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SUMMARY NOTE ON LUXEMBOURG SECURITISATION VEHICLES

This memorandum outlines the key features of the law of 22nd March 2004 on securitisation, as amended, (the "Law") and of the reporting obligations applying to Luxembourg securitisation vehicles pursuant to Regulation (EC) 24/2009 adopted by the European Central Bank[1].

This note is a summary and provides only a basic introduction to the large body of the legislation and practice in this area. It is not exhaustive does not address all possible circumstances. Many areas in this matter are complex and specific legal advice should therefore be sought where appropriate.

The contents may need to be further specified and/or amended in the light of specific circumstances.

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[1] Regulation (EC) 24/2009 of the European Central Bank of 19 December 2008 concerning statistics on the assets and liabilities of financial vehicle corporations engaged in securitisation transactions.

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1. Context and purpose of the Law

The purpose of the Law is to create a legally secure yet flexible environment for the securitisation of a wide range of assets.

The preparatory works to the Law[2] emphasise that one of the crucial elements of securitisations is the isolation of securitised assets within a specific estate which must be exposed only to liabilities related directly to the holding or enforcement of the securitised claims.

The following requirements have been identified as being essential to ensure the effectiveness of the securitised assets' isolation, and are reflected in the Law:

- the final and unchallengeable nature of the transfer of assets ("true sale") and its protection against any claim from the transferor ("originator") of the assets or its receiver in a bankruptcy situation;

- the recognition of the benefit of collateral attached to the transferred assets;

- the protection of investors against the default of their representative or trustee (the Law introduces the "fiduciary representative" to that end); and

- the neutralisation of indirect effects related to the transfer of assets, such as tax rules or regulatory constraints.

The Law provides a complete legal framework encompassing all aspects of a securitisation transaction. It ensures an environment which protects investors' interests while at the same time offering considerable flexibility to promoters in structuring such transactions.

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[2] Bill of Law n°5199.

2. Scope of the Law

The Law defines securitisation as the acquisition or assumption, directly or through the intermediary of another undertaking, of risks related to receivables[3], other assets or obligations assumed by third parties or inherent to all or part of the activities of third parties, while issuing securities whose value or return depend on those risks.

In the context of the Law, a securitisation can involve a single securitisation undertaking but can also be performed by a two-tier structure involving an acquisition vehicle and a separate issuing vehicle[4].

The Law only applies to securitisation undertakings located in Luxembourg. This condition is met by securitisation companies having their registered office in Luxembourg and by securitisation funds whose management company has its registered office in Luxembourg.

The Law contains an "opt-in" clause whereby only those undertakings which elect to be governed by the Law will fall under its scope. Securitisations outside of the Law through the use of SPVs or fiduciary arrangements remain possible.

3. Instruments of the securitisation

Securitisation transactions can be of various types. The list of securitised assets described in the present Section is not exhaustive. It aims at providing information on the approach followed by the Luxembourg financial supervisory authority (the "**CSSF**" or *Commission de Surveillance du Secteur Financier*) in the context of the review of the submission files.

3.1. Debt securitisations[5]

The traditional securitisation of claims involves the acquisition of one or several claims from an originator. Such acquisitions of claims usually take the form of either a true

[3] The original French uses the word *"créance"* which includes any claims under a debtor/creditor relationship including but not limited to claims under loans, notes or other debt instruments and trade receivables. Keeping with predominant market terminology this summary uses the term "receivables".
[4] The preparatory works to the Law specify that a two-tier structure is acceptable only if the two aspects of the transaction are linked.
[5] See the CSSF FAQ on Securitisation, version dated 23 October 2013, Question n°7, p.7.

sale where the securitisation undertaking becomes the legal owner of the claims, or may consist in the synthetic securitisation where only the risks related to the debt portfolio are transferred to the undertaking (for example through credit default swaps or by means of the issue a guarantee).

A debt securitisation may also take the form of structures where the securitisation undertaking grants loans instead of acquiring a receivable on the secondary market. In this case, however, the following conditions must be complied with: (i) the securitisation undertaking cannot allocate the funds raised from the public to a credit activity on own account; (ii) the documentation relating to the issue must clearly define either the assets on which the service and the repayment of the loan granted will depend, or the borrower(s) and/or the criteria according to which the selection of the borrowers will be made. The documents governing the issue of securities must contain in both cases information on the characteristics of the loan.

The CSSF has indicated that in light of the ongoing international discussions on "shadow-banking" the laws and regulations applicable to this kind of activities may change in the future.

As regards the management of these securitisation vehicles, it should be limited to a "prudent-man" passive management of the securitised debt portfolio. Indeed, the management must not be an active management of the portfolio taking advantage of the short-term fluctuations of the market prices and consequently resulting in the ongoing activity of acquisition and transfer of receivables. Neither must it consist in a professional credit activity performed by the securitisation undertaking on its own account. These restrictions also apply in case of delegation of the management to a professional acting on behalf of the securitisation.[6]

3.2. Securitisation of assets/ financial instruments[7]

The securitisation of a portfolio of financial assets is permitted, provided that these assets are managed in compliance with the Law, and in particular the provision according to which a securitisation undertaking cannot assign its assets except in accordance with the provisions laid down in its articles of association or management regulations[8].

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[6] See Section 5.2
[7] See the CSSF FAQ on Securitisation, version dated 23 October 2013, Question n°8 a), p.8.
[8] See Article 61(1) of the Law.

In such a case, the articles of association or documents relating to the issue of securities must contain the selection criteria, the composition of the securitised portfolio, if applicable, and the conditions and criteria according to which the assets can be assigned.

The activities of the securitisation undertaking as regards the frequency and conditions of repurchase of the issued securities must not, as such, fall within the scope of the regulations on operation and management of undertakings for collective investment in transferable securities and alternative investment funds.

