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SECURITISATION OF REGISTERED MOVABLE PROPERTIES

Bernadette Accili

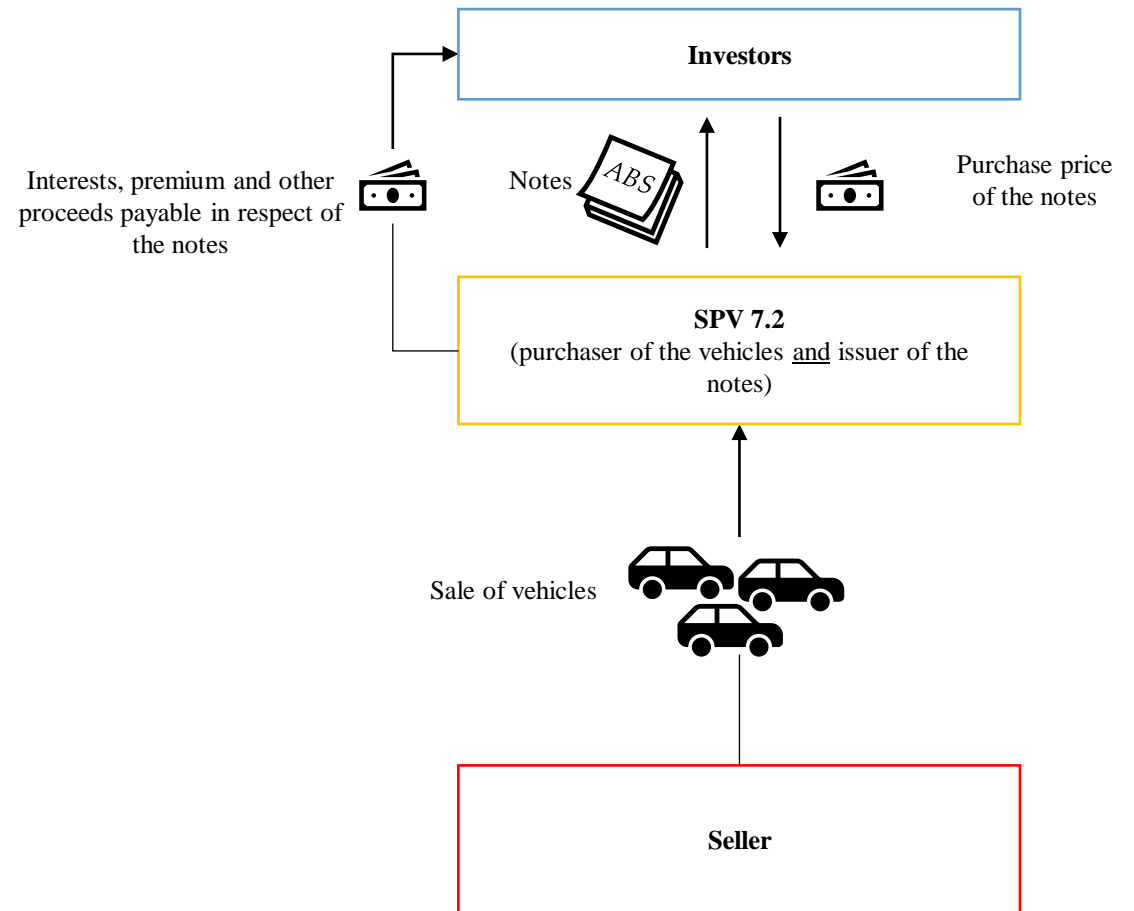
- Paragraph 1-b-bis of Article 7 and Article 7.2 of Law No. 130 of 30 April 1999 (“**Italian Securitisation Law**”) provide that the Italian securitization framework applies to securitisations of proceeds (*proventi*) arising from the ownership of real estate (*beni immobili*) and registered movable assets (*beni mobili registrati*) as well as to other rights in rem (*diritti reali*) or personal rights (*diritti personali*) over such assets.
- According to such provisions, Italian special purpose vehicles (“**SPV 7.2**”) are now permitted to acquire and manage the receivables arising from certain portfolios of assets and own and manage real estate and registered movable assets (and any rights relating thereto).
- It is no longer required a distinction between the entity acquiring and managing the receivables and the company purchasing, having title over and managing, the real estate and registered movable assets and the contracts relating thereto (e.g. ReoCo).
- This should simplify the mechanics of these type of transactions, with a significant reduction of timing and costs.

