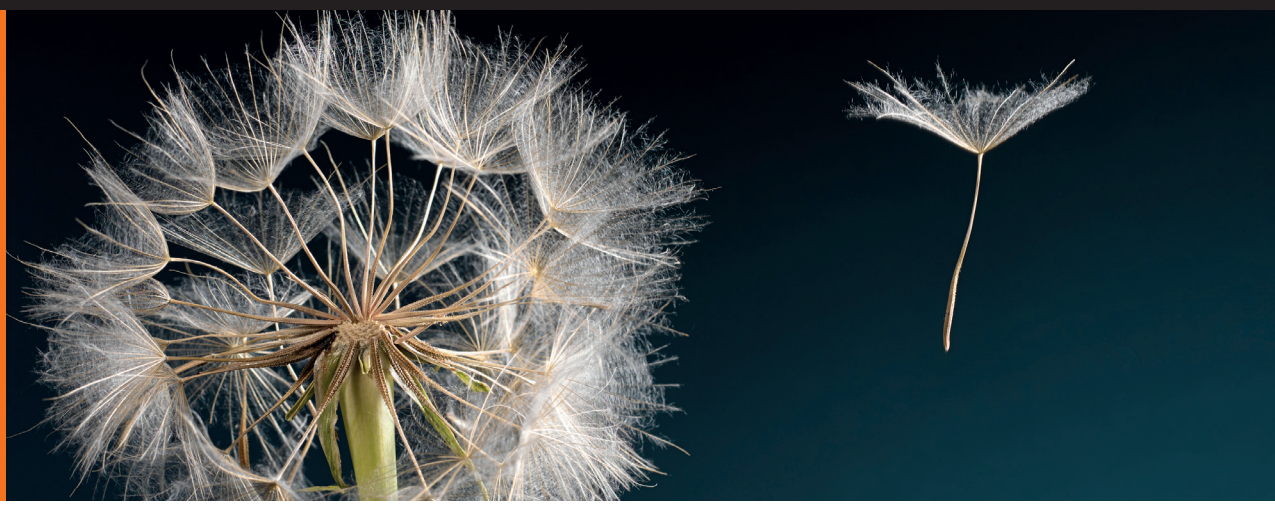

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Why Malta? An overview of Malta's innovative securitisation framework

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The popularity of Maltese special purpose vehicles (SPVs) for securitisation transactions has grown significantly in recent years. A regulatory safe harbour for non-public issues by securitisation vehicles, statutory bankruptcy remoteness and true sale, specifically tailored tax rules and Malta's large network of double tax agreements has attracted the interest of a diverse group of international originators and sponsors that have chosen to domicile their SPV in Malta for transactions involving a number of different asset-classes.

The securitisation market in Malta has experienced strong growth over the past few years, in large part based on an innovative and flexible legal framework for securitisation vehicles and securitisation transactions.

The Securitisation Act

Maltese securitisation vehicles are established under the Securitisation Act, Chapter 484 of the Laws of Malta (the "Securitisation Act"). The Securitisation Act provides a legal framework for securitisation transactions and has been carefully designed to reflect the specificities and wide variety of securitisation transactions brought to market. The Securitisation Act provides statutory solutions and greater certainty of outcomes for many of the legal challenges that investors and credit rating agencies are typically concerned with, including true sale, bankruptcy remoteness and the privileges of securitisation creditors over the vehicle's assets. The structural enhancements afforded to Maltese securitisation vehicles under the Securitisation Act allow for competitive borrowing costs relative to any recognised issuer jurisdiction.

Maltese law allows for the securitisation of all asset classes whether existing or future, movable or immovable, tangible or intangible, securitisation transactions through Maltese vehicles have not been concentrated in one industry sector, but have included a variety of asset classes, ranging from office equipment lease receivables, to container vessels and charter party receivables, as well as various categories of loans and other financial instruments. Malta is also particularly well placed as a jurisdiction for the securitisation of transport-related assets considering the additional benefits of Malta's creditor-friendly maritime and aviation legislation that can also be applied to such transactions.

The authority responsible for the regulation of securitisation in Malta is the Malta Financial Services Authority (the "MFSA"), the single regulator of financial services in Malta. However, a securitisation vehicle only requires *authorisation* by the MFSA if it is established for

assuming insurance risk (that is, as an RSPV in terms of the Reinsurance Special Purpose Vehicle Regulations, Subsidiary Legislation 403.19 of the Laws of Malta) or if it issues financial instruments to the public on a continuous basis. Securitisation vehicles which do not offer their products to the public (as this is defined in the Companies Act, Chapter 386 of the laws of Malta, which definition is similar to that under the Prospectus Regulation) need only *notify* the MFSA prior to commencing business.