In general, the repackaging of financial assets consists of the securitisation of one or more financial assets of which certain characteristics (for example the issue currency or interest rate standards) are changed using the securitisation technique. In respect of the risk transfer technique, such repackaging transactions may be traditional or synthetic securitisation transactions.

In certain cases, repackaging transactions may also consist of the securitisation of equity indices or other financial assets, pools of shares or unit of undertaking for collective investments in compliance with the abovementioned conditions.

3.3. Securitisation of commodities[9]

Securitisation transactions may also take the form of an acquisition of commodities or other goods of this type, provided that such transaction aims to provide for a financing or refinancing. The commodities or goods guarantee the repayment to third parties of the funds they made available.

Where the securitisation undertaking issues securities in the form of structured products exposing the investor to the price fluctuations of the underlying commodities these securities are considered investment products. Thus managers of securitisation undertakings must implement and communicate to the investors an exit strategy which must not force the undertaking to operate on a regular basis and significantly through purchase and sale transactions on the market.

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[9] See the CSSF FAQ on Securitisation, version dated 23 October 2013, Question n°8 b), p.8.

4. Securitisation undertakings

4.1. Types of vehicles

The Law defines a securitisation undertaking as either undertakings carrying out the full securitisation or undertakings participating in it by assuming the securitised risks or issuing securities to ensure the corresponding financing, and subject to the Law.

Securitisation undertakings make it possible to isolate a set of risks in an ad hoc structure to proceed with the issuance of the issuance of securities with a value or yield depending on these risks.

The Law does not require necessarily a securitisation to be carried out through the intermediary of one single securitisation undertaking. Risks may also be transferred to an undertaking distinct from that in charge of issuing the securities, provided that the two link their respective interventions.

Securitisation undertakings can be established either in the form of a company or in the form of an unincorporated fund.

Securitisation undertakings are in principle un-regulated. However if they issue securities to the public on a continuous basis, they will need to be authorised by the CSSF[10].

4.1.1 Securitisation companies

Securitisation companies must opt for one of the corporate forms provided in the Law[11]. Securitisation companies will be governed by the rules generally applicable to the relevant form of commercial company, except for those aspects which are specifically provided for by the Law.

[10] See Section 4.3 of this summary note for more information on the regulated securitisation vehicles.
[11] The possible corporate forms are: *société anonyme* (public limited company), *société en commandite par actions* (corporate partnership limited by shares), *société à responsabilité limitée* (private limited liability company) or *société coopérative* (co-operative society) organised as a *société anonyme.*

4.1.2 Securitisation funds

Unlike securitisation companies, securitisation funds do not have legal personality, they consist in a pool of assets which are managed by a management company.

Securitisation funds can be structured in two different ways: they can either take the form of a co-ownership of assets *(copropriété)* in which case investors will have a right *in rem* to a portion of the relevant securitised assets underlying their securities, or it can be set-up as a fiduciary property[12] in which case the management company will hold the securitised assets as fiduciary property (which will be segregated from its other assets).

The organisation and operation of securitisation funds are largely based on the Luxembourg legislation on UCITS (i.e. the law of 17th December, 2010, as amended, which implements the UCITS Directive[13] into Luxembourg Law) and the structures provided for in the Law in relation to securitisation funds are to a large extent derived from the provisions of that law.

4.2 Securitisation undertakings with multiple compartments

The Law provides for a possibility to establish securitisation undertakings with multiple compartments where each compartment will correspond to separate assets and liabilities and where each compartment will be segregated from the other compartments of the same undertaking as regards investors' and creditors' rights effectively "ring-fencing" each compartment, unless otherwise agreed on by the parties in the articles of association[14]. This "ring-fencing" will also apply in case of liquidation as a compartment can be liquidated without affecting the other compartments.

The possibility to create compartments must be allowed by the company's articles of association or by the management regulations of the fund. The decision to effectively create compartments lies within the powers of the board of directors of the company or

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[12] Within the meaning of the law of 27th July, 2003 on the trust and fiduciary contracts "fiduciary assets" are protected against the bankruptcy of the fiduciary and are reserved for the sole benefit of the fiduciary investors and any creditors whose rights have arisen in connection with the fiduciary contract.

[13] UCITS Directive refers to Directive 2009/65/EC of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

[14] See Articles 5 and 10 of the Law and the CSSF FAQ on Securitisation, version dated 23 October 2013, Question n°14, p.11 and 12.

with the management company of the fund. Such a decision can be taken at any time during throughout the existence of the undertaking.

Financial statements including in particular a breakdown of assets and liabilities per compartment is required from multi-compartment undertakings. The annual accounts and relating financial notes must clearly state the financial data for each compartment[15].

4.3 Regulated securitisation undertakings

4.3.1 Qualification's requirements

Securitisation undertakings which continuously issue securities to the public must be authorised and will be supervised by the CSSF.

This special status was introduced in order to deal with article 3 of Directive 2000/12/EC (the "**Directive**") (replaced by Directive 2013/36/EU (CRD IV)) concerning the activity of credit establishments (which provides that only banks may take deposits or other repayable funds from the public) and with Recital (6) of the Directive, which assimilated the "continuous issue of securities to the public" to deposit taking. Regulated securitisation vehicles will have the benefit of the exemption provided in the Directive for those activities which are subject to regulation aiming at the protection of the depositors and their investments.

It should be noted that in a dual cross-border structure, where the acquisition vehicle is located in Luxembourg and the issuing vehicle abroad, the Law implies that the acquisition vehicle located in Luxembourg is not subject to the authorisation obligation, even if the foreign issuing vehicle issues securities to the public on a continuous basis.

