

SPV comparison

Choosing between a Dutch, an Irish and a Luxembourg SPV

The Netherlands, Ireland and Luxembourg are very popular onshore jurisdictions for the establishment of special purpose vehicles ("SPVs") for structured finance transactions. As the markets have become more innovative and efficient in recent years, each jurisdiction has responded within the confines of its legal and tax regime to position itself as the location of choice. The choice is often driven by a comparison between tax or regulatory treatment and between initial or recurring cost. A number of misperceptions seem to persist in this area and we have therefore outlined below some key aspects in the choice between the jurisdictions of the Netherlands, Ireland and Luxembourg. Furthermore, we have included a matrix which summarises the key financial differences. The Ireland sections of this SPV comparison were prepared with assistance of A&L Goodbody.

1. Timing of establishment

The Netherlands

A Dutch SPV (generally a BV whose shares are held by a 'stichting') can usually be set up in three to five business days.

Ireland

An Irish SPV (a PLC or Ltd.) can commonly be incorporated in three to five business days to set up, although it usually takes two weeks to have a PLC fully operational.

Luxembourg

A Luxembourg SPV (generally an SA or an Sarl) can usually be set up in three to five business days.

2. Minimum capitalisation

The Netherlands

A Dutch SPV must have a minimum share capital of €18,000. However, this amount is generally paid by the Dutch corporate services provider and is therefore not an additional cost. Incorporation costs (of around €5,000) are also generally borne by the Dutch corporate service provider. Furthermore, the Dutch Parliament has recently adopted a bill regarding the flexibilisation of the law governing BVs. This bill is expected to come into effect in 2012. The bill abolishes the requirement of a mandatory minimum capital. A BV will be allowed to have an issued share capital of €0.01. There is no capital duty payable over the amount of share capital.

Ireland

Irish SPVs may be set up as private companies (in the form of a Ltd.), in which case no minimum capitalisation requirements apply, as little as €1 will suffice. For transactions that involve large scale retail offers with low denominations, it will be necessary to incorporate a PLC.

An Irish SPV in the form of a PLC must have a minimum capitalisation of €38,100 of which a quarter should be paid up, even though it is standard practice to fully capitalise

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at the outset. Incorporation costs for an Irish SPV are approximately €2,000 for a Ltd. and €3,000 for a PLC.

Luxembourg

A Luxembourg SA must have a minimum share capital of €31,000 of which a quarter must be paid up, even though it is standard to fully capitalise at the outset. A Luxembourg Sarl has a minimum share capital of €12,500 that must be fully paid up upon incorporation. The notary incorporation fees are around €2,500. Further set up fees are around €5,000.

3. Requirement for audited accounts

The Netherlands

In respect of a Dutch SPV that issues notes that are to be listed on a regulated market, with denominations of at least €100,000 (or equivalent), the financial reporting rules of the Transparency Directive (2004/109/EC), including requirements to make audited annual accounts available to the public within four months following the end of the financial years and semi-annual accounts within two months following the first half of the financial year, do not apply.¹ However, the Dutch Civil Code requires such an SPV to publish audited annual accounts if it issues notes that are traded on a regulated market or multilateral trading facility within the European Economic Area ("EEA") or any similar stock exchange or trading facility outside the EEA. Auditor's fees are approximately €15,000 per year.

Ireland

An Irish SPV must file annual audited accounts prepared in accordance with Irish GAAP or IFRS. Auditor's fees are generally between €15,000 and €17,000 per year.

Luxembourg

The accounts of a Luxembourg SPV governed by the Luxembourg securitisation law of 2004 must be audited by an external '*reviseur d'entreprise*', whose annual fees are approximately €15,000 per year.

4. Taxation of the issuer and minimum retained profit

The Netherlands

The effective tax rate of a Dutch SPV is nil. In the Netherlands an SPV structure is commonly used under which the Dutch SPV makes a profit equal to the amount that would otherwise be paid to the corporate service provider by way of management fee. In this structure the SPV pays no management fees but pays its after tax profits to the corporate service provider as dividend in lieu of the management fee. The end result is a Dutch SPV making a profit of, say, €20,000 per year (which is paid out of the waterfall as a high ranking item) on which it pays Dutch corporate income tax (which is useful where the SPV claims tax treaty benefits). The after tax profits (€16,000 assuming a Dutch corporate tax cost of €4,000²)

are paid to the corporate service provider as dividends - these dividends are tax exempt income for the corporate service provider. In effect, the Dutch tax is therefore nil - the only cost is the €15,000 otherwise due as management fee. Therefore, this minimum profit represents no additional cost to the deal.