Recent Transaction



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- The first securitization in Italy carried out on registered movable assets concerned a portfolio of vehicles.
- The SPV issued asset backed securities in order to finance the purchase.
- Following the purchase, the same SPV 7.2 carries out the relevant long term renting activity.



- **Transfer of the vehicles to the SPV 7.2:**

- subject to VAT at the ordinary tax rate of 22 per cent;
- transfer of vehicles registered in the Public Vehicles Register (so-called “*Pubblico Registro Automobilistico*”) is exempt from registration tax, as they are subject to provincial registration tax which is applied according the specific Tariff set forth by Ministerial Decree of 27 November 1998, No. 435.

Possible
alternative
planning?

- **Tax regime of the SPV 7.2**

In principle, the SPV 7.2 is subject to corporate income tax (“**IRES**”) at the rate of 24 per cent and to regional tax on productive activities (“**IRAP**”) at the rate of 3.9 per cent.

However, any income from the management of assets (i.e. the vehicles) during the securitisation should not be subject to any taxation, with the only exception of amounts (if any) available to the SPV 7.2 after the full discharge of its obligations in relation to the notes and any other creditor of the SPV 7.2 in respect of any costs, fees and expenses in relation to the securitisation performed in the context of the transaction.

- **Tax regime of interest payments made under the Notes:**

The notes are subject to the same tax regime as provided, *inter alia*, for bonds and similar securities issued by Italian-resident joint stock companies whose shares are listed on an Italian stock exchange, including the tax regime provided for by Legislative Decree No. 239 of 1 April 1996.

Therefore, Proceeds distributed to:

- Italian resident individuals should be subject to a 26% substitute tax;
- Italian resident companies should not be subject to substitute tax, but would be included in the relevant taxable income;
- foreign investors, including institutional investors, should benefit from the exemption from the substitute tax provided that certain conditions are met.



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Update on Securitization Spain

Rebeca Rodríguez

January 15th, 2024



VAT STATUS

Background and change of criteria

- Traditionally, the Spanish Tax Administration considered that the Securitization Funds were entrepreneurs for VAT purposes, subject to the formal and material obligations derived from this VAT status.
- Decisions of the Central Economic Administrative Court changing criterion regarding:
 - Pension Funds (June 21st, 2021)
 - Collective Investment Funds (September 22nd, 2021)
- Tax rulings from the Spanish General Directorate of Taxes:
 - Private Equity Funds (V0462-22; March 10th, 2022; and V1326-22; June 10th, 2022).
 - Securitization Funds (V0241-23; February 14th, 2023)

VAT STATUS

Some thoughts

- Collective investment funds, pension funds, private equity funds and securitization funds are not equivalent, but the GDT applies the same arguments. Spanish securitization funds have no equity (orphan).
- The GDT considers that securitization funds have the purpose of providing directly or indirectly financing to companies, but without assuming the risk linked to the business activity (assumed by the “investors”). Passive income.
- Wording of the ruling leaves room to argue, according to the structure of the securitization fund, that they perform a business activity. How?
- Reperforming Loans? Second ruling on Private Equity Funds?
- Awarded real estate assets?
- Case-by-case analysis

ATAD Interest limitation rule

- Article 4.7 of COUNCIL DIRECTIVE (EU) 2016/1164: “Member States may exclude financial undertakings from the scope of paragraphs 1 to 6, including where such financial undertakings are part of a consolidated group for financial accounting purposes.”
- General Interest limitation was included in the Spanish Corporate Income Tax legislation in 2012.
- In 2014, Law 27/2014 on the Corporate Income Tax excluded its application to Securitization Funds (applying the same treatment than the one applicable to insurance and credit entities).
- Act 13/2023, dated May 24th, 2023, eliminates the exception. Securitization funds do not fall within the definition of financial undertakings included in the Directive.



