Roadmap to securitisation in Luxembourg

Over twenty years of success

Luxembourg has long been at the forefront of the trends and evolutions of the financial markets. It grew to become a well-established financial centre in Europe with worldwide recognition, known as one of the world's safest and most business friendly environments. Sponsors, investors and other market participants benefit in Luxembourg from comprehensive and stable regulatory and tax frameworks, within an environment shaped by European Union directives and regulations.

The innovative and practical framework initiated over twenty years ago by the Luxembourg law of 22 March 2004 on securitisation (the **Securitisation Law**) has ever since quickly adapted to the evolving business and legal practices surrounding securitisation transactions. From its inception, the purpose of the Securitisation Law was to create a comprehensive, flexible, efficient and reliable legal and tax framework for securitisation transactions carried out through a Luxembourg securitisation undertaking (*organisme de titrisation*) (a **Securitisation Undertaking**). The Securitisation Law allows for the securitisation of almost any kind of risks and assets. The number of Securitisation Undertakings created in Luxembourg has been steadily growing since the entry into force of the Securitisation Law, now reaching over 1,550 currently active, the majority of them established as multi-compartment structures, securitising over EUR 490 billion of assets.

The Securitisation Law underwent a major update in March 2022 with a view to modernising the Luxembourg securitisation environment and making it even more attractive and flexible to financial market participants.

Starting point: setting-up a Securitisation Undertaking

Company vs. Fund

A Securitisation Undertaking can be structured as a company or as a fund.

When taking the form of a **company**, the Securitisation Undertaking is typically established 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 cooperative company organised as a public limited liability company (*société coopérative organisée comme une société anonyme*). The minimum share capital for a *société anonyme* is EUR 30,000 and for a *société à responsabilité limitée* EUR 12,000. With the recent changes introduced in the Securitisation Law, alternative tax transparent company structures are available, such as a general partnership (*société en nom collectif*), a common limited partnership *(société en commandite simple*) and a special limited partnership (*société en commandite spéciale*). It is also now possible to structure the Securitisation Undertaking as a simplified limited company (*société par actions simplifiée*).

A Securitisation Undertaking can also be set up as a **securitisation fund**. A securitisation fund is a *sui generis* type of funds created by the Securitisation Law. Unlike securitisation companies, securitisation funds do not have legal personality or their own assets. Rather, a securitisation fund consists of a pool of assets managed by a management company. Securitisation funds allow asset managers to offer an investment to potential investors, while running the Securitisation Undertaking through the general partner.

The Securitisation Law allows securitisation funds to be structured in two ways: (i) as a co-ownership of assets (*co-propriété*) in which the investors have a right *in rem* over a portion of the relevant underlying securitised assets, or (ii) as a fiduciary property (in the sense of the Luxembourg law of 27 July 2003 on trust and fiduciary contracts, as amended). In the latter case, the management company will hold the securitised assets as fiduciary property (which will be segregated from its own assets). Such structures may be of interest due to (i) their flexibility in terms of set up and (ii) the fact that they are carved-out from the application of certain rules and regulations, notably from a tax perspective. A securitisation fund can be created with a minimum number of fund units with the transactions financed through the issuance of financial instruments.

Securitisation Undertakings structured either as securitisation companies or as securitisation funds need to register with the Luxembourg trade and companies register.

The constitutional documents of a Securitisation Undertaking must specify that the Securitisation Undertaking is subject to the Securitisation Law and whether the Securitisation Undertaking is set up as a regulated or unregulated vehicle. Customarily, the constitutional documents of Securitisation Undertakings also include limited recourse and non-petition provisions (specifically envisaged by the Securitisation Law and deviating from standard Luxembourg law provisions).

Definition of securitisation

A Securitisation Undertaking is required to engage in “securitisation” within the meaning of the Securitisation Law. “Securitisation” is defined in the Securitisation Law as the transaction by which “a securitisation undertaking (*organisme de titrisation*) acquires or assumes, directly or indirectly 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 financial instruments (*instruments financiers*) or contracts, in whole or in part, any form of loan, the value or yield of which depends on such risks”.