Advance tax rulings are available in the Netherlands. It is however more customary not to obtain tax rulings but to rely on tax opinions. Clifford Chance opinions provide a "will" (the strongest possible) level of comfort on the Dutch tax analysis applying to the SPV and covers (a) the deductibility of the SPVs expenses, (b) the tax treatment of distributions on senior and subordinated notes, and (c) the absence of withholding taxes, and (d) the required level of taxable profit to be retained by the SPV.

Ireland

Subject to any adjustments required or authorised by law, an Irish SPV's profit for tax purposes follows the accounting treatment (GAAP as at 2004 unless an election is made for IFRS). With the issuance of a profit participating security, this invariably results in little or no profit being left in an Irish SPV, except a minimum amount for corporate benefit purposes. Any profit is taxed at a rate of 25%. Tax rulings may be available but it is more customary to rely on tax opinions.

Luxembourg

According to the Luxembourg securitisation law of 22 March 2004, a Luxembourg SPV is a fully taxable company. However, all payments made to the holders of securities (including shares) issued by a Luxembourg SPV and all payments to any creditors as well as all commitments for such payments to holders of securities issued by a Luxembourg SPV, are tax deductible. A Luxembourg SPV could therefore easily end up with a nil taxable profit and nevertheless comply with the above-mentioned law.

5. Corporate administration costs

The Netherlands

Both the corporate service provider's initial set-up fee of around €5,000 (covering its activities in respect of SPV establishment and review of the transactional documents) and its annual management fee (of around €20,000) are commonly included in the minimum retained profit for the first and subsequent years (please refer to chapter 4 of this document). There will also be personal directors' fees for individual directors if they are used in preference to the corporate service provider itself acting as (corporate) director of the SPV. Such fees are approximately €5,000 per person per year. On average, the annual costs payable to Dutch corporate services providers are between €20,000 and €25,000.

¹ The €100,000 is expected to become applicable as per 1 January 2012. The current threshold is €50,000 and remains applicable for issuances and admissions to trading prior to the date at which the new threshold of €100,000 will be implemented.

² The Dutch corporate income tax rate for the first bracket of profits is 20%.

Ireland

The initial set-up fee is generally approximately €3,000 and the annual corporate services provider fee is around €16,000. Personal directors (minimum of two) fees are an additional €5,000 per person per year. Company secretarial services are a separate service in Ireland and a Share Trustee is needed. On average the first year's costs payable to the Irish corporate services provider are approximately €35,500 and subsequent costs are approximately €30,000 per year.

Luxembourg

The initial set-up fee for an SPV is around €5,000. In addition, the annual corporate services provider fee is around €20,000. On average, the first year's costs payable to the Luxembourg corporate services provider are between €25,000 and €30,000.

6. Withholding tax

The Netherlands

Dutch law does not contain interest withholding tax provisions. Consequently, there is no withholding tax on interest paid on notes issued by Dutch SPVs (or swap payments), whether they are in bearer or in registered form and whether or not they are listed. This is different only in limited circumstances where the notes qualify as "hybrid debt" (in which case payments may be subject to dividend withholding tax). Senior notes do not qualify as "hybrid debt" and the subordinated notes might only qualify as such if such notes have a term of over 50 years.

Ireland

There is 20% withholding tax on interest paid by Irish SPVs on notes or loan facilities unless an exemption applies. In the case of interest on notes, the exemption (the quoted Eurobond exemption) commonly relied upon is that which exempts from withholding tax any notes that are listed on a recognised stock exchange.

"Wholesale debt instruments" (eg corporate bonds which mature within two years) may be used as an alternative to quoted Eurobonds, in particular in those cases where a listing of the securities is not required by investors. In order to avail of a withholding tax exemption the wholesale debt instrument may need to be held in a recognised clearing system and have a certain minimum denomination or be beneficially owned by non-residents who make declarations to that effect.

A further exemption often relied upon applies when interest is paid to a person resident in an EU Member State (other than Ireland) or a jurisdiction with which Ireland has signed a double tax treaty. In order to benefit from this second exemption it is necessary to be able to identify the noteholders from time to time, which is achieved by using definitive registered notes with certain transfer restrictions.

Swap payments made by an Irish SPV generally are not subject to Irish withholding tax.

Luxembourg

Payments of interest under debt securities issued by a Luxembourg SPV are not subject to any deduction or withholding in Luxembourg subject however to the application of the Luxembourg law implementing the EU Savings Directive and providing for the possible application of a withholding tax (35% as from 1 July 2011) on interest paid to certain non-Luxembourg resident investors (individuals and certain types of entities called "residual entities").

