

# Clients & Friends Memo

## European CLO 2.0 Issuer Jurisdiction Quick Reference Guide

13 January 2014

New issuance of collateralised loan obligations (“CLOs”) rose last year to its highest level since the credit crunch. 2013 saw U.S. CLO issuance rise to about US\$81 billion, from US\$54 billion the year before while European CLO issuance leapt to about €8 billion from zero during the same period.

Market participants expect this momentum to carry on into 2014. Headwinds including competition from the high-yield market and direct-lending funds, as well as on-going adjustment to regulatory hurdles, are expected to be balanced by a continuation of reasonable economics, with new issuance predicted to reach a similar level to the previous year.

Luxembourg, Ireland and the Netherlands are frequently chosen as jurisdictions for the establishment of the issuer when structuring European CLO transactions, with the final choice often being made on the basis of tax or regulatory treatment or the on-going administrative costs associated with a particular jurisdiction. We have collaborated with local counsel in each jurisdiction to prepare the attached quick reference guide to some of the key issues to consider when establishing an issuer.

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	Luxembourg <sup>1</sup>	Ireland <sup>2</sup>	The Netherlands
<b>Timing of establishment</b>	<ul style="list-style-type: none"> <li>Luxembourg special purpose vehicles (“SPVs”) may be established as securitisation vehicles (“SVs”), governed by the law of March 22, 2004 on securitisation (the “<b>Securitisation Law</b>”) or as non-regulated ordinary commercial companies (i.e., what are often referred to as <i>sociétés de participations financières</i> or “<b>Soparfi</b>”).</li> <li>The Soparfi and SV acronyms do not refer to specific legal forms, but merely to a specific set of legal, regulatory and tax provisions with the actual securitisation entity being formed either as: (i) a public limited liability company (<i>société anonyme</i>) (“<b>S.A.</b>”), (ii) a corporate partnership limited by shares (<i>société en commandite par actions</i>), (iii) a private limited liability company (<i>société à responsabilité limitée</i>) (“<b>S.à r.l.</b>”), (iv) a co-operative company organised as a public limited liability company (<i>société coopérative organisée comme une société anonyme</i>) and (v) solely in respect of an SV, a securitisation fund (<i>fonds de titrisation</i>).</li> <li>An S.A. or S.à r.l. can usually be set up in two to three business days.</li> </ul>	<ul style="list-style-type: none"> <li>A private limited company (“<b>Limited</b>”) can be established in three to five business days.</li> <li>A public limited company (“<b>PLC</b>”) can be established and fully operational in approximately two weeks.</li> </ul>	<ul style="list-style-type: none"> <li>One to two business days.</li> </ul>
<b>Minimum capitalisation</b>	<ul style="list-style-type: none"> <li>An S.A. 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. Such funds could be used by the company as soon as incorporated.</li> <li>An S.à r.l. has a minimum share capital of €12,500 that must be fully paid up upon incorporation. Such funds could be used by the company as soon as incorporated.</li> <li>Notarial incorporation fees are around €1,500- € 2000.</li> <li>Further set up fees are around €3,500.</li> </ul>	<ul style="list-style-type: none"> <li>€1 for a private company.</li> <li>€38,100 for a public company of which a quarter must be paid up. Such funds can be used to meet expenses of the SPV, such as liquidation expenses when the transaction is terminated.</li> <li>Incorporation filing fees typically cost approximately €150.</li> </ul>	<ul style="list-style-type: none"> <li>€0.01.</li> </ul>
<b>Corporate administration costs</b>	<ul style="list-style-type: none"> <li>Initial set-up fee of approx. €3,500.</li> <li>Annual corporate services provider fee of approx. €10,000.</li> </ul>	<ul style="list-style-type: none"> <li>Initial set-up fee of approx. €3,000.</li> <li>Annual fee of approx. €17,000 to €25,000, depending on complexity of transaction.</li> </ul>	<ul style="list-style-type: none"> <li>Initial set-up fee of approx. €4,000.</li> <li>Annual fee of approx. €15,000-18,000.</li> <li>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 (approx. €3,500-5,000 per person per year).</li> <li>There is no Dutch legal or tax requirement for personal directors.</li> </ul>