The CSSF[16] considers that the criterion of issue "on a continuous basis" is assumed to be fulfilled when the securitisation undertaking makes more than three issues per year to the public. The number of issues to consider is determined by the total number of issues of all compartments of the securitisation undertaking. Moreover, the CSSF considers that the setting-up of an issuance programme cannot be considered as equivalent to one single issue. In order to determine the number of annual issues of a securitisation undertaking issuing securities under a programme, the nature of the programme and of the different series of issues must

[15] See also Section 4.4 of this summary note.
[16] See the CSSF FAQ on Securitisation, version dated 23 October 2013, Question n°4, p.4.

be analysed in order to assess whether the characteristics of these issues allow considering that they constitute one single issue and not several separate issues.

Concerning the issuance of securities to the "public", the CSSF has set down the following criteria[17]:

- issues to professional clients within the meaning of Annexe II to Directive 2004/39/EC (MiFID) are not issues to the public;
- issues whose denominations equal or exceed EUR 125,000 are assumed not to be placed with the public;
- the listing of an issue on a regulated or alternative market does not ipso facto entail that the issue is deemed to be placed with the public;
- issues distributed as private placements, whatever their denomination, are not considered as issues to the public. The question as to whether the issue is to be considered as a private placement must be assessed on a case-by-case basis according to the communication means and the technique used to distribute the securities. However, the subscription of securities by an institutional investor or financial intermediary for a subsequent placement of such securities with the public constitutes a placement with the public.

The qualification of an issuance as being made to the public will be determined in particular in connection with the target public to which the issued securities are offered and/or distributed.

Therefore, a securitisation undertaking which intends to carry out transactions which are likely to meet the two criteria "on a continuous basis" and "to the public", must be authorised by the CSSF before starting its activities.

On the contrary, securitisation undertakings which do not intend to carry out such transactions are recommended to specify it in their constitutional documents[18] Securitisation undertakings which do not meet such two criteria will be unregulated. They may benefit from all provisions of the Law but may exercise their activities independently from any supervision by the CSSF.

[17] See the CSSF FAQ on Securitisation, version dated 23 October 2013, Question n°4, p.4 and 5.
[18] See the CSSF FAQ on Securitisation, version dated 23 October 2013, Question n°3, p.3.

4.3.2 Approval procedure and supervision by the CSSF

The approval procedure and the supervision exercised by the CSSF are similar to those applicable to other professionals of the financial sector and, in certain respects, to those regulating investment funds.

As a requirement of the approval procedure, the CSSF systematically invites the arranger of the securitisation undertaking's project to present it in a meeting[19].

The articles of incorporation of a regulated securitisation company and the management regulation of a regulated securitisation fund and any changes thereto must be approved by the CSSF.

The CSSF will need to approve the members of the administrative, management and supervisory bodies of a regulated securitisation company or of the management company of a regulated securitisation fund. The same approval is required of the shareholders thereof who can exercise a significant influence on the conduct of the business of the undertaking. Where appropriate, the names and powers of the representative of the bondholders must also be provided.

Non-consolidated or so called orphaned structures will however remain possible. In this case, the identity of the initiator of the project must be notified to the CSSF in order to enable the CSSF to assess the quality and seriousness of the initiator.

The CSSF requires the board of directors of the securitisation company or of the management company to be composed of at least three members, each of them having a strong professional experience in the securitisation field. The CSSF accepts legal persons to be vested with directors' mandates. In such case, the CSSF will assess the criteria relating to competence and professional standing as regards the legal person and the natural persons designated to represent them. Directors are required to be aware of the financial situation of the securitisation undertaking and to assume their responsibilities towards both the investors and the CSSF[20].

Regulated undertakings must have an organisation and means which are adequate for the conduct of their business. Outsourcing of tasks remains possible.

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[19] See the CSSF FAQ on Securitisation, version dated 23 October 2013, Question n°5, p.5.

[20] See the CSSF FAQ on Securitisation, version dated 23 October 2013, Question n°5 (last paragraph), p.6.

Although the activities of regulated undertakings are supervised, individual transactions are not be subject to prior review or approval by the CSSF.

Cash assets and securities of a regulated undertaking must be deposited with a bank established in Luxembourg.

All administrative information, accounting documents and other key documentation of the securitisation undertakings must be available upon first request of the CSSF which will assess the structure and administrative management of the undertaking on a case-by-case basis[21].

Once authorised, the securitisation undertaking remains in principle under the supervision of the CSSF until its liquidation. However, if, at one point, the securitisation undertaking does not issue new securities on a continuous basis to the public, and provided all the securities that the securitisation undertaking has issued to the public during the time it was subject to supervision have matured and been refunded, the securitisation undertaking may request to be withdrawn from the official list of authorised securitisation undertakings.

4.4. Accounting rules

Securitisation companies are subject to the accounting rules applicable to commercial companies.

Securitisation funds are subject to the accounting regime applicable to investment funds under the Law of 17th December, 2010 on undertakings for collective investment, as amended.

The financial accounts of both forms of securitisation undertakings must be reviewed and certified[22] by one or more Luxembourg auditors (*réviseurs d'entreprises agréés* or approved statutory auditors). In the case of regulated undertakings, the auditor(s) must be approved by the CSSF.

[21] See the CSSF FAQ on Securitisation, version dated 23 October 2013, Question n°5, p.5.
[22] See the CSSF FAQ on Securitisation, version dated 23 October 2013, Question n°18, p.14.

As regards multiple-compartments securitisation undertakings[23], the CSSF requires them to present their annual accounts, as well as the relating financial notes in a form which enable the financial data of each compartment to be emphasized. It is however possible to aggregate the notes to the financial statements for several compartments. The CSSF further recommends the valuation of the underlying assets at fair value, in particular for regulated securitisation undertakings intended for the public and whose purpose is the traditional or synthetic securitisation of one or several financial assets. The fair value valuation is also recommended where investors have call options[24].

4.5 Liquidation of securitisation undertakings

The Law contains provisions dealing with the liquidation of securitisation undertakings and grants, in particular, extensive powers to the liquidator of the undertaking.