7. VAT issues

The Netherlands

Collateral management fees and collateral administration fees (though not "investment advisory" fees) are VAT exempt if the management service provided qualifies as "discretionary management" and the notes are held by at least two separate noteholders that are not part of the same VAT group. Dutch VAT may be payable on fees charged for certain services rendered to the SPV if for Dutch VAT purposes such services are rendered, or deemed to be rendered, in the Netherlands and an exemption from Dutch VAT does not apply to such services, eg trustee fees and rating agency fees. There is no VAT on subscription, underwriting or placement fees (but there may be on structuring and arranger fees if separately identifiable).

Ireland

All collateral management fees (though not "investment advisory" fees) and corporate administration services will generally be VAT exempt on a statutory basis. Irish VAT (at 21%) is due on rating agency fees invoiced to the Irish SPV but not on subscription, underwriting or placement fees.

Luxembourg

Under Luxembourg law, the "management" of a Luxembourg SPV is exempt from Luxembourg VAT and collateral management fees and investment advisory fees may be considered to be covered by this exemption. However, rating agency fees are not covered by this exemption and are therefore subject to Luxembourg VAT. There are good arguments to hold that subscription, underwriting and placement fees are VAT exempt based on the general exemption of fees on the negotiation of securities.

8. Licensing issues

The Netherlands

All Dutch SPVs can be structured so as to be wholly exempt from Dutch banking regulation or ongoing disclosure duties (other than the corporate law requirements of the Dutch Civil Code). Except where:

- the portfolio consists exclusively of cash loans; or
- the SPV engaged the collateral manager on a "reverse solicitation" basis; or
- the securities and derivatives positions of the SPV are managed by a different entity within the collateral manager's group which does have the Dutch regulatory capacity to do so;

the collateral manager for a Dutch SPV needs to either (a) have a local Dutch license or, (b) if it is incorporated and licensed in an EU Member State, passport its local EU license into the Netherlands.³ Generally speaking, there is no Dutch licensing requirement for swap counterparties, monoline insurers or counterparties to credit derivatives.

Dutch entities that have issued securities that are traded on a regulated market within the EEA are required to establish an audit committee. This requirement follows from the EU Statutory Audit Directive 2006/43/EC and should apply to Irish or Luxembourg entities as well. There are a few exemptions from this requirement; the most important for SPVs is the one for securitisation vehicles⁴, provided that the entity makes it clear to the public why it does not consider it appropriate to establish an audit committee or a body performing equivalent functions to an audit committee (as referred to in the first bullet-point above).

Ireland

There is no requirement for the collateral manager to be locally licensed if it is an EU bank, or its head or registered office is outside the EU and it has no branch in Ireland from which it provides the collateral management service and only provides investment services to non-consumers in Ireland.

Luxembourg

A Luxembourg SPV governed by the Luxembourg law of 22 March 2004 on securitisation does not fall under the supervision of the CSSF unless such SPV issues securities to the public on a continuous basis, in which case it must obtain a licence from the CSSF and will be subject to its supervision. The foreign collateral manager for a Luxembourg SPV does not require a license if it carries out its services on a purely cross-border basis. ■

³ Since 1 January 2007 collateral managers from the United States, Switzerland and Australia are also permitted to provide collateral management services to a Dutch SPV provided (i) they file evidence of being subject to supervision in their home country (for collateral management services) with the Dutch securities regulator and (ii) they comply with certain Dutch capital requirements and conduct of business rules.

⁴ A securitisation vehicle is defined as "an undertaking (i) that is not a credit institution; (ii) that has been established for the purpose of one or several securitisations; (iii) whose activities are limited to what is necessary for these securitisations; (iv) whose establishment serves to divide its liabilities from the liabilities of the originator; and (v) whose owners can unconditionally pledge or sell their participation. The separate definition of "securitisation" implies that there should be at least two tranches or categories of notes.

ANNEX

Costs	The Netherlands	Ireland	Luxembourg
Initial capitalization	Not relevant; paid for by CSP	€1 for a Ltd. and €38,100, of which 25% must be paid up, for a PLC	€31,000 (SA) €12,500 (Sarl)
Incorporation fees	Not relevant; paid for by CSP	€3,000 once (expense to the deal)	€7,500 once (expense to the deal)
Minimum taxable profit	€20,000 per year (taxed at 20%)	None, other than a small corporate benefit fee	Depends on regulated or unregulated
Corporate service provider ("CSP") fees	After tax profit distribution in lieu of CSP fees	€16,000 per year	After tax profit distribution in lieu of CSP fees
Personal directors fees	€5,000 per person per year (not required for Dutch legal purposes)	€5,000 per person per year (two directors minimum)	€5,000 per person per year (three directors minimum)
Auditing	€15,000 per year	€15,000 - 17,000 per year	€15,000 per year
Company secretarial services	Not a separate service	Not a separate service	Not a separate service

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