happen except as a result of legal rules which are not specific to securitisation transactions, such as the rules of consent or contract formation. The Securitisation Law creates a particularly strong protection of the validity and of enforceability of assignments of receivables to a securitisation vehicle, as described above.

This is without prejudice, though, to a challenge which would be based on a foreign law governing the receivable and its assignment. Indeed, as provided by Article 58 of the Securitisation Law, "*the law governing the assigned claim determines the assignability of such claim, the relationship between the assignee and the debtor, the conditions under which the assignment is effective against the debtor and whether the debtor's obligations have been validly discharged.*".

19. Are there data protection or confidentiality measures protecting obligors in a securitisation?

There are not, in Luxembourg, any specific principles applying to debtors in the context of a securitisation. As in other Member States, data protection is ensured by the direct application of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (the **GDPR**). In practice, where a securitisation implies a transfer of personal data to the securitisation entity, this issue is dealt with through two alternative means: the first is to obtain the consent of the data subject *ab initio* when the receivable is created; the second is the recourse to a mechanism of data trustee, where only those information which are strictly necessary to the securitisation issuer are communicated to it, until a default occurs under the receivable. This type of mechanism is often used in cases of securitisation of consumer receivables.

20. Is the conduct of credit rating agencies regulated?

Regulation (EC) no 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, as amended from time to time (and most recently by Regulation (EC) no 462/2013 of the European Parliament and of the Council) applies directly in Luxembourg. Some of its features have been implemented into Luxembourg law by the law dated 28 October 2011 implementing Regulation (EC) No 1060/2009. There is no additional regulation with respect to the conduct of credit rating agencies in Luxembourg.

21. Are there taxation considerations in your jurisdiction for originators, securitisation SPVs and investors?

Withholding tax

As a matter of principle, there is no withholding tax in Luxembourg on payments of all items of income from capital other than dividends. In particular, Luxembourg does not apply any withholding tax on interest paid by one of its residents to a Luxembourg non-resident (unless such interest is not at arm's length or paid under a profit participating bond/security). The withholding tax exemption also covers dividend payments made by securitisation companies or funds on shares.

By way of exception, an individual beneficial owner of interest or similar income made or ascribed by a paying agent (in the sense of the law of 23 December 2005, as amended, the **Relibi Law**) established in Luxembourg to an individual beneficial owner who is a resident of Luxembourg, will be subject to a withholding tax of currently 20%. Such a withholding tax will be in full discharge of income tax if the beneficial owner is an individual acting in the course of the management of his/her private wealth (the **20% Withholding Tax**). Responsibility for the withholding of such tax will be assumed by the Luxembourg paying agent.

An individual beneficial owner of interest or similar income, who is a resident of Luxembourg and acts in the course of the management of his/her private wealth, may opt for a final 20% Withholding Tax when he/she receives or is deemed to receive such interest or similar income from a paying agent established in an EU Member State (other than Luxembourg) or in a state of the European Economic Area (which is not an EU Member State).

There is currently no guidance or specific rule under Luxembourg generally accepted accounting principles (**Luxembourg GAAP**) which recharacterises a discount or a deferred purchase price as interest. However, it should be noted that a repayment above the discounted price would be fully taxable unless such sale at a discount would be structured in a tax-efficient way.

VAT

A securitisation vehicle should be considered as a taxable person according to Circular No. 723 issued by the Luxembourg Value Added Tax Administration (*Administration de l'enregistrement et des domaines*). Should the purchaser be considered as a taxable person in Luxembourg, the sale of goods or services would generally be subject to a value added tax (**VAT**) at rates typically lower than those of Luxembourg's neighbours (14% and 17%). However, transactions (except those related to collection of receivables) and negotiations related to receivables, as well as management of securitisation vehicles located in Luxembourg, are exempt from VAT.

Pursuant to article 44 1 d) of the Luxembourg law dated 12 February 1979 on value added taxes (the **VAT Law**), management services rendered to a securitisation vehicle are exempt from VAT.

The concept of "management" of securitisation vehicles is quite vague. In addition to the management of the portfolio (by the securitisation company itself, a management company or fiduciary representative), most administrative services should benefit from the VAT exemption.

Corporate income tax and municipal business tax

Regarding corporate income tax and municipal business tax, the tax treatment depends on the corporate form of the purchaser.

A. Securitisation vehicle organised as a corporate entity

A securitisation vehicle organised as a corporate entity with either its statutory seat or central administration in Luxembourg, is fully liable to corporate income and municipal business taxes at an aggregate tax rate of 24.94% (irrespective of the vehicle's activity and possible appointment of a servicer or collection agent).

