Structured Finance & Securitisation

Contributing editor
Patrick D Dolan

2018

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Structured Finance & Securitisation 2018

Contributing editor
Patrick D Dolan
Norton Rose Fulbright US LLP

Reproduced with permission from Law Business Research Ltd
This article was first published in March 2018
For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

First published 2015
Fourth edition
ISBN 978-1-78915-073-5

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Preface

Structured Finance & Securitisation 2018

Fourth edition

Getting the Deal Through is delighted to publish the fourth edition of *Structured Finance & Securitisation*, which is available in print, as an e-book, and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Luxembourg, Spain and Turkey.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Patrick D Dolan of Norton Rose Fulbright US LLP, for his continued assistance with this volume.

GETTING THE DEAL THROUGH

London
February 2018

Luxembourg

Peter-Jan Bossuyt, Thomas Bedos and Denis Van den Bulke

Vandenbulke

General

1 What legislation governs securitisation in your jurisdiction? Has your jurisdiction enacted a specific securitisation law?

On 22 March 2004, the Luxembourg legislator enacted a legal framework specifically dedicated to govern risk securitisation transactions in their broadest meaning and entities carrying out securitisation activities (Securitisation Law).

In addition, various other national or European regulations may apply depending on the activity of the securitisation vehicle and its structuring. The alternative investment fund manager law of 12 July 2013 may also apply from time to time, in particular if the securitisation vehicle does not qualify as an ad hoc securitisation.

2 Does your jurisdiction define which types of transactions constitute securitisations?

The Securitisation Law (article 1) defines a securitisation transaction whereby a securitisation undertaking acquires or assumes, directly or through another undertaking, the 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 risk.

To qualify as a 'Securitisation undertaking' pursuant to the Securitisation Law, an undertaking must carry out the securitisation in full, and participate in such a transaction by assuming all or part of the securitised risks, or by the issuance of securities to ensure the financing of the securitisation transaction and must, whether in his articles of incorporation, management regulations or issue documents, provide that it is specifically subject to the Securitisation Law.

The Securitisation Law allows the securitisation of a large variety of risks that can relate to all types of assets. The securitisation undertaking may assume the risks by acquiring the assets but also through other forms of risk transfers. Accordingly, besides the traditional true sale securitisation to a securitisation undertaking, the Securitisation Law also authorises the 'synthetic' securitisation that only transfer the risks linked to the assets or whole or partial business securitisation.

3 How large is the market for securitisations in your jurisdiction?

Luxembourg is one of the most attractive markets for securitisation in Europe. Contrary to the European or global securitisation market trends of the past decade, Luxembourg has not been badly hit by the turmoil following the global financial crisis of 2008.

By the end of March 2017, more than 1,770 securitisation vehicles were created under the Securitisation Law. This is leading to a number of 1,222 active securitisation vehicles representing 4,500 to 5,000 active compartments at the end of the first quarter of 2017. Among these existing securitisation vehicles only 34 are regulated by the Luxembourg financial regulator (CSSF). As of 31 December 2016, the volume of securitised assets through those regulated securitisation vehicles amounted to approximately €35.2 billion and represented an increase in securitised assets of €4.9 billion over 2015. Most of the created securitisation vehicles have several compartments. These compartments enable a securitisation undertaking to create distinct parts of their assets and liabilities. Each asset of a compartment is only available to satisfy the rights of the investors investing into that compartment. Each compartment is considered, in principle, as a true separate entity.

Regulation

4 Which body has responsibility for the regulation of securitisation?

Only securitisation undertakings that issue securities to the public on a 'continuous basis' are subject to prior regulatory authorisation to carry out their activities and to regulatory ongoing supervision (regulated securitisation vehicles). The CSSF is the body responsible for granting the authorisation and effecting that supervision.

The issuance of securities is deemed to be carried out on a continuous basis when the securitisation undertaking performs more than three issues to the public per year. The number of issues to be taken into consideration is the total number of issues of all compartments of the securitisation undertaking.

In order to qualify that an issuance of securities is made to the public, the CSSF relies on the following criteria:

- they are not deemed made to the public if:
  - issues are made only to professional clients;
  - issues have a nominal value equalling or exceeding €125,000; and
  - issues are distributed as private placements; and
- the listing of an issue on a regulated market does not systematically mean that the issue is to be considered as a public issue.

The 'public' nature of the issues is assessed by the CSSF, in particular in reference to the targeted investors to which the securities are offered.