Securitisation vehicles established in Malta under the Securitisation Act can be set up in the form of a company, partnership, trust or any other legal structure that the MFSA may expressly permit. Maltese securitisation vehicles are typically established as companies in the form of cell companies (under the Securitisation Cell Companies Regulations, Subsidiary Legislation 386.16 of the Laws of Malta), which companies can be incorporated within a few days from the submission of a complete incorporation pack to the Malta Business Registry.

Regulatory requirements and exemptions

As mentioned, the Securitisation Act distinguishes between public and private securitisation vehicles, requiring public securitisation vehicles to obtain authorisation prior to the commencement of business, while requiring private vehicles to submit a notification before commencing activities. In addition to a simple notification to the MFSA of their activities, Maltese securitisation vehicles also qualify as financial vehicle corporations under Regulation (EU) 1075/2013 of the European Central Bank, which require a notification to the Central Bank of Malta and subsequent quarterly statistical reporting on their assets and liabilities to the Central Bank of Malta. The foregoing considerations aside, Maltese securitisation vehicles are specifically exempt from licensing or authorisation requirements of any kind, irrespective of the kind of activities carried out by the vehicle, including where such activities would ordinarily require authorisation (under the Investment Services Act or the Banking Act, for example).

Of particular relevance to transactions with a managed or dynamic portfolio of assets, the Securitisation Act provides that Maltese securitisation vehicles are not to be considered collective investment schemes (including in the form of an 'alternative investment fund' under the EU Alternative Investment Fund Managers Directive), and are therefore generally exempt from the local regulatory regime applicable to collective investment schemes (including the regime for alternative investment funds), subject to any further guidance that may be issued by the MFSA in this regard.

Securitisation Creditors' Rights and Protections

Bankruptcy remoteness

The Securitisation Act provides for statutory bankruptcy remoteness by providing that "no proceedings taken in relation to the originator under the Companies Act, or any other law, including any dissolution and winding-up proceedings, any company recovery procedure, any company reconstruction and any proceedings affecting creditors' rights generally shall have any effect on: (a) the securitisation vehicle; (b) any securitisation assets acquired or risks assumed by the securitisation vehicle, as well as any cashflow or other asset of the securitised vehicle; or (c) any payments due by the underlying debtors in connection with the securitised assets." These statutory bankruptcy remoteness provisions mean that securitisation vehicles do not, strictly speaking, need to be orphaned to protect the securitisation vehicle's creditors from the bankruptcy of the originator.

That being said, Maltese securitisation vehicles established in terms of the Securitisation Act, generally tend to be orphaned anyway out of an abundance of caution. In this regard, Maltese purpose foundations offer the ideal tool for doing so since purpose foundations (established under the Second Schedule to the Civil Code, Chapter 16 of the Laws of Malta (the "Civil Code")) can be established without beneficiaries, and for the exclusive purpose of holding the shares in a securitisation vehicle, thus providing an ownerless entity ideal for orphaning securitisation vehicles.

True sale

The Securitisation Act specifically addresses the requirement of 'true sale' in securitisation transactions by providing that a transfer of assets (or assignment of rights) to a securitisation vehicle is valid and enforceable on its terms and is not subject to re-characterisation, nor is it subject to the claims of the originator's creditors in insolvency. The only exception to this arises in a case of fraud on the part of the securitisation vehicle or knowledge of pending insolvency proceedings of the originator, in which cases the assignment to the securitisation vehicle may be annulled, rescinded, revoked, terminated, varied or subject to abatement by any person.

Priority claim over assets

Investors in the securities issued by a Maltese securitisation vehicle enjoy the benefit of a first ranking privilege under Maltese law with respect to all assets held, except for other securitisation creditors who are given a prior ranking with the consent of the investors. This privilege extends to all proceeds derived from the securitisation assets and all assets acquired with those proceeds.

Limited recourse

Market standard limited recourse clauses will be given effect in accordance with the provisions of the Securitisation Act, which provides that any contract entered into in connection with a securitisation transaction shall be valid and enforceable in accordance with its terms, and where the parties agree in writing as to the effects that will arise on the occurrence of a specified event, it shall not be necessary for either party to obtain any court judgement or declaration confirming that the specified event has occurred or otherwise.

