

ATOZ ALERT

European Commission requests Luxembourg to amend its tax rules on foreign securitisation enterprises & its ATAD law on EU securitisation vehicles

15 May 2020

Yesterday, the European Commission sent 2 letters of formal notice to Luxembourg relating to securitisation, one objecting to more heavy tax of foreign securitisation enterprises and another one asking Luxembourg to remove the ATAD interest rules “carve out” for EU regulated securitisation vehicles.

Discriminatory tax rules concerning securitisation enterprises

The European Commission decided to send a letter of formal notice to Luxembourg for taxing more heavily securitisation enterprises with taxable operations in Luxembourg whose statutory seat is in another EU or EEA Member State. The Commission considers that the legislation at issue is not compatible with the freedom of establishment of the Treaty on the Functioning of the European Union.

While no further details have been published on why the Luxembourg tax regime of securitisation companies would be discriminatory, it could be that the issue raised by the Commission is due to the fact that the Luxembourg tax provisions applicable to securitisation undertakings only apply to securitisation undertakings incorporated in Luxembourg, i.e. they would not apply to the Luxembourg permanent establishment of a securitisation entity located in a foreign jurisdiction nor to a foreign entity having its place of effective management in Luxembourg. However, in our view, this is more a theoretical than a practical issue since it is questionable why a foreign entity would be willing to perform a securitisation activity in Luxembourg under these conditions given that the entity would, in such case, still not fall within the regulatory scope of the Luxembourg securitisation law.

Should the view of the Commission be confirmed at a further stage of the procedure, Luxembourg could consider extending the scope of its securitisation tax regime to foreign entities with securitisation activities in Luxembourg. However, in our view, it would be solving a problem that doesn't really exist and it would give rise to a number of practical regulatory and legal issues.

Implementation of the ATAD interest limitation rules & exemption of securitisation entities

The European Commission also decided to send a letter of formal notice to Luxembourg asking to correctly transpose the interest limitation rule of the Anti-Tax Avoidance Directive (“ATAD”). The Commission considers that Luxembourg goes beyond the allowed exemption of “financial undertakings” when providing unlimited deductibility of interest for the purpose of corporate income tax to securitisation entities, which are regulated under EU regulations, but which do not in the opinion of the Commission qualify as “financial undertakings” under ATAD.

The Luxembourg law implementing the ATAD rule on the limitation to the deduction of interest provides an exemption for financial undertakings. Under Luxembourg law, securitisation undertakings that are subject to EU Regulation 2017/2402 are financial undertakings within the meaning of ATAD and are therefore exempt from the limitation to the deduction of interest. Still, should the view of the Commission be confirmed in a later stage of the procedure and should Luxembourg be required to amend its law implementing ATAD, the impact should be rather limited in our view, given that, at least in our experience, there are relatively few securitisation companies falling within the scope of EU regulation 2017/2402 that rely on the ATAD exemption applicable to financial undertakings.

Next steps

The 2 letters of formal notice are only the very first stage of the procedure. Should Luxembourg not act within the next 4 months, the European Commission may send a reasoned opinion to the Luxembourg authorities. This reasoned opinion (also an unpublished document) will provide the arguments of the Commission on why the Luxembourg securitisation tax regime is considered discriminatory. Should the discrimination issue be confirmed, the scope of the regime could be extended to foreign entities to make it EU compliant in the view of the Commission. However, to us, this would raise a number of practical regulatory issues.

Do you have further questions?



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