5 Must originators, servicers or issuers be licensed?

Apart from the requirements set out under question 4, no specific securitisation-related licence is required from originators, servicers or issuers involved in securitisation transactions. With respect to the custodian of a CSSF-authorised securitisation undertaking, see question 13.

6 What will the regulator consider before granting, refusing or withdrawing authorisation?

If a securitisation vehicle qualifies as a regulated securitisation vehicle (see question 4), the CSSF will review and approve its articles of incorporation or, as applicable, its management regulations or its management company, or both. During the authorisation procedure, the CSSF shall also review a list of documents relating to the securitisation vehicle and operates a thorough screening of its board of directors, human resources and financing before delivering its approval.

The Luxembourg financial regulator shall verify during the authorisation procedure that the securitisation undertaking has an appropriate organisation and can rely on adequate human and material resources to perform properly securitisation activities, in compliance with the Securitisation Law.

The reputation and experience of the members of the administrative, management and supervisory bodies of the securitisation undertaking or, as applicable, its management company shall be examined in order to ascertain that they have the appropriate capacities to manage or be involved in the securitisation structure.

7 What sanctions can the regulator impose?

If the CSSF determines that a regulated securitisation vehicle is not complying with the provisions of the Securitisation Law, its management regulations, articles of incorporation or the agreements relating to the issuance of its securities, or that the rights attached to the securities it has issued may be impaired, it may summon the securitisation undertaking to remedy the situation within a delay that it sets.

If such summons is not complied with, the Luxembourg financial regulator may:

- publish its conclusion in case of non-compliance;
- prohibit any issuance of securities;
- request the suspension of the listing of its issued securities;
- request the competent judge to appoint a provisional administrator acting in lieu of its management; or
- withdraw its authorisation.

In the event that directors, managers and officers of a regulated securitisation vehicle refuse to provide the CSSF with the financial reports and the requested information, or where such documents prove to be incomplete, inaccurate or false, or if the existence of any other serious irregularity is established, the CSSF may impose upon them fines ranging from €125 up to €12,500.

8 What are the public disclosure requirements for issuance of a securitisation?

No public disclosure requirement is provided under the Securitisation Law for securitisation undertakings that do not have to be authorised by the CSSF. They remain, however, subject to the customary obligation applicable to all legal entities to file their annual accounts with the Luxembourg Companies and Trade Registry.

In respect of the regulated securitisation vehicles, there is no other specific public disclosure requirement. They are, however, officially listed as a regulated securitisation entity by the CSSF. In addition, the CSSF may publicly advert their failure to comply with their legal obligations, if they do not remedy in due course as described under question 7.

9 What are the ongoing public disclosure requirements following a securitisation issuance?

There are no public disclosure requirements following a securitisation issuance.

Eligibility

10 Outside licensing considerations, are there any restrictions on which entities can be originators?

There are no restrictions on originators other than those set out in questions 4 and 5.

11 What types of receivables or other assets can be securitised?

The scope of types of receivables or assets that can be securitised under Luxembourg law is considerable. In addition to receivables and assets, whether movable or immovable, tangible or intangible; all risks resulting from the obligations assumed by third parties, or relating to all or part of the activities of third parties, may be securitised.

12 Are there any limitations on the classes of investors that can participate in an offering in a securitisation transaction?

There are no limitations on the classes of investors that can participate in an offering of securities, unless it is intended to be a private offering. If the offering is intended to be public, the rules of the law of 10 July 2005 relating to the prospectus for securities, as amended (Prospectus Law) will apply and need to be complied with.

13 Who may act as custodian, account bank and portfolio administrator or servicer for the securitised assets and the securities?

Regulated securitisation vehicles must entrust the custody of their liquid assets and securities with a credit institution established or having its registered office in Luxembourg. There is no such requirement for non-authorised securitisation entities.

14 Are there any special considerations for securitisations involving receivables with a public-sector element?

There are no specific considerations to be taken into account regarding the features of the receivables themselves (other than possible transfer restrictions). However, public-sector entities may raise their sovereign immunity in case of enforcement for payment of the receivable. Furthermore, certain official notifications, publications or procedures may need to be made for effecting the transfer of the receivables of public institutions.

Transactional issues

15 Which forms can special purpose vehicles take in a securitisation transaction?

Securitisation undertakings may be set up under the form of incorporated or unincorporated entity (ie, a fund managed by an incorporated management company). Securitisation companies would be generally set up as:

- limited liability either under the form of public limited company;
- a corporate partnership limited by shares;
- a private limited liability company; or
- a cooperative company organised as a public limited company.