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Thank you

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Securitisation and Derivatives: United Kingdom Tax Update

Adam Blakemore

Cadwalader, Wickersham and Taft

United Kingdom – Taxation of Securitisations

- UK taxation of securitisation companies
 - The Taxation of Securitisation Companies Regulations 2006 (the “**Regulations**”)
 - Recent legal developments:
 - HMRC consultation leading to changes in law - May 2022 (SI 2022/465)
 - Impact of Pillar 2: amendments proposed by UK Government in Autumn Statement (November 2023) to UK’s enactment of Pillar 2 proposals.
- Activities of a securitisation company within the Regulations
- Lifecycle of assets being securitised
- Non-performing loans

United Kingdom – SPVs and securitisation transactions

– Companies used in UK securitisation transactions:

- PLC or limited company
- tax residence
- tax ‘substance’

– Scope of activities:

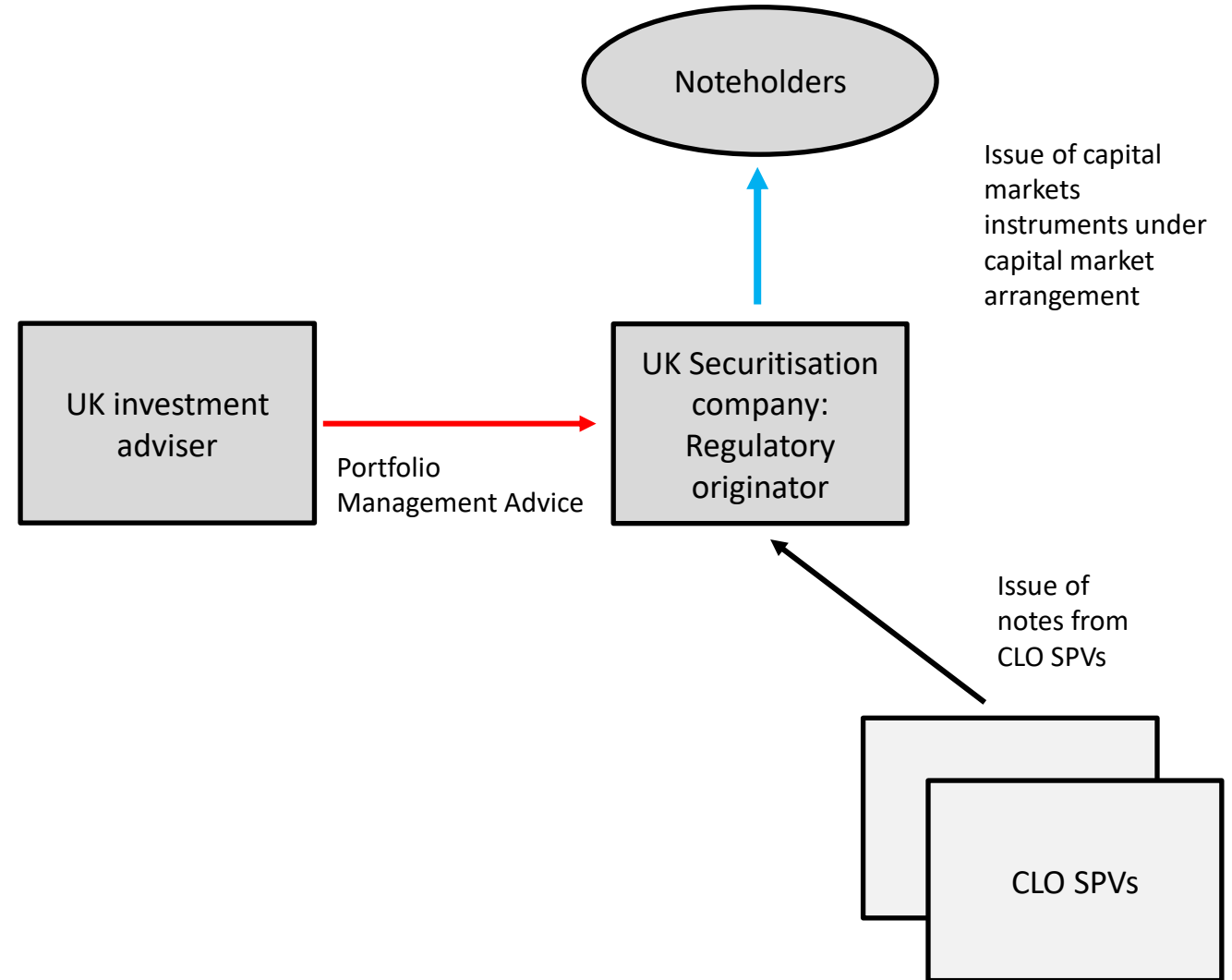
- “apart from any incidental activities”
- “acquiring, holding and managing financial assets forming the whole or part of the security for a capital market arrangement” (Regulation 5(5))

