



# LUXEMBOURG SECURITISATION VEHICLES

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# LUXEMBOURG, A PRIME LOCATION FOR SECURITISATION

Luxembourg has emerged as a prime location for securitisation vehicles (SVs) due to an attractive and flexible environment.

## An attractive tax environment

The tax regime applicable to SVs depends on their legal form.

SVs incorporated under the form of a company have the following main tax features:

- **Tax neutrality**  
SVs are subject to corporate income tax. However, their taxable basis including income from securitized assets is reduced by payments of interests or dividends made to securities holders. As a result, their taxable basis is likely to be nil or close to nil.
- **No Withholding tax**  
There is no withholding tax on dividend distributions, payments on fund units and interest payments on debt securities except for the potential application of a 35% withholding tax on interest payments made to individuals or so-called residual entities, within the meaning of the EU Savings Directive, resident in the EU or in certain associated territories unless the beneficiary of such payments has opted for the procedure of exchange of information or for the "tax certificate procedure".
- **Exemption from Net Worth Tax**
- **No capital/stamp duty**  
Only a fixed capital duty of €75 is due upon incorporation of the SV and any further capital increase. For regulated SVs, additional registration duties are due to the CSSF.
- **Daily management services rendered to an SV are generally VAT exempt**
- **Eligibility to Luxembourg double tax treaties network subject to confirmation beforehand with the Luxembourg tax authorities**
- **Possibility to obtain advanced tax clearances**  
SVs created as a securitisation fund are considered as transparent vehicles, i.e. their income or distributions are not subject to taxation.

## A flexible legal environment

SVs benefit from a flexible legal and regulatory environment. Here is a list of the main features:

- **Supervision by the CSSF in limited circumstances**  
Only SVs issuing securities to the public on a continuous basis are subject to the supervision of the CSSF.
- **Eligibility of all asset classes, all investors and all types of instruments to be issued**
- **No risk diversification required**
- **Possibility to set-up:**
  - multi-compartment structures
  - true sale or synthetic transactions
  - two-level structures (acquisition and issuing vehicles)
  - bankruptcy remote structures

# LUXEMBOURG SECURITISATION VEHICLES

The Law on securitisation of 22 March 2004 (hereinafter referred to as the "Law") purports to encourage securitisation business in Luxembourg with a comprehensive, flexible and competitive legal, regulatory and fiscal framework.

## Definition

The Law defines securitisation as "an operation by which a securitisation vehicle acquires or takes on, directly or through the intermediary of an other entity, the risks connected to claims, to other goods, or to liabilities of third parties or inherent to all or part of the activities carried out by third parties by issuing securities whose value or return depends on such risks".

## Different forms of SVs

Securitisation vehicles are defined by the law as being entities, which carry out a securitisation in its entirety or participate in such transaction by assuming all or part of the securitised risks (the "**acquisition entities**") or by issuing securities for the purpose of the financing thereof (the "**issuing entities**"), subject to their constitutive documents, management regulations or issuing documents specifying that they are subject to the provisions of the Law.

Under the Law, it is possible to create SVs as a securitisation company or as a securitisation fund.

### Securitisation Companies

Securitisation Companies can take the form of a *société anonyme*, a *société à responsabilité limitée*, a *société en commandite par actions* or a *société coopérative* organised as a *société anonyme*.

The minimum share capital for an S.A. is EUR 31,000.- and for an S.à r.l. EUR 12,500.-.

### Securitisation Funds

A securitisation fund does not have a legal personality and may be organised either as one or several co-ownership funds or one or several fiduciary estates and will be managed by a management company.

## SVs with compartments

In order to create appropriate segregation of assets and liabilities, the articles of incorporation of a securitisation company may give the board of directors the right to create one or more compartments each corresponding to a distinct part of the securitisation company's assets.

A securitisation fund may also be split into several compartments, each of which having different applicable rules and different characteristics or investment strategies customized to specific investors profile.

The rights of recourse of investors and creditors are usually limited to the assets of the SV. However, where such rights relate to a specific compartment or have arisen in connection with the creation, the operation or the liquidation of a specific compartment, their recourse is limited to the assets of the relevant compartment.

Between investors, each compartment is treated as a separate entity, unless otherwise provided for in the constitutional documents of the SV.

An SV may issue securities the value or yield of which is linked to specific compartments.

Each compartment of an SV may be liquidated separately, without triggering the liquidation of another compartment.

## Regulated SVs

Luxembourg SVs are in principle unregulated entities and are not subject to any authorization or prudential supervision, unless the SV issues securities to the public on a continuous basis. In the latter case, the SV must be approved by the Luxembourg regulator of the financial sector (the "CSSF").

According to the CSSF, an SV is issuing securities on a continuous basis if it makes "more than three issues per year".