The choice for an incorporated or unincorporated form depends mainly on the level of tax transparency that investors and securitisation vehicles wish to obtain.

16 What is involved in forming the different types of SPVs in your jurisdiction?

Depending on the type of securitisation vehicle and its regulatory status (or absence thereof), the incorporation of a plain vanilla unregulated special purpose vehicle (SPV) may be rather straightforward and be made at reasonable cost. The delay for incorporating a plain vanilla SPV, provided the know-your-client (KYC) formalities with the local banks have been satisfactorily filled out with the depositary and the bank, would not exceed 48 hours. Luxembourg banks aim to closely scrutinise securitisation operations that would not be directed to institutional investor and may be reluctant to act as depositary without a full KYC process and identification of future subscribers.

The main public documentation would consist in the articles of incorporation of the SPV. Another contractual agreement for structuring the securitisation transactions would need to be drafted and remitted to the depositary bank, such as:

- the claims purchase agreement;
- the claims risk assignment agreement; and
- the terms and conditions of the SPV securities issued to its investors.

A regulated securitisation vehicle will require approval of its offering circular by the CSSF, which requires a certain period of time.

17 Is it possible to stipulate which jurisdiction's law applies to the assignment of receivables to the SPV?

The assignment of the receivables to the SPV concerns the relationship between the originator as assignor and the SPV as assignee. At this level, it is possible to stipulate which jurisdiction's law applies to the assignment of receivables to the SPV.

For contracts entered into on or after 17 December 2009, the choice of law is governed by Regulation No. 593/2008/EC of 17 June 2008 (Rome I).

Under Rome I, the parties to a contract are free to agree that the contract be governed by the law of any country, irrespective of the law governing the receivables. The Rome Convention and Rome I allow for modification of the parties' choice only:

- where all elements of a contract are connected to a country other than the country whose law has been chosen by the parties, and that country has rules that cannot be disapplied by contract;
- to the extent that the elected law conflicts with overriding mandatory rules of Luxembourg law; or
- where the applicable foreign law is manifestly incompatible with Luxembourg public policy.

With regard to the rights of the SPV as assignee against the underlying debtor, the position differs. The liabilities (and rights) of the debtor, including the assignability of the claim and the question as to whether the claim has been discharged, will be governed by the governing law of the assigned or underlying claim (namely the receivables contract itself) pursuant to article 14(2) of Rome I.

18 May an SPV acquire new assets or transfer its assets after issuance of its securities? Under what conditions?

An SPV may acquire new assets or transfer its assets after the issuance of its securities, provided that the constitutional documents and the purchase agreement as well the documentation in relation to the securities issued to the investors allow it. An SPV may also create a new sub-fund in relation to the issue of new securities.

19 What are the registration requirements for a securitisation?

A securitisation vehicle that does not have to be authorised by the CSSF as set out under question 4 must not fulfil any securitisation specific registration requirement. As a general matter and, as for any Luxembourg commercial company, a securitisation company, either regulated or not, must be registered with the Luxembourg trade and companies' registry and file with it its articles of incorporation, annual accounts and other corporate documents.

As set out under question 6, a regulated securitisation vehicle must have its articles of incorporation or, as applicable, its management regulations or the articles of its management company, or both, reviewed and approved by the Luxembourg financial regulator. See question 6 for further details on the documents to be filed with the CSSF during the authorisation procedure of a securitisation undertaking.

Any change in the administrative, management and supervisory bodies of a regulated securitisation vehicle must be notified forthwith to the CSSF and any change in control, any replacement of its management company, as well as any amendment to the management regulations or its articles of incorporation are subject to the prior approval of the CSSF.

Each CSSF authorised securitisation undertaking must spontaneously communicate to the CSSF the reports and written comments issued by its statutory auditors in the framework of the approval of its annual accounts.

20 Must obligors be informed of the securitisation? How is notification effected?

In accordance with the Securitisation Law, the assignment of an existing claim to or by a securitisation undertaking becomes effective between the parties and against third parties as from the time the assignment is agreed upon.

However, a notification to the assigned obligor is advisable to the extent that, failing that notification, he or she would validly be discharged from their debt when paying it to the assignor.

In practice, the law governing the assignment of claims to a securitisation undertaking would frequently be a foreign law. Accordingly, the conditions for effecting the transfer and making it opposable to third-parties will be governed by that foreign law and an analysis claim by claim and obligor by obligor may be required to determine whether any notification or any other formality would apply.