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	Luxembourg <sup>1</sup>	Ireland <sup>2</sup>	The Netherlands
<b>Requirement for audited accounts</b>	<ul style="list-style-type: none"> <li>Generally, a Soparfi does not need to have its annual accounts audited unless it exceeds certain thresholds relating to number of employees, turnover and balance sheet items during two successive years.</li> <li>An SPV (Soparfi or SV) having securities admitted to trading on a regulated market of the European Community is required to file and publish audited accounts.</li> <li>The annual accounts and financial statements of both regulated and unregulated SVs (governed by the Securitisation Law) have to be audited by one or more independent auditors (<i>réviseurs d'entreprises</i>), whose annual fees are approximately €15,000 per year.</li> </ul>	<ul style="list-style-type: none"> <li>Annual audited accounts are required and must be prepared in accordance with Irish GAAP or IFRS.</li> <li>Auditor's fees are approx. €15,000 per year.</li> </ul>	<ul style="list-style-type: none"> <li>Annual audited accounts if notes are traded on a regulated market or multilateral trading facility within the EEA or any similar stock exchange or trading facility outside the EEA.</li> <li>Auditor's fees are approx. €15,000 per year.</li> </ul>
<b>Reporting obligations</b>	<ul style="list-style-type: none"> <li>Both regulated and unregulated SVs and Soparfi, which qualify as financial vehicle corporations engaged in securitisation transactions have to comply with the reporting obligations laid down in (i) the Regulation ECB/2008/30 of the European Central Bank of December 19, 2008 concerning statistics on the assets and liabilities of financial vehicle corporations engaged in securitisation transactions and (ii) the circular BCL 2009/224 of the Luxembourg Central Bank dated June 8, 2009 on statistical data collection for securitisation vehicles (notably notifying the Luxembourg Central Bank of its existence and reporting certain data on a quarterly basis).</li> </ul>	<ul style="list-style-type: none"> <li>If the SPV qualifies as a 'financial vehicle corporation' for the purposes of Regulation (EC) No 24/2009 of the European Central Bank it is required to register with the Central Bank of Ireland and to file quarterly reports to the Central Bank of Ireland containing details of its assets and liabilities. This information is gathered by the Central Bank of Ireland on behalf of the ECB for statistical purposes.</li> </ul>	<ul style="list-style-type: none"> <li>Most Dutch SPVs involved in securitisation transactions have to comply with monthly reporting obligations to the Dutch Central Bank ("DNB"), in accordance with the Reporting Instructions Balance of Payments Reports 2003 (<i>Rapportagevoorschriften Betalingsbalansrapportages 2003</i>) issued by DNB pursuant to the External Financial Relations Act 1994 (<i>Wet Financiële Betrekkingen Buitenland 1994</i>), which in part implements Regulation EC No.24/2009 of the ECB (Regulation ECB/2008/30).</li> </ul>
<b>Taxation of the issuer and minimum retained profit</b>	<ul style="list-style-type: none"> <li>An SV company is fully subject to Luxembourg corporate income tax, levied at a combined general rate of 29.22% for 2014 in Luxembourg-City. An annual minimum tax of EUR 3,210 applies if at least 90% of the assets of the SV company are comprised of financial type assets such as shares, loans, securities and cash. As SV companies generally hold financial type assets, the minimum tax of EUR 3,210 is likely to apply.</li> <li>An SV company benefits from a special tax deduction right which aims to achieve corporate income tax neutrality. Under such right, commitments vis-à-vis investors and other creditors are tax-deductible. As a result, interest on debt and commitments to pay out dividends to equity holders are considered as tax deductible for corporate income tax purposes.</li> <li>An SV company is not subject to Luxembourg net wealth tax.</li> <li>As SV companies are fully taxable Luxembourg resident companies, they should be considered as "liable to tax" in the sense of tax treaties and therefore qualify as residents under the tax treaties. However, the relevant source countries must confirm whether tax treaty benefits are granted to SV</li> </ul>	<ul style="list-style-type: none"> <li>SPVs are typically established as 'qualifying companies' for the purposes of section 110 of the Irish Taxes Consolidation Act 1997 (commonly referred to as 'section 110 companies').</li> <li>Principal conditions for being a 'section 110 company' are (i) that the SPV is Irish tax resident, (ii) that the SPV enters into all transactions (other than in relation to payment of profit participating interest where certain conditions are met) on an arm's length basis, (iii) that the SPV carries on a business of holding and / or managing qualifying assets (which include receivables, bonds, loans, shares, certain partnership interests, derivatives, commodities, aircraft, shipping assets or containers), and (iv) that the SPV's first transaction must relate to qualifying assets having a market value of at least EUR 10 million.</li> <li>The SPV's profit for tax purposes follows the accounting treatment.</li> <li>Profit participating interest is generally tax deductible where certain conditions are met.</li> <li>This results in little or no taxable profit being left in an Irish SPV, except a purely nominal amount for corporate benefit purposes.</li> </ul>	<ul style="list-style-type: none"> <li>SPVs are structured to make a profit equal to the amount that would otherwise be paid to the corporate service provider by way of management fee.</li> <li>After tax profits are paid to the corporate service provider as dividend in lieu of the management fee.</li> <li>Therefore, in effect, the Dutch corporate tax is nil.</li> </ul>