Regarding the second criteria, i.e. issuing securities to the public, an issue of securities to professional clients as defined in Annex II of Directive 2004/39/EC of April 21, 2004 on markets in financial instruments (the "MiFI Directive" or "MiFID") is not considered by the CSSF as an issue to the public for the purpose of the Law.

Securities issued with a nominal value of at least EUR 125,000 each, are considered as not being issued to the public.

The assessment of the above criteria must take into account distribution channels used for the placement of the securities (look-through approach). A SV can also be created in a contractual form as a securitisation fund. Indeed, the subscription of securities by an institutional investor or financial intermediary with a view to a subsequent placement of such securities with the public does constitute an offer to the public for the purpose of the Law (CSSF – Securitisation FAQ – Question Nr. 4).

Whereas unregulated SVs are not required to appoint a custodian bank, regulated SVs have to entrust the custody of their liquid assets and securities to a credit institution established or having its registered office in Luxembourg.

In a two-level structure where the acquisition entity is located in Luxembourg and the issuing entity is located in another jurisdiction, the acquisition entity does not become subject to prudential supervision even if the issuing entity is issuing securities to the public on a continuous basis.

## Reporting obligations and accounting

An SV has to notify the Luxembourg Central Bank of its existence and to report certain data on a quarterly basis in accordance with (i) the Regulation (EC) Nr 24/2009 of the European Central Bank of December 19, 2008 concerning statistics on the assets and liabilities of financial vehicle corporations engaged in securitisation transactions (the "**ECB Regulation**") and (ii) the circular 2009/224 of the Luxembourg Central Bank dated June 8, 2009 on statistical data collection for securitisation vehicles.

SVs must prepare and publish annual accounts, which must be audited by at least one statutory auditor (*réviseur d'entreprises*), which, in the case of a regulated SV, must be approved by the CSSF.

Multi-compartment structures must in their financial statements include a breakdown of the assets and liabilities per compartment.

## Securitisable risks

All risks related to the holding of all movable or immovable assets, tangible or intangible assets as well as those risks resulting from obligations undertaken by third parties or inherent to all or part of their activities may serve for securitisation purposes.

Securitisation vehicles can take on present or future risks by acquiring the underlying assets from their originator (true sale), by way of guaranteeing the obligations of the originator, by using credit derivatives such as credit default swaps (synthetic transactions) or in any other manner.

The Law states that securitisation transactions are not qualifying as insurance activities.

The Law contains particular provisions in relation to the transfer of claims to an SV. The transfer of claims becomes effective vis-à-vis the parties and third parties as of the moment the transfer is agreed upon between the parties (unless stipulated otherwise). Unless otherwise agreed, all guarantees and securities attached to the claim are transferred upon transfer of the claim and are opposable without further formalities to third parties.

The law governing the assigned claims determines its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and whether the debtor's obligations have been discharged.

The Law clarifies also that the law determining the opposability to third parties of an assignment is the law of the State where the assignor is located, thereby filling a gap left by the Rome Convention of 19 June 1980.

## Financing

The acquisition of the securised risks by an SV has to be financed through the issuance of securities (*valeurs mobilières*), the value or yield of which is linked to such risks.

There is no definition of securities (*valeurs mobilières*) in the Law. In accordance with Luxembourg conflicts of law rules referring to the *lex contractus* in respect of debt securities and to the *lex societatis* in respect of equity securities instruments, which are considered as securities under their governing law or which constitute securities within the meaning of MiFID are considered as securities for the purpose of the law (CSSF – Securitisation FAQ – Question Nr. 10).

An SV may use leverage by borrowing funds from third parties (i) on a temporary basis, in order to pre-fund the acquisition of the relevant assets while awaiting to securitize those assets (warehousing) within an appropriate timeframe by taking into account the market conditions or (ii) on a permanent but limited basis, to cover liquidity shortfalls.

In each case, the issuance documentation must disclose any additional risks for the investors that could potentially result from such borrowings.

## Management of assets

The role of the SV must be limited to the administration of financial flows linked to the securitisation transaction itself and to the prudent-man management of the securitised risks.

An SV may manage its assets itself or entrust third parties (including the originator) with the management of its assets (such as the recovery of its claims) without such persons having to apply for a license under the Luxembourg law of 5 April 1993 on the financial sector as amended.

An SV cannot assign its assets, except in accordance with the provisions set forth in its constitutional documents.

In order to provide additional security for securitisation structures, an SV is allowed to grant security over its assets only for the purpose of guaranteeing its undertakings in the framework of the securitisation structure or in favour of the investors, their fiduciary representative or an issuing vehicle involved in the securitisation structure.

Security interests and guarantees created in violation of this restriction are void by operation of law.

## Bankruptcy remote structures

The Law expressly confirms the validity of limited recourse and non-petition clauses and indicates that proceedings in violation of these clauses will be dismissed by the courts.

In case an SV delegates the recovery of its claims to a third party, the sums recovered are protected from the bankruptcy of any such third party and the SV has the right to recover such sums.

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