

Luxembourg Securitisation Vehicles Could be Removed from ATAD I Exemption

On 14 May 2020, the European Commission ("EC") sent formal notice letters to advise Luxembourg and Portugal to remove the exemptions from interest limitation rules currently available to certain securitisation vehicles ("SVs"), claiming that the respective provisions of applicable domestic legislation go beyond the allowed exemptions under Article 4 of the EU Anti-Tax and Avoidance Directive I ("ATAD I").¹

Notably the EC's announcement states that the current legislation allows for unlimited deductibility of interest for certain SVs, which in the EC's interpretation, do not qualify as "financial undertakings" as defined under ATAD I.

The announcement also advised that, should Luxembourg and Portugal not amend their legislation in the next four months, the EC might send a reasoned opinion to the Luxembourgish and Portuguese authorities.

Current Exemptions for Luxembourg SVs

Luxembourg's ATAD I interest limitation rules provide for an exemption to Luxembourg SVs that qualify as "securitisation special purpose entities" within the meaning of Regulation (EU) 2017/2402 ("Securitisation Regulation"), which imposes *inter alia*, certain disclosure and

transparency obligations, as well as restrictions regarding retail investors.

Luxembourg ATAD I Interest Limitation Rules

Pursuant to ATAD I, Luxembourg implemented rules on the limitation of interest tax deductibility to 30% of EBITDA or EUR 3,000,000 (whichever is higher) to the extent the taxpayer has "excess borrowing costs".

Excess borrowing costs are generally defined as the amount of tax-deductible borrowing costs incurred by a taxpayer, which exceed taxable interest income and other economically equivalent income. Borrowing costs are broadly defined and include interest expense on all forms of debt and other economically equivalent costs incurred with respect to financing.

Both ATAD I and relevant Luxembourg legislation provide for several exemptions including "financial undertakings" as specifically defined and listed. Notably, Luxembourg's domestic law extends the definition of financial undertakings to securitisation special purpose entities (subject to the aforementioned Securitisation Regulation) whereas the ATAD I Directive itself does not specifically mention these types of entities.

¹ Council Directive (EU) 2016/1164).

Impact on Applicable Exemptions to AIFs and Other "Financial Undertakings"

This EU notification will not impact the other ATAD I interest limitation exemptions available to "financial undertakings" including alternative investment funds, UCITS, insurance and reinsurance companies, and credit institutions.

Impact on Existing Luxembourg SVs

Luxembourg SVs in corporate form that earn income other than interest could be impacted by this development. The removal of the exemption would result in a limitation of tax-deductible commitment payments to 30% of EBITDA for such entities. Those SVs currently relying on the exemption should contact their tax and legal advisers for further guidance.

For further information or advice as to how this development may affect current structures with Luxembourg SVs, please contact one of the below contacts or your usual Maples Group contact.

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May 2020

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