21 What confidentiality and data protection measures are required to protect obligors in a securitisation? Is waiver of confidentiality possible?

The rules relating to the protection of confidentiality or personal data and banking secrecy remain applicable after the securitisation of the receivables and may restrain the transfer of information to investors or to the securitisation entity. Luxembourg data protection law requires that any individual whose personal data is stored in a database be entitled to accede to the stored information enabling him to alter or remove such information.

Furthermore, when the assignor of receivables is a credit institution, the confidential information is covered by strict banking secrecy laws, prohibiting the transfer of the information to third parties without prior consent of the concerned obligors.

22 Are there any rules regulating the relationship between credit rating agencies and issuers? What factors do ratings agencies focus on when rating securitised issuances?

The relationship between credit rating agencies (CRAs) and issuers is regulated by Regulation (EC) No. 1060/2009, as amended in May 2011 by Regulation (EU) No. 513/2011 (CRA II) (in which responsibility for the registration and ongoing supervision of EU-based credit rating agencies was transferred to the European Securities Markets Authority (ESMA) and in June 2013 by Regulation (EU) No. 462/2013 (CRA III).

CRA III introduced new measures for structured finance instruments in particular, which require, among others:

- that issuers who pay for a credit rating on a structured finance instrument will need to obtain ratings from at least two CRAs on that instrument;
- a mandatory rotation of CRAs every four years; and
- that the issuer, originator and sponsor be all jointly responsible for making specific information publicly available through a website (the European Rating Platform) established by the ESMA, on an ongoing basis.

In giving a rating to the securitisation, the CRAs disregard the creditworthiness of the originator, insofar as a properly structured securitisation should isolate the securitised assets from the originator's insolvency. Rather, the CRAs take into account factors including:

- the historic performance of the securitised assets;
- any credit enhancement, liquidity facilities and the credit standing of the administrative parties (including hedging counterparties and account banks); and
- the structure and legal integrity of the transaction.

23 What are the chief duties of directors and officers of SPVs? Must they be independent of the originator and owner of the SPV?

There is no legal requirement for the directors and officers of an SPV to be independent of the originator and owner of the SPV. However, pursuant to principles of good governance, directors have a duty to conduct the business of the SPV in accordance with its corporate purpose and laws and manage it in its best corporate interest. Even if the SPV has only one shareholder, the corporate interest of the SPV should not to be aligned to the interest of that sole shareholder and it would be advisable to appoint one or more independent directors.

24 Are there regulations requiring originators and arrangers to retain some exposure to risk in a securitisation?

Originators and sponsors are required to retain some exposure to risk. Typically, the initiator, originator or sponsor of the securitisation would retain 5 per cent risk in the securitisation operation. This would result from various prudential and regulatory obligations such as the EU's latest Capital Requirements Regulation (CRR) legislation comprising Directive 2013/36/EU and Regulation (EU) No. 575/2013 (CRR). The Regulatory Technical Standards published by the European Banking Authority on securitisation retention rules is another important regulatory source. The Alternative Investment Fund Managers Directive (Directive 2011/61/EU) and the Solvency II Directive (Directive 2009/138/EC), both as amended, also contain substantially similar requirements.

Security

25 What types of collateral/security are typically granted to investors in a securitisation in your jurisdiction?

A Luxembourg securitisation vehicle may not, by any means whatsoever, create security interests over its assets or transfer its assets for guarantee purposes, except to secure the obligations it has assumed for their securitisation or in favour of its investors, their fiduciary-representative or the issuing vehicle participating in the securitisation.

The main type of collateral granted to investors in a securitisation would be a pledge over receivables acquired by the securitisation vehicle as well as a pledge over the SPV's bank accounts. These types of assets fall under the definition of financial instruments according to the Luxembourg law of 5 August 2005 on financial collateral (Financial Collateral Law) that regulates the creation, perfection and enforcement of security interests over such assets.