The liquidation of a compartment of a securitisation undertaking does not have any consequences on other compartments. Therefore, each compartment can be liquidated separately.

In the case of a securitisation company, the liquidation of the last compartment does not result in the liquidation of the company itself, whereas, the liquidation of the last compartment of a securitisation fund entails the liquidation of the fund itself.

The liquidators of regulated securitisation undertakings must be authorised by the CSSF and regulated undertakings can be subject to compulsory liquidation proceedings if the authorisation of the undertaking is withdrawn by the CSSF.

4.6 Regulatory developments

Further to the adoption of the Alternative Investment Fund Managers Directive (the "**AIFMD**")[25], the managers of alternative investment funds ("**AIFMs)**") which manage and/or market alternative investment fund ("**AIFs**") in the European Union ("**EU**") must comply with specific rules on authorisation, supervision, ongoing operation and transparency.

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[23] See the CSSF FAQ on Securitisation, version dated 23 October 2013, Question n°14 (last paragraph), p.12 and Question n°18, p.14.

[24] See the CSSF FAQ on Securitisation, version dated 23 October 2013, Question n°18, p.14.

[25] AIFMD refers to Directive 2011/61/EU on Alternative Investment Fund Managers, dated 8 June 2011.

EU authorities have adopted an all-encompassing approach for the definition of AIF[26]. All types of AIFs are targeted by the AIFMD, regardless of their current legal regime, i.e. regulated or non-regulated, their legal form, and to a certain extent, their location within or outside the EU.

The AIFMD was implemented in Luxembourg by the Law dated 12 July 2013 on Alternative Investment Fund Managers (the "**AIFM Law**") and applies from 22 July 2013.

A very limited number of entities are exempted from the application of the AIFMD obligations among which the securitisation vehicles[27].

As regards Luxembourg entities, given that the definition of "securitisation special purpose entity" and "securitisations" as contained in the AIFMD and reflected in the AIFM Law are very specific, it is recommended that each Luxembourg securitisation undertaking undertakes its own assessment in order to determine whether it may benefit from the exemption provided in the AIFM Law.

According to the CSSF FAQ on Securitisation[28], a securitisation undertaking which complies with the definition of "securitisation special purpose entity" cannot qualify as AIF and is therefore excluded from the scope of application of the AIFM Law.

Securitisation special purpose entities are defined as entities which carry on a securitisation or securitisations within the meaning of a European Central Bank ("**ECB**") regulation (the "**2013 ECB Regulation**")[29].

According to the 2013 ECB Regulation, a securitisation is *"a transaction or scheme whereby an entity that is separate from the originator or insurance or reinsurance*

[26] AIF is defined in Article 4.1 ((a) of the AIFMD.
[27] The AIFMD refers to securitisation special purpose entities. This term is defined in Article 4.1 (an) of the AIFMD.
[28] CSSF FAQ on Securitisation, version dated 23 October 2013, Question n°19, p.14.
[29] The AIFMD and the AIFM Law both refer the definition of securitisation contained in the ECB Regulation (EC) 24/2009 of the European Central Bank of 19 December 2008 concerning statistics on the assets and liabilities of financial vehicle corporations engaged in securitisation transactions and other activities which are appropriate to accomplish that purpose ("**2009 ECB Regulation**"). The 2009 ECB Regulation was repealed by Regulation (EU) 1075/2013 of the European Central Bank of 18 October 2013 concerning statistics on the assets and liabilities of financial vehicle corporations engaged in securitisation transactions. According to Article 10 of the 2013 ECB Regulation, as from 1st January 2015, all references to the repealed 2009 ECB Regulation must be construed as references to the 2013 ECB Regulation. See also Section 10.1 of this Summary note.

undertaking and is created for or serves the purpose of the transaction or scheme issues financing instruments to investors, and one or more of the following takes place:

> *(a) an asset or pool of assets, or part thereof, is transferred to an entity that is separate from the originator and is created for or serves the purpose of the transaction or scheme, either by the transfer of legal title or beneficial interest of those assets from the originator or through sub-participation;*
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> *(b) the credit risk of an asset or pool of assets, or part thereof, is transferred through the use of credit derivatives, guarantees or any similar mechanism to the investors in the financing instruments issued by an entity that is separate from the originator and is created for or serves the purpose of the transaction or scheme;*
>
> *(c) insurance risks are transferred from an insurance or reinsurance undertaking to a separate entity that is created for or serves the purpose of the transaction or scheme, whereby the entity fully funds its exposure to such risks through the issuance of financing instruments, and the repayment rights of the investors in those financing instruments are subordinated to the reinsurance obligations of the entity;*

Where such financing instruments are issued, they do not represent the payment obligations of the originator, or insurance or reinsurance undertaking."

For interpretation purposes, the CSSF refers in its FAQ on Securitisation[30] to the clarifications provided by (i) the ECB in its "*Guidance note on the definitions of financial vehicle corporation and securitisation under regulation ECB/2008/30*", (ii) the European Securities and Markets Authority ("**ESMA**") Guidelines on key concepts of the AIFMD of 13 August 2013 and (iii) the EU Commission's Q&A on the AIFMD published in March 2013.

The CSSF confirms that (i) the securitisation vehicles which principal activity is loan origination, and (ii) entities which issue structured products with principal purpose to offer a synthetic exposure to assets other than credit and where the transfer of the credit risk is only ancillary, cannot benefit from the AIFMD exemption[31].

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[30] CSSF FAQ on Securitisation, version dated 23 October 2013, Question n°19, p.14.

[31] Given that (i) the current version of the CSSF FAQ on Securitisation is based on the 2009 ECB Regulation which was repealed by the 2013 ECB Regulation and (ii) the definition of securitisation contained in the 2013 ECB Regulation is broader and now includes a reference to insurance risks transfers, it is not excluded that the CSSF FAQ on Securitisation will be updated in the future and that the present Section of the Summary note will need to be reviewed and updated accordingly.