It is worth noting that this definition is much broader than the traditional understanding of securitisation, notably securitisation as it is understood in the relevant EU regulations, making the Luxembourg securitisation regime among the most flexible and efficient regimes worldwide.

Securitisable risks and assets

A wide variety of risks can be securitised: risks relating to the holding of assets, whether movable or immovable, tangible or intangible, as well as risks resulting from the obligations assumed by third parties or relating to all or part of the activities of third parties.

Securitisation transactions in Luxembourg traditionally include commercial loans, mortgage loans, car lease receivables, commercial receivables, consumer credits, non-performing loans, commodities, intellectual property rights, income from operating businesses, etc. – in theory, pretty much any kind of asset can be securitised. The Securitisation Law further explicitly confirms that tangible assets (such as commodities, aircrafts or ships) can be securitised, even if the securitisation is made indirectly through a dedicated vehicle (look-through approach). The Securitisation Law does not impose risk diversification requirements.

Loan origination: an ideal lending platform

The Commission of the Financial Sector (*Commission de Surveillance du Secteur Financier*) (the **CSSF**) confirmed in its Frequently Asked Questions guidance on securitisation issued in 2013 (the **CSSF FAQ**) that a Securitisation Undertaking may originate loans in specific circumstances, and this operation will be regarded as a securitisation, provided that:

(a) the Securitisation Undertaking does not use funds collected from the public to engage in credit activities for its own account; and

(b) the issuance documentation of the financial instruments:

   (i) clearly defines the assets on which the service and the repayment of the loans granted by the Securitisation Undertaking will depend; and

   (ii) clearly describes (1) the borrowers and/or (2) the criteria for the selection of the borrowers (the rationale aiming at allowing investors to gain adequate knowledge of the risks (including credit risk) and the return on their investments at the time of issuance of the financial instruments).

The features of the loans granted by the Securitisation Undertaking will in any event need to be described in the issuance documentation.

Financing of Securitisation Undertakings

The acquisition of the securitised risks by a Securitisation Undertaking must be financed through financial instruments (*instruments financiers*) or loans, the value or yield of which depends on such risks. The Securitisation Law defines financial instruments by reference to the Luxembourg law of 5 August 2005 on financial collateral arrangements, broadening substantially the financing options to a wide array of instruments (governed by Luxembourg law or foreign law), which can have equity or debt features.

A Securitisation Undertaking can be financed partially or entirely through loans as long as the repayable amount depends on the securitised assets. This aims at aligning the Securitisation Law more closely with Regulation (EU) 2017/2402 of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation (the **Securitisation Regulation**), which does not require financing solely in the form of securities, and opens Luxembourg securitisation structures to investors that are prevented for regulatory reasons from investing into securities.

The Securitisation Law introduces an interesting legal subordination regime for different types of financial instruments that can be issued by a Securitisation Undertaking. By virtue of the Securitisation Law:

(a) shares and partnership interests will be subordinated to other financial instruments issued by the Securitisation Undertaking (or borrowings entered into by the Securitisation Undertaking);

(b) shares and partnership interests will be subordinated to beneficiary shares issued by the Securitisation Undertaking;

(c) beneficiary shares will be subordinated to debt financial instruments issued by the Securitisation Undertaking; (or borrowings entered into by the Securitisation Undertaking); and

(d) non-fixed income debt financial instruments will be subordinated to fixed rate debt financial instruments issued by the Securitisation Undertaking.

There is room for flexibility, though, as the legal subordination rules can be overridden in the constitutional documents or issuance documents.

Acquisition of securitised assets

A Securitisation Undertaking may assume the securitised risks either by acquiring the assets directly (true sale) or by acquiring a "synthetic" exposure to the assets, notably through the use of derivative agreements.

