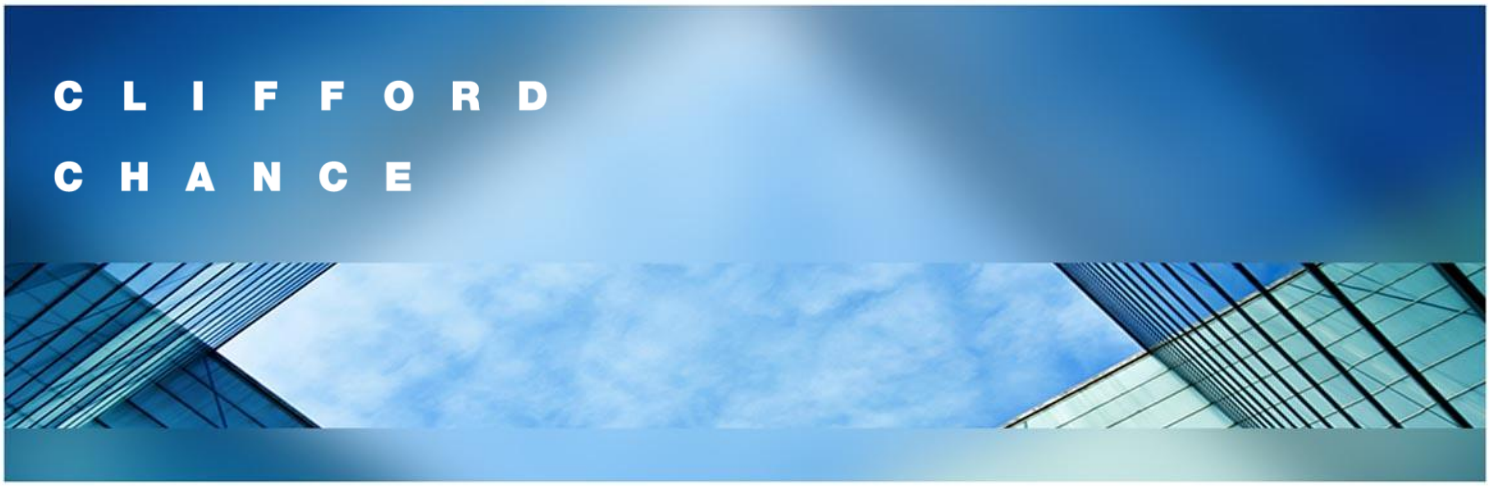

BILL AMENDING THE LUXEMBOURG SECURITISATION LAW

Over the past years, the Luxembourg law dated 22 March 2004 on securitisation (the Securitisation Law) has proven to be a highly successful framework for a large variety of securitisation, repackaging and financing transactions.

On 20 May 2021, the Luxembourg government has introduced bill 7825 (the Bill) with a view to make, inter alias, some small, but important adjustments to the Securitisation Law and to clarify certain questions in the interest of legal certainty in the market practice.

Key aspects

- The Bill proposes to modernise and to provide **increased legal certainty** on key aspects of the Securitisation Law.
- The Bill in particular broadens the available **means of funding** beyond the current requirement to raise financing via the issuance of securities.
- The Bill also confirms the possibility to **actively manage debt portfolios** which will enhance the attractivity of the Securitisation Law for CLO structures.
- **Partnerships** can be used as securitisation vehicles.

1. INCREASED FLEXIBILITY ON THE FINANCING SIDE

a. Types of funding

The Securitisation Law currently requires a securitisation vehicle to issue securities, the value or return of which depends on the securitized assets. This requirement has led to discussions as to the concept of securities, in particular under foreign laws as well as to the possibility to use loan funding for leverage or liquidity management purposes, or during the warehousing phase.

The Bill proposes to allow a securitisation vehicle not only to fund itself via any form of financial instruments (as opposed to the narrower concept of securities), but also via loans, each time of course under the condition that the value or return of such financial instruments or loans depend on the underlying assets which is for instance the case if the loan is limited recourse on the securitised assets, or otherwise tracks its value or return. This change is welcome as it firstly simplifies the discussion around the characterisation of the funding instruments which can be used , and allows securitisation vehicles to be funded via loans such as e.g. asset-backed or profit participating loans.

b. Issuance to the public

Any securitisation vehicle issuing securities on a continuous basis to the public needs to be licensed by the CSSF. The Securitisation Law does however not define the concept of "on a continuous basis to the public", although the concept has been clarified by the CSSF in its *Frequently Asked Questions*.