The CSSF also indicates that irrespective of whether or not they qualify as securitisation special entities under the AIFM Law, the securitisation undertakings which issue debt instruments only do not qualify as AIF[32].

Finally, the CSSF reminds that even if a securitisation undertaking issues equity instruments and performs an activity which does not comply with the conditions of the definition of "securitisation special purpose entities" provided in the AIFM Law, all the elements of the definition of AIF under the AIFM Law will need to be complied with in order for the securitisation undertaking to be considered as an AIF and to be subject to the AIFM Law obligations. Therefore, securitisation undertakings which are not managed pursuant to an investment policy[33] within the meaning of the AIFM Law do not qualify as AIF.

5. Rules relating to the assumption of risks and management of assets

5.1 Transfer of risks

5.1.1 Methods

The Law is very flexible as to the methods of assumption of risks. Securitisation undertakings can assume risks by the acquisition of receivables or other assets. They can also assume risks by guaranteeing obligations or by entering into any other type of commitment.

Besides the traditional true sale securitisation through the assignment of assets to the securitisation undertaking, the Law allows for "synthetic" securitisations, where only the risk linked to the assets is transferred, as well as whole business securitisations or partial business securitisations where the risk assumed by the securitisation undertaking lies in the profitability of all or part of the activity performed by the third party.

The specific nature of the securitisation undertaking's activity requires that the risks securitised by the securitisation undertaking exclusively result from assets or claims or obligations assumed by third parties or inherent to all or part of the

[32] On this particular matter, the CSSF refers to the Q&A on the AIFMD published in March 2013 by the European Commission.

[33] The requirement of a defined investment policy is one of the elements of the definition of AIF. For more information on this notion and on the other elements of the AIF definition, see the ESMA Guidelines on key concepts of the AIFMD dated 13 August 2013.

activities of the third parties, but that they cannot be generated by the securitisation undertaking or result as a whole or in part from the securitisation undertaking's activity itself acting as entrepreneur.

The CSSF has, in its FAQ on Securitisation[34], listed a series of transactions, which may qualify as securitisations under certain conditions. In practice, the assumption of risks linked to holdings of shares and parts of undertakings for collective investment, hedge funds and limited partnerships or other companies holding the securitised risks can also be considered as securitisation transaction, provided that the securitisation undertaking does not actively intervene with the management of the entities in which it holds, directly or indirectly, a holding. The securitisation undertaking is only allowed to exercise its shareholder rights (voting right, right to a dividend) linked to the interest it holds and is not allowed to exercise any managing function in the company's bodies or provide services of whatever nature. A majority representation of the managers of the securitisation undertaking in the managing bodies of companies in which the securitisation undertaking holds an interest would not be acceptable.

As regards the ancillary activities of a securitisation undertaking such as concluding transactions on derivative instruments or forward transactions with a view to cover or effectively manage the asset portfolio, or such as to perform repurchase agreements concluded and securities lending activities, the specialisation principle applying to securitisation undertakings implies that they must limit those activities to the strict minimum, i.e. where these activities have been made necessary by or are an integral part of the securitisation transactions. Moreover, those activities must be performed pursuant to article 61(1) of the Law which provides that a securitisation undertaking can assign its assets only pursuant to the provisions laid down in its articles of incorporation or its management regulations.

The Law provides for the possibility to transfer both existing and future receivables.

The transfer of an existing claim is effective between parties and vis-à-vis third parties as of the moment the parties have entered into the assignment agreement, except if the agreement provides otherwise.

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[34] See the CSSF FAQ on Securitisation, version dated 23 October 2013, Questions n°7 and 8, p. 7 and 8.

In the case of future receivables, the transfer will become effective when the receivable comes into existence, but the deemed time of the transfer between the parties and vis-à-vis third parties will retroact to the time of entering into the assignment agreement, and this notwithstanding the bankruptcy of the transferor prior to the coming into existence of the receivable.

The debtor of a transferred receivable can however validly discharge its obligations to the transferor as long as it has not become aware of the transfer.

Furthermore, the "true sale" nature of transfers is protected against recharacterisation by a specific provision that a transfer will be effective notwithstanding any commitment by the securitisation undertaking to retransfer such assets.

Another important feature of this part of the Law is that the transfer to a securitisation undertaking of assets includes, except if there is a contractual provision to the contrary, the transfer of guarantees and collateral securing the relevant assets.

Contractual restrictions on transferability of a receivable agreed between the originator and the debtor will not prevent its assignment to a securitisation vehicle if (i) the debtor has agreed hereto, (ii) the securitisation undertaking was not aware of the restrictions or is not supposed to have known them or (iii) the receivable is a cash receivable. As a result of the conflict of law rules of the Rome Convention and/or the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), the effect of this provision is likely in an EU context to be limited to Luxembourg law governed receivables.

5.1.2 Conflict of laws

The preparatory works to the Law recognise that the laws of foreign jurisdictions, most notably those of the debtor of the securitised claims or risks, may prevent the full effectiveness of the above assumption of risks rules. Foreign laws may indeed impose certain requirements as regards notification to, or acceptance, by the debtor.

In order to resolve any potential conflict of laws between different jurisdictions and to provide additional legal certainty on this question, a specific provision[35] on the rule applicable to the transfer of receivables is provided by the Law.

According to this provision, the transferable nature of a receivable, the relationship between transferee and debtor, the conditions of effectiveness of the transfer vis-à-vis the debtor and the satisfactory nature of the payment made by the debtor is determined by the law governing the receivable. This is consistent with article 14(2) of the Regulation (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I). The Law provides furthermore that it is the law of the location of the transferor which will govern the conditions of effectiveness of the transfer vis-à-vis third parties. This rule is derived from the United Nations Convention on the assignment of receivables in international trade signed at New York in 2004.