The Securitisation Law establishes a protective and specific framework around the acquisition of claims. It provides that the law governing the assigned claims governs the assignability of such claims, the relationship between the assignee and the debtor and the conditions subject to which the assignment will be effective against the debtor. Such governing law also determines the conditions for the valid discharge of the debtor's obligations. The Securitisation Law provides that the assignment of an existing claim to, or by, a Securitisation Undertaking becomes effective between the parties and against third parties as from the moment the assignment is agreed upon among the parties (unless agreed otherwise). It is also possible to assign future claims not yet in existence at the time of the entry into the securitisation transaction documents. Under Luxembourg law, the assignment of claims to, or by, a Securitisation Undertaking entails the transfer of any underlying guarantees and security interests relating to such claims. The Securitisation Law also provides that the law of the State of the assignor applies in respect of the opposability of the assignment of claims towards third parties.

Management of securitised assets

Whilst the principle remains the passive management of the securitised assets by the Securitisation Undertaking – the guiding rule is that its role should be limited to the management of the financial flows of the securitisation transaction and "prudent man" management of the securitised assets – active management (by the Securitisation Undertaking or a third party) is allowed for Securitisation Undertakings in respect of risks linked to an underlying portfolio of bonds, loans or other debt instruments, to the extent the financial instruments are not issued to the public. This means that the Luxembourg securitisation environment is also suitable to host CDO/CLO structures (implying an active management of the underlying debt/loans portfolios), which have historically been set up in other jurisdictions.

Granting of security interests and guarantees

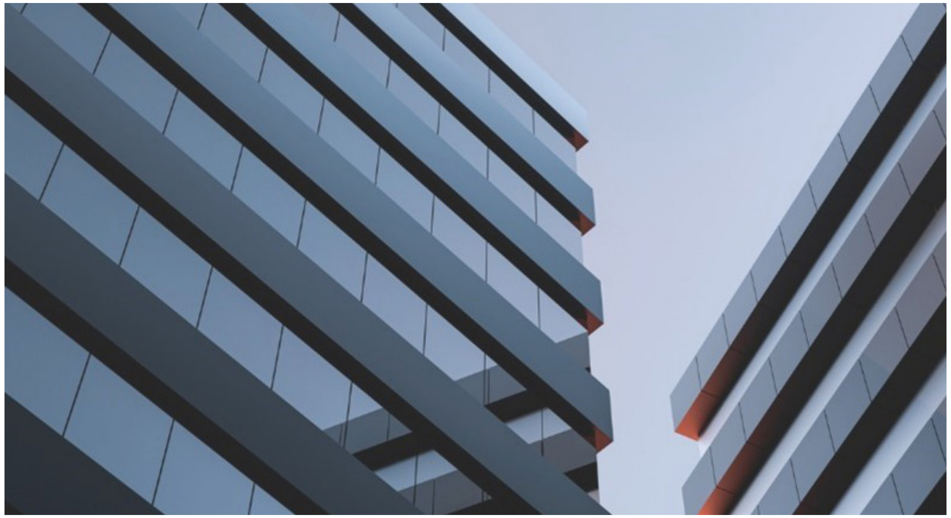
The Securitisation Law allows a Securitisation Undertaking to grant security interests over its assets to parties involved in a securitisation transaction but who are not direct creditors of the Securitisation Undertaking.

Enhancing insolvency remoteness

The Securitisation Law explicitly protects limited recourse and non-petition clauses which are inherent to securitisation transactions. Such clauses are typically included in the constitutional documents of the Securitisation Undertaking and in the contractual documentation with its investors and third parties. The effectiveness of such clauses contributes to the insolvency remote character of Securitisation Undertakings.

To increase their insolvency remoteness, Luxembourg securitisation structures often also feature an orphan vehicle (typically a Dutch *stichting*) as sole shareholder of the Securitisation Undertaking company, thereby ensuring a clean and remote segregation between the securitisation structure and the other parties involved (e.g. originators, sponsors, etc.).

In addition, the Securitisation Law recognises the validity of contractually agreed subordination clauses (such as waterfall provisions).



Compartments

One of the main special features of the Luxembourg securitisation framework is that the estate of a Securitisation Undertaking can be segregated into different compartments, each representing a distinct part of the assets and liabilities of the Securitisation Undertaking.

Compartments do not have a legal personality distinct from the Securitisation Undertaking, meaning that towards third parties the compartments are represented by the Securitisation Undertaking acting in respect of the relevant compartment(s).