The Bill now proposes to have a statutory definition of this concept, thus increasing the legal certainty in this important area. Under the Bill, any vehicle that issues financial instruments to the public more than 3 times per financial year needs to be regulated. The Bill furthermore provides that an issuance will

not be seen as being made to the public if it meets any of the following three conditions:

i. The issuance is solely made to professional clients as defined in the financial sector law.

ii. The denomination of the financial instruments offered exceeds EUR 100,000.

iii. The financial instruments are distributed by way of a private placement.

These conditions are broadly based on the guidance provided for by the CSSF except that going forward financial instruments with a denomination of EUR 100,000 will benefit from a safe harbour whereas currently the denomination therefore needs to be EUR 125,000. This will a welcome alignment between the Securitisation Law and the prospectus legislation.

2. RULES IMPACTING THE SECURITISED ASSETS

a. Active management

The Securitisation Law is currently silent on the question whether or not a securitisation vehicle can actively manage its assets. In this respect, one of the novelties of the Bill is to specify that a securitisation vehicle may solely securitise a debt portfolio that is actively managed if the financial instruments issued for the purposes of such securitisation are not offered to the public.

This confirms that the active management of a debt portfolio is possible unless the relevant securitisation is offered to the public. This clarification is very welcome as it removes uncertainties that may have existed as to whether the active management of debt portfolios was possible and, with this clarification, Luxembourg will offer an efficient legal framework for actively managed collateralised loan obligations (CLOs), putting Luxembourg on the map of managers of CLOs.

b. Acquisition of real assets

Under the Bill, a securitisation vehicle may acquire directly or indirectly the assets which it securitises. Besides allowing the securitisation vehicle to directly own the assets generating the cash flows that are securitised (such as the assets subject to a lease if the lease receivables are securitised), this provision also confirms that a securitisation vehicle can acquire the assets or risks to be securitised indirectly, either through a fully owned subsidiary, or via the acquisition of an entity holding these assets or risks.

c. Article 61(3)

The Securitisation Law currently provides that a securitisation vehicle may only grant security over its assets for the purpose of securing obligations it has assumed for the securitisation of the assets subject to the security, or in favour of its investors. As a result, any security for the obligations of a third party is at risk of being null and void. This restriction will be slightly adjusted and in the future a securitisation vehicle will be allowed to give security for obligations (without excluding obligations of a third party) relating to the securitisation transaction. This will for example allow a securitisation vehicle that will acquire a junior loan to provide security over such loan in favour of the senior lenders, as is occasionally required and which made it until now complicated for securitisation vehicles to acquire such loans. The Bill furthermore proposes to

drop the sanction that any security granted in violation of this rule is null and void.

3. CORPORATE GOVERNANCE RULES

a. New corporate forms available

Under the original Securitisation Law, securitisation vehicles were either established as a securitisation fund or as a company. In the latter case, only *société anonyme*, *société en commandite par action* or *société à responsabilité limitée* were permitted.

The Bill will also allow the use of tax transparent partnerships such as a *société en nom collectif*, or a *société en commandite spéciale*.

The Bill specifies that partnerships subject to the Securitisation Law will need to prepare and publish annual accounts on the basis of the provisions of the law of 2002 on the register of commerce and on financial statements and that they hence not benefit from available exemptions in that respect

b. Annual accounts and distributions

Where a compartment is financed by way of equity, the Bill provides that the financial accounts relating to such compartment will be approved by the shareholders of the relevant compartment only. Similarly, in such case the determination of the distributable assets and reserves, as well as of the legal reserve, is made on a compartment by compartment basis.

c. Ranking of securities

The Bill finally provides for a framework governing the ranking of different classes of funding and, in particular confirms that, unless otherwise agreed, any form of debt ranks senior to shares, units and beneficiary units and that fixed income debt ranks senior to participating debt.

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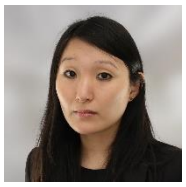

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