Update and trends

The long-awaited EU securitisation regulation was issued on 28 December 2017 (Regulation (EU) No. 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, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No. 1060/2009 and (EU) No. 648/2012 (Securitisation Regulation) to establishing a more risk-sensitive prudential framework for simple, transparent and standardised securitisations. This framework shall apply as of 1 January 2019. The regulation shall not apply to all Luxembourg securitisations to the extent that Luxembourg SPVs do not restrict their activity to credit risk acquisition, nor issue several tranches of securities. The regulation shall therefore not affect the whole Luxembourg securitisation market that will keep its flexibility. In the future, three types of securitisation vehicles shall coexist in Luxembourg:

- the Luxembourg SPVs who are out of the scope of the EU regulation;
- the SPV who securitise credit risks and issue subordinated securities and must comply also with the requirements of the EU regulation; and
- the simple, transparent and standardised securitisation vehicle that fulfils the definition of EU securitisation and may not be subject to the Luxembourg securitisation law to the extent the regulation will directly apply to them.

The Financial Collateral Law specifically provides that a security interest over financial instruments can be granted to an agent or a trustee acting for itself or for the benefit of all investors, or both, in order to secure the claims of third-party beneficiaries, whether present or future, provided such third-party beneficiaries are determined or determinable.

The legal documentation relating to security interests over assets located in Luxembourg would be governed by Luxembourg law on the basis of the lex rei sitae principle. The pledge over claims will generally be governed by the law governing the receivable, depending on the foreign governing law. the security interest over the receivables may also be by way of a charge or an assignment for security purposes.

Luxembourg law does not provide for the creation of floating charges or debentures. This, however, does not restrict a Luxembourg company to grant a floating charge or a debenture over non-Luxembourg-located assets, which will be governed accordingly by foreign laws.

26 How is the interest of investors in a securitisation in the underlying security perfected in your jurisdiction?

Under Luxembourg law, the transfer of the possession (dispossession) of the assets over which the pledge is granted is a condition to the constitution of the pledge. Such dispossession can be done in various ways depending on the type of assets to be pledged. Dispossession is also required to make the pledge enforceable towards third parties. The law of the debtor's jurisdiction may impose further perfection or notification requirements.

A Luxembourg law-governed claims pledge agreement is perfected by the mere conclusion of the pledge agreement. However, unless the debtor, whose claims are pledged, is party to the pledge agreement (which is highly unlikely in a securitisation operation), such a pledge agreement shall be notified to or acknowledged by the debtor whose claim is pledged. Lacking such notification, the debtor of a pledged claim may validly discharge his or her obligation to the pledger as long as he or she has no knowledge of the pledge's conclusion. A Luxembourg law-governed pledge over bank accounts shall be notified to, and acknowledged by, the account bank maintaining the accounts.

27 How do investors enforce their security interest?

The Financial Collateral Law provides that security interests in relation to financial instruments can be enforced as follows (with the first option being the most common one), unless otherwise agreed by the parties at the moment of contracting. A notice prior to enforcement is not required where:

- appropriate or cause a third party to appropriate the pledged assets at a price fixed, before or after their appropriation, according to the valuation method mutually determined by the parties;
- assign or cause the assignment of the pledged assets by private sale in a commercially reasonable manner, by a sale on the stock exchange or by public auction;
- obtain a court decision ruling that the pledged assets shall remain in his or her possession up to the amount of the debt, on the basis of an expert's estimate; or
- in the case of financial instruments, appropriate these financial instruments at the market price, if they are admitted to official listing on a stock exchange located in Luxembourg or elsewhere or are traded on a recognised, functionally operational, regulated market that is open to the public.

28 Is commingling risk relating to collections an issue in your jurisdiction?

Commingling risk may be an issue in Luxembourg to the extent there is no security interest over the asset (receivable or bank account). On the other hand, any cash deposited in an account with another origin than the securitisation and pledged in favour of the investors (or their agent or trustee), will, in case of enforcement, be assumed to be for the benefit of such investors (or their agent or trustee) and other interested third parties will need to provide evidence of the non-securitisation link of such proceeds.

Taxation

29 What are the primary tax considerations for originators in your jurisdiction?

The tax neutrality of the securitisation operation is one of the key success drivers so as to optimise investors' returns and the originator's funding costs. As such, any tax levied on the securitisation vehicle or in relation to the securitisation itself would clearly increase the overall costs of the transaction and therefore reduce its effectiveness.

Consequently, a securitisation transaction must be structured on a tax-efficient basis in order to prevent any tax leakage.

In particular, all structural features of a securitisation transaction must be clearly analysed from a Luxembourg tax perspective to ensure that none of the features either lead to an additional tax burden or accelerate tax liabilities that would not have been incurred had the securitisation not taken place.

30 What are the primary tax considerations for issuers in your jurisdiction? What structures are used to avoid entity-level taxation of issuers?