5.2 Management of securitised assets

5.2.1 Organisation of the asset management

As far as the management of the securitised risks is concerned, the Law provides[36] that the securitisation undertaking can outsource these tasks to the transferor (or originator) or to a third party.

In case the originator or other party in charge of collecting the assets become subject to an insolvency proceeding, any cash collected by them prior to such proceeding and not yet paid to the securitisation undertaking will be reserved for the latter.

[35] Article 58 of the Law.

This together with the above conflict of law will offer un-rivalled protection where the originator or such third party has its principal establishment in Luxembourg. Its validity in case of a non Luxembourg insolvency of the originator or other party will be subject to its recognition in the relevant jurisdiction of the insolvency proceedings.

5.2.2 Asset management guidelines

The role of the management undertaking must be limited to the management of the administration of financial flows linked to the securitisation transaction itself and to the "prudent-man" management of the securitised risks, except for any activity likely to qualify the securitisation undertaking as an entrepreneur[37].

Except for securitisation undertakings which purpose is to manage financial assets portfolios, is also incompatible with the purpose of the Law, any management that creates an additional risk owing to the activity of the securitisation undertaking compared to the risk attached to the claims, assets or activities managed or any management aiming at creating additional assets or resulting in the commercial development the undertaking's activity, notwithstanding the fact that the actual management has been delegated to an external service provider.

In the activity of management during the securitisation of a portfolio of financial assets, the undertaking cannot assign its assets unless in accordance with its articles of incorporation or management regulations. The issue documents must contain the principles and terms applicable during such securitisation, and specify for each issue how and by whom the decision of the sale of assets will be made. In the prospectus or constitutional documents of the securitisation must be described any possibility of transfer and re-employment of the assets by the counterparty of the securitisation undertaking.

In any other activity ancillary to the securitisation of a portfolio of financial assets, the securitisation undertaking must limit these activities to the extent they are justified by the nature of the securitisation transactions.

5.3 Restriction on transfers of assets

In order to provide additional protection to investors, the Law provides that a securitisation undertaking can only sell its assets in accordance with its articles of

[37] See the CSSF FAQ on Securitisation, version dated 23 October 2013, Question n°13, p.11.

incorporation or management regulations. It can only collateralise its assets in order to secure its obligation under the securitisation arrangements or for the benefit of the investors, their fiduciary-representative or the issuance vehicle (if there is one in the structure). Any security or guarantee given in breach of this provision is void.

Collateral and guarantees provided in respect of securitised assets automatically extend to the income received in respect of the assets given as security. Hardening period rules which could affect such collateral are rendered ineffective in this context.

6. Investor and creditor rights

6.1. Limited recourse

Considering that it is of the essence of all securitisations that investors and creditors must have a preferential right to the securitised assets but that their obligations should not exceed their investment, the Law recognises that the rights and obligations of investors and creditors are limited in recourse to the assets of the securitisation undertaking or to the particular compartment to which they relate and that assets are reserved to satisfy such rights.

6.2. Recognition of specific instruments

The Law also specifically recognises the validity of specific securitisation products. It allows securitisation undertakings to issue tracking securities and subordinated instruments.

In addition, the Law allows shares of different par values and with voting rights that are proportionate to the part of capital they represent. This is derogation from general company law, which requires that shares must have the same par value and that each share has one vote.

The units and bonds issued by a securitisation undertaking having the form of a *société à responsabilité limitée* are also deemed as securities under the Law.

6.3. Recognition of right of recovery of originator

The Law recognises the validity of provisions pursuant to which an originator may recover the excess of assets assigned or proceeds therefrom after all other creditors of securitisation vehicles have been satisfied.

6.4. Bankruptcy remoteness

The crucially important bankruptcy remoteness element is addressed by the recognition of the validity of clauses by which investors or creditors commit neither to attach the assets of the securitisation undertaking, nor to initiate bankruptcy proceedings against any securitisation undertaking (non-petition and non-attachment clauses).

The Law further provides[38] that the terms and conditions of the securities issued by securitisation undertaking are enforceable against the investors and any third parties, even in the case of a liquidation or bankruptcy.

7. **Fiduciary representatives**

The Law organises the status of security trustee, called a "fiduciary representative" *(représentant-fiduciaire)* who may be appointed to represent and manage the interests of investors and creditors of a securitisation undertaking.

The Law however only applies to those fiduciary-representatives whose registered office is in Luxembourg although it is permitted to appoint a non-Luxembourg security trustee (who will not be subject to the provisions of the Law).

Where a security trustee governed by foreign law is appointed, (i) the documentation relating to the issue of the securities shall provide for the terms of this representation, and (ii) this trustee must have "an appropriate organisation and proper human, financial and material resource to perform its activity in a professional manner"[39].

Fiduciary representatives must be authorised and are regulated by the CSSF. Their activities must be limited to act as fiduciary representative in securitisation transactions.

The functions of the fiduciary representative will essentially be those of a security trustee. The extent of its rights and powers will be defined in its appointment. If and as long as a fiduciary representative has been appointed all individual rights of action of represented investors and creditors are suspended. The fiduciary representative will have the power to represent investors and creditors, including in relation to legal action, without having to disclose their identity.

[38] Article 65 of the Law.
[39] See the CSSF FAQ on Securitisation, version dated 23 October 2013, Question n°15, p.12.

The Law provides that the fiduciary representative can also act in a fiduciary capacity in accordance with the law of 27th July, 2003 on the trust and fiduciary contracts. In such case, the assets held and payments received by it on behalf of investors will be segregated from its general estate and will be protected against arrest by its general creditors and will not form part of its general assets in case of bankruptcy. Payments made to a fiduciary representative will be protected against the impact of any hardening period rules.

8. Financing of a securitisation undertaking[40]

Securitisation undertakings are financed by issuing securities whose value or yield depends on the risks assumed by the securitisation undertaking or the acquisition vehicle where the securitised risks are held by an undertaking different from that issuing securities. It is however accepted during a transitional period to make use of intra-group financing to pre-finance the acquisition of the risks to be securitised.