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	<p>companies.</p> <ul style="list-style-type: none"> <li>A fund type SV is transparent for Luxembourg tax purposes, hence it will not be subject to corporate income tax or net wealth tax.</li> </ul>		
<b>Withholding tax</b>	<ul style="list-style-type: none"> <li>Interest and dividend payments to investors by an SV company are not subject to Luxembourg withholding tax, except (subject to below) for a potential 35% withholding tax (under the EU Savings Directive) on payments to EU resident individuals or certain EU entities or, pursuant to specific agreements, to certain entities and individuals resident of so-called dependent and associated territories.</li> <li>Distributions by a fund type of SV are not subject to withholding tax. Also here a 35% withholding tax (under the EU Savings Directive) may however apply on interest payments. In case of a securitisation of debt, this withholding tax may even apply to profit distributions and capital gains realised by foreign investors.</li> <li>The 35% withholding tax (under the EU Savings Directive) referred to above will not apply if investors agree that the Luxembourg authorities exchange information on their identity, address and interest received with the authorities of their country of residence. The Luxembourg government has indicated that it will stop applying the 35% withholding tax as from January 1, 2015. From such date the exchange of information will become obligatory.</li> <li>Concerning SVs, which have issued shares, non-resident shareholders (those without a Luxembourg permanent establishment to which the shares of an SV company are allocable) are only taxable in Luxembourg when they realise a capital gain in respect of at least a 10% shareholding in an SV company within six months after the acquisition of the shares, or they became non-resident taxpayers less than five years before the disposal took place, after being Luxembourg resident taxpayers for more than 15 years. However, shareholders, which reside in a country with which Luxembourg has a tax treaty in force, should generally not be taxable on such capital gains.</li> </ul>	<ul style="list-style-type: none"> <li>Quoted Eurobond exemption commonly relied upon exempts from withholding tax any notes that are listed on a recognised stock exchange.</li> <li>For non-listed debt instruments, interest payments are likely to be exempt from withholding tax if they are made to recipients in an EU member state or any other jurisdiction with which Ireland has a double tax treaty.</li> <li>Swap payments made by an Irish SPV generally are not subject to Irish withholding tax.</li> </ul>	<ul style="list-style-type: none"> <li>No withholding tax on interest paid on notes (assuming notes have a legal maturity of less than 50 years) irrespective of whether the notes are listed on a stock exchange and irrespective of the jurisdiction of the noteholders.</li> <li>No withholding tax on swap payments made by SPV.</li> </ul>
<b>VAT issues</b>	<ul style="list-style-type: none"> <li>"Management services" provided to a Luxembourg SV are exempt from Luxembourg VAT - collateral management fees and investment advisory fees may be considered to be covered by this exemption.</li> <li>Rating agency fees are not covered by this exemption.</li> </ul>	<ul style="list-style-type: none"> <li>Collateral management fees (though not "investment advisory" fees) and corporate administration services will generally be VAT exempt.</li> <li>Irish VAT (at 23%) is due on rating agency fees invoiced to the Irish SPV but not on subscription, underwriting or placement fees.</li> </ul>	<ul style="list-style-type: none"> <li>Collateral management fees and collateral administration 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.</li> <li>Dutch VAT may be payable on fees charged for certain services</li> </ul>

