

# ATOZ ALERT

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## Securitisation entities within the meaning of the EU Securitisation Regulation no longer exempt from the interest limitation rules

10 March 2022

Yesterday, a draft law was presented to Parliament in order to remove the exemption applicable to securitisation entities within the meaning of EU Regulation 2017/2402 of 12 December 2017 (the “**EU Securitisation Regulation**”) from the interest limitation rules that were introduced as from 1 January 2019 following the transposition of ATAD into Luxembourg domestic law. The draft law follows an infringement procedure launched by the European Commission against Luxembourg on the way it implemented the interest limitation rules of ATAD. As from 1 January 2023, securitisation entities within the meaning of the EU Securitisation Regulation will become subject to the interest limitation rules of article 168bis of the Luxembourg Income Tax Law (“**LITL**”).

### Financial undertakings excluded from the interest limitation rules of ATAD

The interest limitation rules of EU Directive 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (the so-called “**Anti-Tax Avoidance Directive**”, or “**ATAD**”) provide a carve-out/exemption for financial undertakings. The definition of financial undertakings of ATAD does not include securitisation entities within the meaning of EU Regulation 2017/2402 of 12 December 2017 since ATAD was adopted in 2016, so before the EU Securitisation Regulation.

However, when implementing the interest limitation rules of ATAD into Luxembourg law, Luxembourg was of the view that securitisation entities within the meaning of the EU Securitisation Regulation should also be considered as financial undertakings. Luxembourg anticipated that the list of financial undertakings of ATAD would evolve over time each time new types of EU financial undertakings become regulated under EU law. In this respect, it is interesting to note that [the recent EU Unshell Directive Proposal laying down rules to prevent the misuse of shell entities for tax purposes](#) provides a carve-out for regulated financial undertakings and that the definition of financial undertakings in this EU Unshell Directive Proposal includes securitisation entities within the meaning of the EU Securitisation Regulation.

## Infringement procedure launched by the European Commission

On 14 May 2020, the Commission sent a letter of formal notice to Luxembourg asking for the interest limitation rules of ATAD to be correctly transposed. The EU Commission considered that Luxembourg went beyond the allowed exemptions of "financial undertakings" when providing unlimited deductibility of interest for the purpose of Corporate Income Tax to securitisation entities within the meaning of the EU Securitisation Regulation, which, according to the Commission, do not qualify as "financial undertakings" under ATAD. On 2 December 2021, this letter was followed by a reasoned opinion (final pre-litigation step of the infringement procedure) of the European Commission.

## Repeal of the exemption of securitisation entities with effect as from 1 January 2023

Given that the definition included in ATAD has finally not been extended and even though there might be good arguments according to which these regulated securitisation entities should also be considered as financial undertakings, the Luxembourg Government decided to follow the position of the Commission and to repeal the exemption applicable to these undertakings for the purpose of the interest limitation rules of Article 168bis of the LITL.

A draft law was presented to Parliament to this effect, which will remove the provisions exempting securitisation entities within the meaning of Article 2-2) of the EU Securitisation Regulation from Article 168bis of the LITL.

The change will apply to financial years beginning on or after 1 January 2023. The absence of retroactivity in the draft law is most welcome as it reaffirms Luxembourg's core principles of legal certainty and security.

## Next steps and implications

Even though the legislative procedure has just begun, given the type of law change to be introduced, it can be expected that the draft law will be adopted quickly and that the text will not evolve over the legislative procedure. Securitisation undertakings which have benefited from the exemption so far should anticipate this change and seek advice from their tax advisers in order to analyse the future potential tax impact and take any action if necessary.

## Do you have further questions?



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