Even though a securitisation company is fully taxable, its commitments made by the purchaser to remunerate its investors qualify as interest on debt (even if paid as return on equity).

As of 1 January 2019, however, due to the transposition into Luxembourg tax law of the interest deduction limitation rule (article 168*bis* of the Luxembourg Income Tax Law (**LITL**)), deduction of interest qualifying as "exceeding borrowing costs" is limited up to the higher of:

1. 30% of the company's EBITDA (defined as the total net income increased by the exceeding borrowing costs, depreciation and amortisation); or
2. EUR 3 million.

The EUR 3 million thresholds is to be calculated on the company level and not on the compartment level only.

Exceeding borrowing costs are defined as the amount by which the deductible borrowing costs of a taxpayer exceeds taxable interest revenues and other economically equivalent taxable income of the taxpayer.

Interestingly, although borrowing costs are defined, there is no definition of "interest revenues and other equivalent taxable income". Based on the recommendation of the Luxembourg Chamber of Commerce, practitioners take the view that such term should be interpreted by analogy with the definition of borrowing costs, and encompass by symmetry the items listed under the latter definition (e.g., these include, but are not limited to: payments under profit participating loans; imputed interest on instruments such as convertible bonds and zero-coupon bonds; amounts paid under alternative financing arrangements, such as Islamic finance, the finance cost element of finance lease payments, capitalised interest included in the balance sheet value of a related asset, or the amortisation of capitalised interest; amounts measured by reference to a funding return under transfer pricing rules; notional interest under derivative instruments or hedging arrangements related to an entity's borrowings; certain foreign exchange gains and losses on borrowings and instruments connected with the raising of finance guarantee fees for financing arrangements; and arrangement fees and similar costs related to the borrowing of funds).

Exceeding borrowing costs not deductible in a tax period can be carried forward indefinitely. The same applies to the excess interest capacity, which cannot be used in a given tax period (however, this is for a period of maximum of five years).

Exemptions to the interest deduction limitation rule have been introduced, as follows:

- Grandfathering: debt instruments concluded before 17 June 2016 shall not fall within the scope of the interest limitation rule to the extent that they have not been amended. The amount of exceeding borrowing costs shall be computed as if no amendments have taken place.
- Stand-alone entity: stand-alone entities are exempt from the scope of application of the interest deduction limitation rule. A stand-alone entity is defined as a taxpayer that is not part of a consolidated group for financial accounting purposes and had no associated enterprise. The legal definition of "associated enterprise" as per art. 168ter LITL encompasses any entity – and not company – in which the taxpayer holds, directly or indirectly, 50% or more of voting, capital or profit interests, or an individual or entity that holds, directly or indirectly, 50% or more of voting, capital or profit interest in the taxpayer. In case of hybrid mismatches involving a financial instrument, the threshold of 50% is replaced by a threshold of 25%. Furthermore, in the category of associated enterprises are included entities that are part of the same consolidated group for financial accounting purposes as the taxpayer, enterprises in which the taxpayer has significant managerial influence or enterprises that have a significant managerial influence over the taxpayer. As a result, a securitisation company held by a trust, a foundation or a stichting should not be considered as a stand-alone entity under the interest deduction limitation rule. As per the Luxembourg law of 20 December 2019 implementing ATAD 2 into Luxembourg domestic law (the **ATAD 2 Law**), the so called "acting together" concept was introduced in the framework of associated enterprises to circumvent abusive splitting of holding of participations to third parties, into several persons or entities. Following this concept, an individual or an entity who acts together with another individual or entity in respect to the voting rights or capital ownership in another entity shall be treated as holding the other's individual or entity's participation.
- Financial undertaking: this is outside the scope of the interest deduction limitation rule,

any entity which falls within the definition of a "financial undertaking" (under article 168*bis* LITL), is included in this definition, *inter alia*, (i) alternative investment funds in the meaning of the AIFM Directive 2011/61/EU, and (ii) EU securitisation vehicles that fall within the scope of article 2(2) of EU Regulation 2017/2402. Although this exemption is welcome, out of the 1,215 existing Luxembourg securitisation vehicles, only a minority would fall within the scope of the aforesaid EU Regulation.

To summarise the impact of the interest limitation rule on securitisation transactions, securitisation companies with interest-bearing assets and liabilities should not be significantly affected. However, securitisation companies receiving income from funds or shares, repackaging and, to a certain extent, non-performing loans might be impacted by such rule. Such structures should be assessed on a case-by-case basis in order to determine whether restructuring is required (it should be noted that the absence of definition of an "interest revenue" leaves room for interpretation on certain kinds of hybrid income (e.g., capital gains on non-performing loans)).