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	<ul style="list-style-type: none"> <li>Subscription, underwriting and placement fees are VAT exempt based on the general exemption of fees on the negotiation of securities.</li> </ul>		<p>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.</p> <ul style="list-style-type: none"> <li>No VAT on subscription, underwriting or placement fees (but there may be on structuring and arranger fees if separately identifiable).</li> </ul>
<b>Licensing issues</b>	<ul style="list-style-type: none"> <li>Luxembourg SPVs can be structured as to be wholly exempted from banking regulation or other licensing requirements.</li> <li>Luxembourg SVs are in principle unregulated entities and are not subject to any authorisation or prudential supervision, unless the SV issues securities to the public on a continuous basis (that is, it makes more than three issues to the public per year) in which case the SV must be approved by the Luxembourg Supervisory Commission for the Financial Sector ("CSSF"). The issue of securities to professional clients as defined in Annex II of the MiFid Directive is not considered by the CSSF as an issue to the public for the purpose of the Securitisation Law. Securities issued with a nominal value of at least EUR 125,000 each, are presumed as not being issued to the public.</li> <li>A foreign collateral manager for a Luxembourg SPV does not require a license if it carries out its services on a purely cross border basis.</li> </ul>	<ul style="list-style-type: none"> <li>There is no requirement for the collateral manager to be locally licensed if:                             <ul style="list-style-type: none"> <li>it is an EU licensed financial institution and it has passported its authorisation into Ireland, or</li> <li>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.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>SPVs can be structured so as to be wholly exempt from Dutch banking regulation.</li> <li>The collateral manager needs to either have a local Dutch license or, if it is incorporated and licensed in an EU Member State, passport its local EU license into the Netherlands in respect of the management of securities and derivatives positions. Alternatively, the "reverse solicitation" test may be available.</li> <li>No Dutch licence/EU passport is required if the portfolio of the SPV that is managed consists of (cash) loans only.</li> </ul>
<b>AIFMD</b>	<ul style="list-style-type: none"> <li>AIFMD and the Luxembourg law of July 12, 2013 on alternative investment fund managers (the "AIFM Law") do not apply to securitisation special purpose entities ("SSPE").</li> <li>According to the 2013 FAQ of the CSSF and the guidance note of the European Central Bank on the definition of "financial vehicle corporation" and "securitisation" under Regulation ECB/2008/30 (the "ECB Guidance Note") collateralised loan obligations' vehicles are considered as engaged in securitisation transactions and as a result, are not subject to the AIFMD.</li> <li>Independently of the qualification as an SSPE for the purpose of the AIFMD, the CSSF considers in the 2013 FAQ that the following types of vehicles do not constitute alternative investment funds ("AIFs") for the purpose of the AIFM Law:                             <ul style="list-style-type: none"> <li>SVs, which issue only debt instruments, and</li> <li>SVs, which are not managed in accordance with a defined investment policy within the meaning of the AIFM Law.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>AIFMD does not apply to securitisation special purpose entities ("SSPEs").</li> <li>Separately, the Central Bank of Ireland has confirmed in its AIFMD Q&amp;A published in November 2013 that entities which are either:                             <ul style="list-style-type: none"> <li>registered financial vehicle corporations within the meaning of Article 1(2) of Regulation (EC) no 24/2009 of the European Central Bank (see further above), or</li> <li>financial vehicles engaged solely in activities where economic participation is by way of debt or other corresponding instruments which do not provide ownership rights in the financial vehicle as are provided by the sale of units or shares,</li> </ul>                             need not seek authorisation as, or appoint, an AIFM.                         </li> </ul>	<ul style="list-style-type: none"> <li>The Dutch AFM has informally informed Dutch counsel that it is of the view that the AIFMD should not apply to Dutch CLO SPVs.</li> </ul>
<b>Warehousing</b>	<ul style="list-style-type: none"> <li>The CSSF accepts in its 2013 FAQ that SVs may use, on a transitional basis, loans or intra-group financing in order to pre-</li> </ul>	<ul style="list-style-type: none"> <li>As noted above, one of the threshold conditions for an SPV to be a qualifying company for the purposes of section 110 of the Taxes</li> </ul>	<ul style="list-style-type: none"> <li>SPV is not required to acquire its first assets in a certain minimum amount. This is particularly beneficial for structuring</li> </ul>

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	<p>finance the acquisition of the risks to be securitised while awaiting to proceed with the issuance of securities to investors (warehousing) within an appropriate timeframe, taking into account market conditions.</p>	<p>Consolidation Act 1997 of Ireland is that the SPV's first transaction must relate to qualifying assets having a market value of at least EUR 10 million.</p> <ul style="list-style-type: none"> <li>• Subject to satisfying this test, warehousing transactions rarely present difficulties for Irish SPVs.</li> <li>• An Irish SPV is generally entitled to pay interest free of Irish withholding tax to EU banks, as well as to non-bank entities resident in an EU member state or any other jurisdiction with which Ireland has a double tax treaty.</li> </ul>	<p>the warehousing of a CLO transaction.</p> <ul style="list-style-type: none"> <li>• There is no Dutch withholding tax in respect of payments by SPV to warehouse providers.</li> </ul>