In this framework, the right of recourse of the investors and creditors is as a rule limited to the assets of the relevant compartment (only). Thus, where rights relate to a specific compartment or have arisen in connection with the creation, operation or liquidation of a specific compartment, the recourse of the relevant investors and creditors will be limited to the assets of that specific compartment.

Compartments can be liquidated separately without affecting the status of the Securitisation Undertaking as a whole nor any of its other compartments. The creation of one or more compartments is entrusted to the management body of the Securitisation Undertaking, thereby ensuring a competitive and straightforward set-up process.

The treatment of profits and losses, as well as distributions of equity-financed compartments is addressed in the Securitisation Law, creating an optional regime to be included in the constitutional documents of the Securitisation Undertaking, and enabling the approval of specific financial statements per compartment or the distributions of profit on a compartment basis (without reference to the financial situation of the Securitisation Undertaking as a whole).

Drive carefully: regulatory aspects

Supervision

The vast majority of Securitisation Undertakings are unregulated entities not subject to any prior authorisation or prudential supervision from the CSSF (there are currently fewer than 30 regulated Securitisation Undertakings in Luxembourg). A Securitisation Undertaking will need to be authorised by the CSSF only if more than three times per year, it issues financial instruments to non-professional clients, the denomination of which instruments is less than EUR 100,000 per title and which instruments are not offered by way of private placement (cumulative criteria). Taking those criteria in turn:

(i) *Three times per year:* For multi-compartment Securitisation Undertakings, this threshold is assessed at the level of the Securitisation Undertaking on a consolidated basis and not at the level of each compartment.

(ii) *To non-professional clients:* professional clients need to be understood in the sense of MiFID II.

(iii) *Denomination:* the threshold for financial instruments has been reduced from EUR 125,000 to EUR 100,000 to match the EU Prospectus Regulation exemption.

(iv) *Public offering:* how the financial instruments will be offered is also relevant. The concept of 'private placement' is not defined in the Securitisation Law and the available CSSF guidance indicates that this should be assessed on a case-by-case basis.

Authorised Securitisation Undertakings need to be authorised and will be supervised by the CSSF. The application process entails the approval of the constitutional documents, shareholders and management of the Securitisation Undertaking by the CSSF. Whilst unregulated Securitisation Undertakings are not required to appoint a custodian bank, regulated Securitisation Undertakings must entrust the custody of their liquid assets and securities to a credit institution established or having its registered office in Luxembourg. Regulated Securitisation Undertakings are required to comply with ongoing and periodic reporting and disclosure obligations towards the CSSF. Failure to apply for authorisation by the CSSF is subject to various sanctions.

External audit

The annual accounts and financial statements of both regulated and unregulated Securitisation Undertakings need to be audited by one or more approved independent auditors (*réviseur d'entreprises agréé*). For multi-compartment Securitisation Undertakings, each compartment must be separately detailed in the financial statements. Financial information relating to each compartment must be clearly identifiable and the approved independent auditor (*réviseur d'entreprises agréé*) must assess the proper drawing up of the annual accounts in light of the fair view principle both at the level of the Securitisation Undertaking as a whole and separately at the level of each compartment.

Securitisation Regulation

The Securitisation Regulation essentially consolidates the legal framework governing European securitisations and lays down the rules for issuing simple, transparent and standardised (**STS**) securitisation transactions – principally aiming at establishing a more risk sensitive prudential framework for STSs. The Securitisation Regulation notably imposes due diligence requirements for institutional investors and transparency requirements to give investors better access to information on the underlying exposures. The Securitisation Regulation also imposes risk retention requirements pursuant to which either the originators, the sponsors or the lender will be directly required to ensure compliance with the risk retention obligations.

A key criteria to determine whether a securitisation transaction falls within the scope of the Securitisation Regulation derives from the so-called "tranching criteria". The Securitisation Regulation defines "securitisation" as a transaction or scheme, whereby the credit risk associated with an exposure or pool of exposures is tranched, having all of the following characteristics:

- payments in the transaction or scheme are dependent upon the performance of the exposure or the pool of exposures; and
- the subordination of tranches determines the distribution of losses during the ongoing life of the transaction or scheme.