Borrowings are permitted provided that the main and determining purpose of the transaction remains securitisation i.e. borrowing must be used on an ancillary basis only or in the event where a temporary financing is needed based on the type of securitisation.

It is worth noting that any borrowing activity will be assessed by the CSSF and hence, the securities issue documents must provide sufficient information to the investors as to the additional risk incurred by the investors due to the borrowing; the existence of any security interests constituted in consideration of these financing; the limits imposed on indebtedness and the credit terms.

9. Taxation regime

9.1 Corporate income tax

Corporate securitisation vehicles will be subject to corporate income tax, municipal tax on income and solidarity surcharge. They will be able to deduct from their gross profits their operational costs including all obligations assumed vis-à-vis investors and creditors. Given the nature of their activity and the possibility to deduct all their obligations under the securities they have issued to investors and creditors, corporate

[40] See the CSSF FAQ on Securitisation, version dated 23 October 2013, Question n°9, p.9.

securitisation companies should not generate significant taxable profits and should therefore to a large extent be tax neutral. Thin capitalisation rules do not apply. Securitisation companies are fully taxable Luxembourg residents and should therefore be able to benefit from double taxation avoidance treaties.

Securitisation funds will not be subject to any income taxes. Their tax regime is aligned to that of common investment funds. They will however not be subject to the subscription tax due by investment funds. Securitisation funds are tax transparent.

9.2 Net wealth tax

Securitisation undertakings are exempt from net wealth tax *(impôt sur la fortune)*.

9.3 Investor taxation

Distributions and other proceeds allocated by securitisation undertakings to their investors and creditors are exempt from Luxembourg withholding tax without prejudice to the provisions of the EU directive on the taxation of savings.

9.4 Registration taxes

Capital contributions to corporate undertakings are subject to a fixed registration tax of €75. Contributions to securitisation funds are not subject to any registration tax.

Agreements entered into in the context of the securitisation transaction do not need to be registered except where they transfer rights on real estate located in Luxembourg or on airplanes, ships or boats for circulation on internal waterways registered in Luxembourg.

If the agreements that do not need to be registered are nevertheless presented for registration, only a fixed duty will be applicable.

The registration of agreements transferring rights to Luxembourg real estate or to airplanes, boats or ships registered in Luxembourg do not come into the benefit of the above fixed rate but are taxed at the generally applicable *ad valorem* rates.

9.5 VAT

Management services provided to a securitisation undertaking are exempt from VAT.

10. Reporting Obligations

10.1. Reporting obligations applying to all Luxembourg securitisation undertakings

Pursuant to the 2013 ECB Regulation[41], all Luxembourg undertakings which proceed to securitisation transactions, irrespective of whether or not they are submitted to the Law, are required to provide the ECB with adequate statistics on the financial activities of the financial vehicle corporations.

The ECB has estimated that given the close links between the securitisation activities of Financial Vehicle Corporations ("**FVC(s)**") (as defined below) and Monetary Financial Institutions ("**MFI(s)**")[42], a complementary and integrated reporting of MFIs and FVCs is required.

10.1.1. Definition of FVC and securitisation in the 2013 ECB Regulation

FVC refers to "*an undertaking which is constituted pursuant to national or Union law under one of the following:*

(i) contract law as a common fund managed by management companies;

(ii) trust law;

(iii) company law as a public or private limited company;

(iv) any other similar mechanism;

and whose principal activity meets both of the following criteria:

(a) it intends to carry out, or carries out, one or more securitisation transactions and its structure is intended to isolate the payment obligations of the undertaking from those of the originator, or the insurance or reinsurance undertaking; and

(b) it issues, or intends to issue, debt securities, other debt instruments, securitisation fund units, and/or financial derivatives (hereinafter the 'financing instruments') and/or legally or economically owns, or may own, assets underlying the issue of financing instruments that are offered for sale to the public or sold on the basis of private placements.

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[41] See Footnote 29.

[42] MFIs refer to Monetary Financial Institutions within the meaning of Article 1 of Regulation (EU) 1071/2013 (ECB/2013/33) concerning the balance sheet of the monetary financial institutions sector.

This definition does not include:

(a) MFIs;

(b) investment funds as defined in Article 1 of the ECB Regulation (EU) 1073/2013 of 18 October 2013 concerning statistics on the assets and liabilities of investment funds (ECB/2013/38)."[43]

Securitisation means "*a transaction or scheme whereby an entity that is separate from the originator or insurance or reinsurance undertaking and is created for or serves the purpose of the transaction or scheme issues financing instruments to investors, and one or more of the following takes place:*

(a) an asset or pool of assets, or part thereof, is transferred to an entity that is separate from the originator and is created for or serves the purpose of the transaction or scheme, either by the transfer of legal title or beneficial interest of those assets from the originator or through sub-participation;

(b) the credit risk of an asset or pool of assets, or part thereof, is transferred through the use of credit derivatives, guarantees or any similar mechanism to the investors in the financing instruments issued by an entity that is separate from the originator and is created for or serves the purpose of the transaction or scheme;

(c) insurance risks are transferred from an insurance or reinsurance undertaking to a separate entity that is created for or serves the purpose of the transaction or scheme, whereby the entity fully funds its exposure to such risks through the issuance of financing instruments, and the repayment rights of the investors in those financing instruments are subordinated to the reinsurance obligations of the entity;

Where such financing instruments are issued, they do not represent the payment obligations of the originator, or insurance or reinsurance undertaking[44]."

Originator is defined as "*the transferor of an asset or a pool of assets, and/or the credit risk of the asset or pool of assets to the securitisation structure*."[45]

[43] Article 1 (1) of the 2013 ECB Regulation.
[44] Article 1 (2) of the 2013 ECB Regulation.
[45] Article 1 (3) of the 2013 ECB Regulation.