Tax neutrality is a substantial element to avoid any entity taxation issue in Luxembourg (see question 29).

The securitisation vehicles are widely organised as corporate entities fully liable to corporate income tax and municipal business tax at an aggregate tax rate of 26.01 per cent in 2018. The corporate entities are in principle taxed on their net accounting profit of the year. However, securitisation SPV may reduce this taxable basis to possibly nil to the extent that any payment to investors for issued bonds or holding shares (dividends) qualify as tax deductible payments. Furthermore, no withholding tax applies on any distribution made either under the form of interest or dividends. With this technique, a Luxembourg SPV can achieve tax neutrality for the SPV and tax transparency for investors even though there are incorporated as capital companies.

However, it is advisable to undertake a planning of the cash flow so as to leave an arm's length remuneration on the securitisation vehicle and avoid triggering any tax adjustments with countries involved in the securitisation operations.

Securitisation companies may be liable to a minimum tax liability although their accounting result for the year does not reflect any profits but losses. Indeed, a minimum net wealth tax charge was introduced as from 1 January 2016 that replaced the previous provision for the minimum corporate income tax for all corporate entities having their statutory seat or central administration in Luxembourg. This minimum tax applies to companies whose sum of fixed assets, intercompany loans, transferable securities and cash at bank exceeds both 90 per cent of their total gross assets and €350,000.

31 What are the primary tax considerations for investors?

Clearly, investors seek tax neutrality, in particular to avoid taxation at the level of the Luxembourg SPV and at source of the payment of their investment income. As any income distributed by a securitisation entity qualify as interests under Luxembourg law and is therefore not subject to withholding taxes.

Any capital gain realised by the Luxembourg SPV if distributed or committed to be distributed to the investors shall be tax deductible and not subject to tax in Luxembourg. Depending on the application of a double tax treaty, dividends paid to a Luxembourg securitisation SPV should benefit from reduced withholding tax as stipulated in the treaty; and dividends received from fully taxable subsidiaries should benefit from the affiliation privilege and so not be subject to tax in Luxembourg.

However, dividends paid by a securitisation SPV to a fully taxable Luxembourg joint-stock company will not benefit from the affiliation privilege and will not benefit from an exemption in the hands of the Luxembourg company. Same treatment will apply to capital gains realised by the Luxembourg joint-stock company (amended Income Tax Act of 4 December 1967 (the Tax Act)).

If the interest payment is made for the intermediate benefit of an individual beneficial owner who is resident of Luxembourg, it may be subject to a withholding tax of 20 per cent according to the amended Luxembourg law dated 23 December 2005.

Bankruptcy

32 How are SPVs made bankruptcy-remote?

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. 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. As between investors, each compartment shall be treated as a separate entity, except if otherwise provided for in the constitutional documents.

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. They may also agree not to petition for bankruptcy nor request the opening of any other collective or reorganisation proceedings against them. Proceedings initiated in breach of such provisions shall be declared inadmissible.

33 What factors would a court in your jurisdiction consider in making a determination of true sale of the underlying assets to the SPV (eg, absence of recourse for credit losses, arm's length)?

There is no specific case law in Luxembourg in relation to true sale operations. Having said that, we assume that a Luxembourg judge would look for certain characteristics in the operation as to consider it as a true sale; namely, that the originator transfers an asset or a pool of assets through an asset sale agreement from its (originator) balance sheet to the SPV. The originator, therefore, transfers the legal and economic title to the assets to the SPV. Through subscription of the securitisation position, the security holder may receive access to the legal and economic rights of the securitised assets pool.

34 What are the factors that a bankruptcy court would consider in deciding to consolidate the assets and liabilities of the originator and the SPV in your jurisdiction?

Under Luxembourg law, the principle of separate corporate identity is upheld. Only in limited circumstances will the Luxembourg courts treat the assets of the SPV as those of the originator. Examples include where the separate legal personality of a company is being used for fraud, illegality, dishonestly placing assets beyond the reach of creditors, or where an agency or nominee relationship is found to exist.

VANDENBULKE
CORPORATE, FINANCE AND TAX LAWYERS

Peter-Jan Bossuyt **pjb@vdblaw.com**
Thomas Bedos **tb@vdblaw.com**
Denis Van den Bulke **dv@vdblaw.com**

35 Avenue Monterey
L-2163
Luxembourg

Tel: +352 26 38 33 50
Fax: +352 26 38 33 49
www.vdblaw.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

ISBN 978-1-78915-073-5