In case of a hybrid mismatch arrangements, securitisation companies might be also affected by the ATAD 2 Law extending the rules to neutralize hybrid mismatch effects. Hybrid mismatch arrangements can be briefly summarised as taking advantage of the different tax treatment of an entity or a financial instrument under the laws of two different jurisdictions to achieve either a double deduction or a deduction without inclusion. Such hybrid mismatch must arise either between associated enterprises of within a structured arrangement. The ATAD 2 Law has introduced a legal definition of structured arrangement being an arrangement involving a hybrid mismatch where the mismatch outcome is priced into the terms of the arrangement or an arrangement that has been designed to produce a hybrid mismatch outcome, unless the taxpayer or an associated enterprise could not reasonably have been expected to be aware of the hybrid mismatch and did not share in the value of the tax benefit resulting from the hybrid mismatch. In case a securitisation company issues a financial instrument with a hybrid character and the potential to be treated differently for tax purposes in the involved jurisdiction, the respective documentation would need to be carefully drafted in order to prove that no structured arrangement was intended.

On a separate note, securitisation companies may obtain tax residency certificates from the Luxembourg tax authorities to benefit from the European directives and Luxembourg's important tax treaty network.

B. Securitisation funds

Securitisation funds should arguably be considered as transparent as investment funds for Luxembourg tax purposes. Hence, they are not liable to corporate income tax and municipal business tax, and remain unaffected by the interest deduction limitation rule. It should be noted that reverse hybrid mismatch rules applying to tax transparent vehicles will be introduced in Luxembourg as of the fiscal year 2022. However, we deem that securitisation funds should not be significantly affected by these rules.

Stamp duty

According to article 52 (1) of the Securitisation Law, all agreements entered into in the context of a securitisation transaction, as well as all other deeds relating to such transaction, are exempt from registration formalities if they do not have the effect of transferring rights pertaining to Luxembourg real estate, aircraft or ships. However, they may be presented for registration, in which case they will be subject to a fixed charge of EUR 12.

22. To what extent does the legal and regulatory framework for securitisations in your jurisdiction allow for global or cross-border transactions?

The Luxembourg legal framework for securitisations has a particular focus on legal issues arising in the context of global or cross-border transactions and to protect the interests of investors, sponsors and originators. Continuously driving innovation, Luxembourg has grown to become a key hub for securitisation and structured finance vehicles, which can blend perfectly into an international structure with non-Luxembourg elements.

23. To what extent has the securitisation market in your jurisdiction transitioned from IBORs to near risk-free interest rates?

Most recent securitisation transactions in Luxembourg providing for benchmark interest rates have been taking into account the provisions of the Regulation (EU) 2016/1011 on indices used as benchmarks (the **Benchmark Regulation**). In particular, the issue documentation of such notes would typically provide for (i) fallback provisions to change the base rate of the notes and the related transaction documentation from the pre-determined benchmark to an alternative base rate under certain circumstances broadly related to such benchmark dysfunction or discontinuation and (ii) risk factors addressing the specific risks related to the transition from one benchmark to another one.

On 24 December 2019, the CSSF published a *communiqué* regarding the Benchmark Regulation addressed to entities subject to the CSSF supervision, including regulated securitisation vehicles, requiring such entities to set up fallback provisions.

24. How could the legal and regulatory framework for securitisations be improved in your jurisdiction?

The Luxembourg legal framework on securitisation is very sophisticated, flexible and recognised by the market. A very limited number of certain underlying assets may, however, require a more active management than a simple buy and hold strategy to address the common practice of international capital markets and securities transactions. In this respect, a clarification, either in the form of a CSSF FAQ or amendment to the Securitisation Law, would be welcome.

25. To what extent has the impact of COVID-19 changed practice and regulation in relation to securitisations in your jurisdiction?

COVID-19 had no specific impact on practice and regulation related to securitisation transactions in Luxembourg, save for the general rules relating to noteholders' meetings, which have been supplemented (latest by the Luxembourg law dated 23 September 2020, as amended) to allow resolutions in writing and online meetings in lieu of physical ones, despite any contrary provision in the terms and conditions of the notes. Such measures are temporary and contingent on the pandemic.

At European level, it is an important political sign that EU institutions are currently considering amendments to the EU Securitisation Regulation to help the recovery from the COVID-19 pandemic. Luxembourg, with its vibrant securitisation market and best in class legal framework, can play an important role to provide the necessary flow of funding to the real economy in the aftermath of the COVID-19 pandemic.

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