Consequently, a transaction would only fall in the scope of the Securitisation Regulation if the securitised credit risk is tranched.

The Securitisation Regulation further defines "tranche" as:

(a) a contractually established segment of the credit risk associated with an exposure or a pool of exposures;

(b) where a position in the segment entails a risk of credit loss greater than or less than a position of the same amount in another segment; and

(c) without taking account of credit protection provided by third parties directly to the holders of positions in the segment or in other segments.

Given the applicable regulatory framework, it has become essential to analyse on a case-by-case basis whether the Securitisation Regulation could apply or not to a contemplated securitisation transaction.

Keep in mind: the definition of "securitisation" in the Securitisation Law has a broader meaning than the definition of "securitisation" in the Securitisation Regulation. As a result, a large number of securitisations carried out by Securitisation Undertakings will not fall within the scope of the Securitisation Regulation (notably unitranche securitisations and securitisations of non-credit risk related assets) whilst still being able to benefit from the favourable framework and rules offered by the Securitisation Law.

Reporting to Luxembourg Central Bank

Circular 2014/236 of the Luxembourg Central Bank on statistical data collection for securitisation vehicles requires qualifying Securitisation Undertakings to register with the Luxembourg Central Bank upon incorporation and to comply with the applicable ongoing and periodic reporting obligations towards the Luxembourg Central Bank (e.g. quarterly and monthly reports).

AIFMD

Directive 2011/61/EU of 8 June 2011 on Alternative Investment Fund Managers (the **AIFMD**) and the Luxembourg law of 12 July 2013 on alternative investment fund managers, as amended (the **AIFM Law**) do not apply to securitisation special purpose entities (**SSPE**). An SSPE is defined in the AIFMD as an entity whose sole purpose is to carry on a securitisation or securitisations within the meaning of the European Central Bank's Regulation (EC) No. 24/2009 of 19 December 2008.

Securitisation Undertakings that do not meet the criteria to be considered an SSPE will need to assess on a case-by-case whether they could be considered an alternative investment fund and be subject to the AIFM Law.

Securitisation Undertakings issuing collateralised loan obligations (CLOs) are generally considered as being engaged in securitisation transactions and, as a result, are not subject to the AIFM Law. In contrast, entities which primarily act as "first" lenders (i.e. originating new loans) are not considered as being engaged in securitisation transactions and will thus fall within the scope of the AIFM Law.

Pursuant to the CSSF FAQ, notwithstanding their qualification as SSPE or not (for the purpose of the AIFMD), Securitisation Undertakings that only issue debt instruments do not constitute alternative investment funds for the purpose of the AIFM Law. Similarly, it is the view of the CSSF that irrespective of the fact whether a Securitisation Undertaking is considered an SSPE for the purpose of the AIFMD, a Securitisation Undertaking that is not managed in accordance within a "defined investment policy" does not constitute an alternative investment fund.

NPL Law

Securitisation Undertakings generally fall within the scope of the Luxembourg law of 15 July 2024 on the transfer of non-performing loans (transposing Directive (EU) 2021/2167 on credit servicers and credit purchasers) (the **NPL Law**), unless they are SSPEs within the meaning of the Securitisation Regulation.

Securitisation Undertakings within the scope of the NPL Law which acquire non-performing loans (**NPLs**) concluded with consumers must appoint a credit servicer, a credit institution established in the Union, or a non-credit institution subject to supervision by a competent authority of a Member State for the performance of credit servicing activities in respect of the NPLs. They must notify the CSSF of the identity and address of any credit servicer and enter into a credit servicing agreement including certain mandatory provisions outlined in the NPL Law.

In their interactions with borrowers, the Securitisation Undertakings as credit purchasers are required to act in good faith, fairly and professionally. Furthermore, the Securitisation Undertakings have ongoing information obligations towards the CSSF relating to any transfers.

The NPL Law does not create any additional obligations on the investors investing or financing the Securitisation Undertaking.

Sustainable Securitisations

Sustainable securitisations can be interesting for sponsors and investors looking to adopt a sustainable strategy, diversify their portfolio, or enhance their reputation.

