

Legal considerations regarding SPVs

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Introduction

Switzerland has no specific securitisation legislation. Therefore, securitisation transactions are subject to the general legal framework that applies to all other financial transactions with respect to, among others, both corporate law and regulatory matters (for further details please see "[Regulatory aspects of securitisation in Switzerland](#)").

This article provides a short overview of certain company-related aspects to consider when setting up a special purpose vehicle (SPV) structure for a securitisation transaction in Switzerland.

Forms of SPV in securitisation transactions

In securitisation transactions, a Swiss SPV is incorporated as either a joint stock corporation or a limited liability company. The process is relatively straightforward and involves a notary public. It usually takes only a few weeks, depending on the workload of the relevant cantonal commercial registry where the commercial register inscription is made. Depending on the specifics of the deal structure, it may be beneficial to have the draft incorporation documentation pre-approved by the commercial registry.

In terms of capitalisation, a joint-stock company requires a share capital of Sfr100,000, which must be paid in full pursuant to market and rating agency requirements. On the other hand, the quota capital for a limited liability company is Sfr20,000, which must also be paid in full.

No specific regulatory regime applies to SPVs formed in the context of a securitisation transaction; however, ruling confirmation is typically sought by the relevant regulatory bodies to establish that an SPV will not be subject to licencing requirements in the context of a specific transaction.

Applying general corporate law

No charitable trusts

Swiss law does not provide for the establishment of charitable trusts (or similar), unlike orphan structures in Anglo-American securitisation practice.

From a Swiss perspective, shareholders must be the legal owners of an SPV. However, during the past decade, shareholder structures have been developed that meet the requirements of market participants and have been approved by rating agencies.

These structures typically provide for the respective originator to act as a shareholder of the SPV. Golden shareholder structures may be set up depending on the rating agency involved. Therefore, it is worth contacting rating agencies at an early stage in the transaction in order to minimise time and effort.

Depending on the overall shareholder structure, the implementation of an independent director structure at the board level, which provides one or more independent directors with some control (ie, veto) rights is deemed sufficient in this regard.

No compartments

Unlike certain non-Swiss securitisation legislation, Swiss law does not provide for the creation of compartments within the same legal entity. Therefore, segregating assets within the same legal entity is challenging. New SPVs are commonly established for each transaction in order to avoid any legal

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uncertainties that would undermine the transaction.

Bankruptcy remoteness

Bankruptcy remoteness is generally achieved by providing a limited and concise corporate purpose for SPVs in the articles of association. Further, transaction documents customarily contain limited recourse and non-petition provisions to which counterparties to the SPV are asked to agree. In addition, all parties contracting with the SPV must contractually waive any offset rights that they may otherwise have against the SPV.

Under Swiss corporate law, an SPV shareholder's bankruptcy would not lead to the bankruptcy or liquidation of the SPV itself. Rather, the shareholder's bankruptcy would result in the shares in the SPV falling into the shareholder's bankruptcy estate and being sold in the course of such liquidation or bankruptcy. Any such transfer of shares in the SPV would not legally affect the contractual obligations of the SPV under the transaction documents. Further, Swiss law contains no concept of substantive consolidation (subject to extraordinary cases, such as fraud and abuse of rights) and an SPV shareholder bankruptcy would not result in the consolidation of its assets and liabilities with those of the SPV.

Domestic SPVs versus offshore SPVs

While most Swiss securitisation transactions use SPVs incorporated in Switzerland, there is no rule requiring such approach. Therefore, it is worth considering the pros and cons of using Swiss SPVs when structuring a securitisation transaction. Among others, the following aspects should be considered.

Swiss real estate

If the underlying assets relate to real estate located in Switzerland, it is typical to use a double SPV structure involving a Swiss asset SPV and a non-Swiss issuer SPV for various reasons, including confidentiality considerations and access to euro capital market investors. Tax ruling confirmations will typically be available to deal with federal withholding taxes (see below) and special withholding taxes that may be incurred on any interest payments secured by Swiss real estate.

Transfers of receivables abroad

Depending on the asset classes being securitised and the applicable contractual framework in place, the transfer of a receivable or an asset abroad may be undesirable from both a legal and customer perspective. For example, should a third-party debtor's underlying documentation not provide for a proper waiver of data protection in regard to cross-border data transfers, the use of a domestic Swiss SPV would be favoured from a legal perspective.

Swiss withholding tax

Interest payments on debt instruments issued directly to multiple investors by a Swiss vehicle attract Swiss withholding tax at a rate of 35%. While Swiss withholding tax is generally recoverable, the process for doing so might be burdensome for non-Swiss investors, and even Swiss investors would suffer a delay.

If an investor is in a jurisdiction that does not benefit from favourable double tax treaties or does not otherwise benefit from treaty protection (eg, tax transparent funds), Swiss withholding tax may not be entirely or even partially recoverable. Swiss withholding tax can basically be structured away in case a non-Swiss vehicle is used, subject to a tax ruling confirmation, which must be sought before the structure is implemented.

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