10.1.2. Reporting obligations and timing

The relevant national central bank ("**NCB**"), in the case of the Grand Duchy of Luxembourg, the Banque Centrale de Luxembourg ("**BCL**"), must establish and maintain a list of the FVCs resident[46] in its territory which are required to report under the 2013 ECB Regulation and transmit this information to the ECB on a regular basis.

An FVC must inform the relevant NBC (in the case of Luxembourg FVCs, the BCL) within one week from the date when the FVC has taken up business irrespective of whether it expects to be subject to regular reporting obligations under the 2013 ECB Regulation.

Taking up business means any activity, including any preparatory measures, related to the securitisation, other than merely establishing an entity that is not expected to commence the securitisation activity in the next six months. Any activity by the FVC taken after the securitisation activity becomes foreseeable means taking up business[47].

Luxembourg resident FVCs shall provide to the BCL, data on outstanding amounts, financial transactions and write-offs/write-downs on the assets and liabilities of FVCs on a quarterly basis, in accordance with Annexes I and II of the 2013 ECB Regulation.

The reporting agents[48] shall comply with the reporting requirements in accordance with the minimum standards specified in Annex III of the 2013 ECB Regulation. The NCBs shall define and implement the arrangements to be actually followed in accordance with local characteristics.

The NCB may grant the following derogations to certain reporting requirements set out in the 2013 ECB Regulation:

(i) For loans originated by euro area MFIs and broken down by maturity, sector and residency of debtors, and where the MFIs continue to service the securitised loans within the meaning of Regulation (EU) 1071/2013 (ECB/2013/33), the NCBs may grant

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[46] "Resident" is defined in Article 1 (5) of the 2013 ECB Regulation.
[47] Article 1 (7) of the 2013 ECB Regulation.
[48] Reporting agents refers to the legal and natural persons and the entities (including the FVC) referred to in Article 2(3) of Regulation (EC) 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank, which are subject to the ECB's statistical reporting requirements.

FVCs derogations from reporting data on these loans. Regulation (EU) No 1071/2013 (ECB/2013/33) provides for the reporting of these data.;

(ii) the NCL may exempt FVCs from all reporting requirements set out in Annex I of the Regulation, apart from the obligation to report on a quarterly basis, end-of-quarter outstanding amount data on total assets, provided that the FVCs that contribute to the quarterly aggregated assets/liabilities account for at least 95% of the total of C' assets in terms of outstanding amounts, in each euro area Member State. The NCBs shall check the fulfilment of this condition in good time in order to grant or withdraw, if necessary, any derogation with effect from the start of each calendar year.;

(iii) to the extent that certain data can be derived, according to the minimum statistical standards as specified in Annex III of the Updated BCE Regulation, from other statistical, public or supervisory data sources, the NCL may, after consulting the ECB, fully or partially exempt reporting agents[49] from the reporting requirements set out in Annex I to the 2013 ECB Regulation.

The ECB's sanctions regime laid down in Regulation (EC) 2533/98 of 23 November 1998 is applicable to reporting agents (including the FVCs). According to this latter Regulation, the ECB may impose fines of up to EUR 200,000 for certain infringements.

10.2. Ongoing reporting obligations applying to regulated securitisation undertakings

The CSSF has indicated in its FAQ on Securitisation that the objective of the prudential supervision of the regulated securitisation undertakings is to ensure the compliance by these undertakings with both their legal and contractual obligations.

In this view, the following reporting obligations apply to them:

1. Any change to the constitutional documents of the securitisation undertaking, to its directors and auditor(s) must be notified to the CSSF without any delay and must be approved in advance. Any change of control at the level of the securitisation company or management company is also subject to the CSSF's prior approval.

[49] Reporting agents under the Regulation (EC) 2533/98 (Article 1) concerning the collection of statistical information by the European Central Bank.

2. The following documents and information must be sent to the CSSF as soon as they are finalised:

- a copy of the issuance documents in final form, relating to any issue of securities, irrespective of any prior notification of these documents to the CSSF as competent for the supervision of the financial markets in view of the prospectus approval in the event of a public offer or an admission to official listing;

- a copy of the financial reports drawn up by the securitisation undertaking to the attention of its investors and rating agencies, where applicable;

- a copy of the annual report and other documents issued by the auditor within the context of the audit of the annual accounts regardless of any delivery of these documents to the CSSF in its capacity as competent authority as regards transparency requirements. The management letter issued by the auditor, or where no management letter was issued, a written statement of the auditor confirming the non-issuance of this letter, must be transmitted to the CSSF;

- information on any change of service provider and material provisions of an agreement, including the conditions applicable to the issued securities;

- information on any change relating to the fees and commissions.

3. Regulated undertakings must, in addition, provide the following documents to the CSSF on a half-yearly basis:

- a statement listing the new issues of securities, the outstanding issues and the issues which have expired during the period under review. The statement must specify the nominal amount of each issue and the nature of the securitisation transaction, the investor profile and, where applicable, the relevant compartment. For each issue, the following information must be added: the initial issue price and the current market price (if available) for each outstanding issue, or the redemption price in the case of issues which have expired, as well as information on any issues (or certain tranches of an issue) for which the securitisation undertaking was not able to realise the expected yield rate or to guarantee the final redemption price. In these cases, details on the effective yield or the redemption value must be indicated;

– a summary of the financial situation of the securitisation undertaking, including a breakdown of its assets and liabilities, by compartment, where applicable.

4. On the financial year closing date, a draft balance sheet and loss account, where applicable, on a sub-fund basis, within 30 days.

The CSSF is also empowered to request securitisation undertakings to provide any additional information that it may deem necessary or appropriate for the fulfilment of its supervisory function. The CSSF may also proceed to on-site inspections.

Luxembourg, April 2015

Elvinger, Hoss & Prussen