The simplest concept of sustainable securitisation is a securitisation where the securitised assets can be considered sustainable, according to a certain metric. To date such sustainable securitisations have not yet been subjected to a separate regulatory regime, however:

- certain regulations could apply indirectly (e.g. Regulation (EU) 2020/852 known as the Taxonomy Regulation, Regulation (EU) 2019/2088 known as SFDR and Directive (EU) 2022/2464 known as CSRD) as holders of securities issued in the framework of a securitisation may need to receive confirmations on whether the underlying assets are taxonomy-aligned and will require certain information to remain compliant;
- if a securitisation is an STS securitisation within the meaning of the Securitisation Regulation and the underlying assets are residential mortgages, auto loans or auto leases, some information must be published (where available) on the environmental performance of such assets or on the principal adverse impacts of such assets; and
- the European Green Bonds Standard includes a regime specific for debt securities issued as part of a securitisation in the sense of the Securitisation Regulation which wish to benefit from an EuGB label.The concept of a sustainable securitisation for the purposes of this regime is primarily focused on a green use of proceeds by the originator (understood by reference to the Taxonomy Regulation), although there are also certain requirements relating to the securitised assets (e.g. the exclusion of loans financing fossil energies).

Be efficient: tax aspects

Income tax

Securitisation Undertaking structured as a company

A Securitisation Undertaking (incorporated as a company) is subject to Luxembourg corporate income tax and municipal business tax on its income at a current overall rate of 23.87% (for a company located in the city of Luxembourg).

According to the Securitisation Law and subject to the ATAD 1 rules described hereafter, all commitments (*engagements*) of a Securitisation Undertaking *vis-à-vis* investors and creditors are considered deductible expenses for tax purposes, thereby ensuring that a Securitisation Undertaking is close to tax neutral. The foregoing rule applies irrespective of whether the investors hold equity or debt securities issued by the Securitisation Undertaking.

A Securitisation Undertaking is further exempt from net wealth tax, save for an annual minimum tax. The annual minimum net wealth tax amounts to EUR 535 for a balance sheet total up to and including EUR 350,000; EUR 1,605 for a balance sheet total exceeding EUR 350,000 up to and including EUR 2 million; EUR 4,815 for a balance sheet total exceeding EUR 2 million.

Securitisation Undertakings are fully taxable Luxembourg-resident companies and consequently should be viewed as "liable to tax" in the sense of tax treaties and EU directives and qualify as resident under such tax treaties and EU directives.

Securitisation Undertaking structured as a fund

A Securitisation Undertaking (structured as a fund) is transparent for tax purposes; hence it will not be subject to corporate income tax (subject to the ATAD 2 rules described hereafter), municipal business tax or the minimum annual net wealth tax. A Securitisation Undertaking will also not be subject to the subscription tax payable by investment funds. A Securitisation Undertaking will as a rule not be considered a resident under tax treaties and EU directives and therefore tends not to be entitled to applicable tax treaty benefits and EU directives.

ATAD

Luxembourg has implemented the European Anti-Tax Avoidance Directives (Directive (EU) 2016/1164 of 12 July 2016 – ATAD 1 and Directive (EU) 2017/952 of 29 May 2017 – ATAD 2).

Following the transposition of ATAD 1, Luxembourg tax regulations encompass interest limitation rules applicable to taxable companies. Because of these rules, the ability of Securitisation Undertakings (incorporated as companies) to deduct interest expenses and economically equivalent expenses (borrowing costs) may be limited. Borrowing costs in excess of taxable interest income and economically equivalent expenses constitute exceeding borrowing costs. Exceeding borrowing costs, can be deducted in the tax year in which they are incurred only up to the higher of (i) 30 percent of the earnings before interest, tax, depreciation and amortisation (EBITDA) or (ii) EUR 3 million. Exemptions to the restrictions shaped under the interest limitation rules apply, *inter alia* for alternative investment funds. The carve-out for Securitisation Undertakings falling in the scope of the Securitisation Regulation is expected to be repealed following the decision of the EU Commission to refer Luxembourg to the Court of Justice of the European Union for failing to correctly transpose ATAD 1 in this respect.