Non-petition clauses

Maltese securitisation vehicles are also expressly permitted to enter into agreements whereby creditors or shareholders accept to restrict or waive their rights to commence any form of dissolution and winding up proceedings in respect of the securitisation vehicle. Conversely, securitisation vehicles may give any securitisation creditor (including any trustee or other representative of the holders of a vehicle's securities) the exclusive right to demand the securitisation vehicle's dissolution, liquidation, winding up, reconstruction or recovery.

Transfer of receivables

The most common form of transfer used to transfer receivables from originators to securitisation vehicles in the Maltese context is a transfer by way of assignment.

The Securitisation Act seeks to facilitate assignments of receivables in the context of securitisation transactions by simplifying a number of onerous rules on assignment contained in the Civil Code. For example, while the Civil Code provides that an assignment is not fully perfected until due notice of the assignment has been given to the debtor by means of a judicial act, or after the debtor acknowledges the assignment, the Securitisation Act provides that in the case of an assignment of a securitisation asset (i.e. receivables) to a securitisation vehicle, the debtor will be deemed to be notified of the assignment upon one of the following events taking place *at the option of the originator or the securitisation vehicle:* "(a) on notification to the debtor in writing by any means; or (b) on the publication of a notice as follows: (i) in a daily


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newspaper circulating wholly or mainly in Malta, or (ii) where it appears that the majority of the debtors reside outside Malta, in a daily newspaper circulating wholly or mainly in such other jurisdiction outside Malta, or (c) where there is doubt as to where the majority of the debtors reside, in a daily newspaper which has wide international circulation."

Furthermore, the Securitisation Act keeps with the general rule contained in the Civil Code that an assignment of a debt (i.e. a receivable) includes with it every security, privilege or hypothec attached to the debt and every other thing accessory to it, by providing that unless the assignment of rights from the originator to the securitisation vehicle expressly provides otherwise, the assignment of a debt shall also include every suretyship, warranty or indemnity for the payment of the debt. The Securitisation Act further provides that the assignment of a debt shall include every suretyship, warranty or indemnity, accessory to the debt and this notwithstanding any contractual prohibition or restriction against such assignment of the debt in the contract of suretyship, guarantee or indemnity.

The Securitisation Act expressly provides that the parties to a securitisation are free to choose any law to govern contracts relating to the securitisation. In practice, these agreements are almost always governed by the law of the jurisdiction of the receivables. The securities issued by the securitisation vehicle are typically governed by English law, New York law or Maltese law.

Profit extraction

As mentioned above, due to the statutory bankruptcy remoteness of Maltese securitisation vehicles in the Securitisation Act, there is strictly speaking no need for a securitisation vehicle to be orphaned, which allows originators to retain an equity interest in the securitisation vehicle and extract profits (if any) by simple dividend. This approach is commonly used in conjunction with a partial orphaning of securitisation vehicles where originators retain an equity stake in the vehicle (generally limited to economic participation only) for profit extraction purposes but with a purpose foundation holding a 'golden share' or interest that gives the foundation veto rights over all major corporate actions of the securitisation vehicle (whether at shareholder or SPV level) that may in any way affect the transaction in question, thus removing any possible control or influence that the originator might have through its equity stake in the vehicle.

Importantly, the Securitisation Act also provides that it is lawful (without affecting bankruptcy remoteness) for a securitisation vehicle to enter into an agreement with the originator to the effect that the originator is given rights over all or part of the securitisation assets that may remain available (as profit) after payment of investors and all other securitisation creditors.

Tax neutrality

Malta has implemented specific rules governing the tax treatment of securitisation vehicles – the Securitisation Transactions (Deduction) Rules (Subsidiary Legislation 123.128 of the Laws of Malta) – which are intended to deliver tax neutrality in Malta where the originators are not Malta tax resident. Tax neutrality in Malta can be achieved through a combination of (1) the general provisions on deductibility of expenses under the Income Tax Act and (2) further deductions specified under the Securitisation Transactions (Deductions) Rules.

Moreover, no Maltese tax is levied or withheld on payments of interest by a securitisation vehicle to a holder of the vehicle's securities if a number of conditions are satisfied.

Malta also has an extensive Double Tax Treaty network with over 75 treaties currently in force.

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