Further, entities that are part of a consolidated group for financial accounting purposes may, upon request, deduct the entirety of their exceeding borrowing costs incurred if they can demonstrate that the ratio of their equity to its total assets is to be considered equal to or greater than the equivalent ratio of the group to which it belongs.

Lastly, single entity groups – entities that (i) are not required to be part of the consolidated reporting for financial reporting purposes and (ii) have one or more associated enterprises, may also deduct the entirety of their exceeding borrowing costs if they can demonstrate that their equity to total assets ratio is at least equal to or greater than the ratio of the group. Such ratio is considered equal to the ratio of the single entity group if it is lower than 2%.

Anti-reverse hybrid rules have been enshrined in the Luxembourg tax regulations following the transposition of ATAD 2. By application of the anti-reverse hybrid rules, entities that are transparent for Luxembourg tax purposes (i.a. a Securitisation Undertaking structured as a fund) may be subjected to corporate income tax for the portion of their net income not otherwise taxed in Luxembourg or abroad if one or more non-resident investors holding aggregating interests of 50 per cent or more of the voting rights, capital participations or profit participation rights of such entities, are located in a jurisdiction or jurisdictions which view such entities as taxable.

Securitisation Undertakings should carefully assess possible drawbacks deriving from ATAD in light of the nature of their securitised assets (i.a. receivables, participations), income deriving therefrom (i.a. interest income, gains), their funding and their investors.

Withholding tax

Payments of interest and dividends by a Securitisation Undertaking (whether a company or a fund) to its shareholders and investors do not trigger withholding tax in Luxembourg.

VAT

A standard VAT rate of 17% applies in Luxembourg.

The management services provided to a Securitisation Undertaking benefit from a VAT exemption. This ensures that VAT leakage is therefore reduced to a minimum in Luxembourg securitisation structures. It is generally held that collateral management fees and investment advisory fees fall within this exemption, provided that they are specific and essential to the management of the Securitisation Undertaking.

Securitisation Undertakings should carefully assess the applicability of the VAT exemption prior to implementation of the contemplated services supplied to them and the corresponding fees flow.

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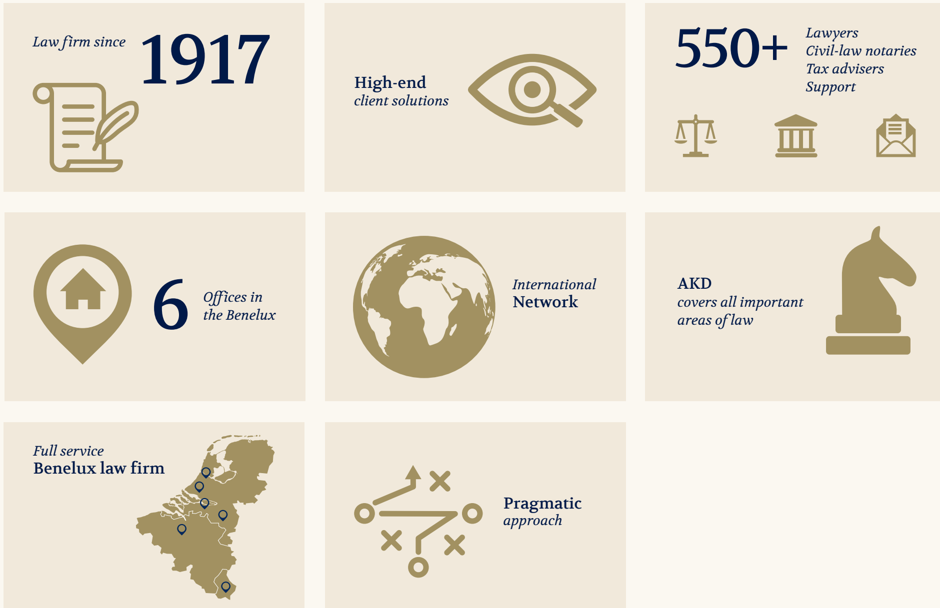

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