– Regulatory-compliant activities?

– Typical 2023 transactions

– TSCR-qualifying company or a UK Qualifying Asset Holding Company?

– Pillar 2 – consolidation and ownership interests



United Kingdom – Derivatives and Beneficial Ownership

- English law, EU Directives, OECD Model Tax Convention and HMRC guidance:
 - HMRC’s guidance: Beneficial ownership is defined as “**the sole and unfettered right to use, enjoy or dispose of**” the asset or income in question (INTM 332010: ‘*Double Taxation Claims and applications: Beneficial ownership: What beneficial ownership is*’)
- The “Danish Cases”: *T Danmark* (Case C-116/16) and *Y Denmark* (Case C-117/16) (and others)
 - concepts of “economic reality” and “abuse of rights”
 - market practice and transaction themes in 2023
- UK tax treatment of derivatives in the context of beneficial ownership:
 - withholding taxes on interest or annual payments
 - application to derivatives
 - comparison to sub-participations and other contractual payments

United Kingdom – Derivatives and Cryptoassets

- Assets being securitised by UK securitisation companies
- “Investment Transactions List”, relevant for the UK’s investment manager exemption, expanded to include cryptoassets.
- Definition based on the OECD’s Crypto-Asset Reporting Framework
- Inclusion of cryptoassets in portfolios of offshore funds managed in the UK
- But what about UK securitisations and the application of the Regulations to derivatives (and cryptoassets)?
 - paragraph 9A of the Regulations
 - “derivative contracts”
 - “acquiring, holding and managing **financial assets** forming the whole or part of the security for a capital market arrangement”
 - IFRS and principles-based approach to cryptoassets accounting: debt security, equity security, intangible asset...?



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Thank you

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Cadwalader, Wickersham and Taft

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2023 Securitization and Derivatives

US Tax Market Update

January 16, 2023

11:45 - 12:30

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Overview of US Dividend Equivalent Withholding Rules

- **US Tax Code imposes a 30% withholding tax on payments of U.S. source dividends.**
- **Unless special rule applies, payments on an equity or other derivative (such as an equity swap) are generally not subject to withholding. Swap payments are otherwise sourced to the residence of the payee.**
- **Congress determined that dividend equivalents with respect to certain derivatives should be taxed in the same manner as actual dividends.**
- **US Code generally applies a 30% withholding tax on “dividend equivalent payments,” in respect of certain derivatives that reference U.S. stocks.**

Overview of US Withholding Rules on Dividend Equivalents

- **US Tax Regulations provide that the withholding tax generally applies to long U.S. equity-linked derivative positions that have a “delta” of .8 or greater.**
 - **For contracts entered into before January 1, 2025, the delta threshold is one.**
- **Withholding tax applies even if the derivative does not provide for payments of U.S. dividend equivalents.**
 - **Accordingly, price return swaps, options and structured notes could be subject to the US withholding tax even if they do not provide for a direct pass through of dividends on the underlying stock.**
- **The withholding tax does not apply to derivatives with respect to a “qualified index.”**
- **Delta is generally the ratio of the change in the FMV of the contract to a small change in the FMV of the underlying equity.**
- **Delta is determined when the financial contract is issued.**
 - **A new delta will need to be computed upon each purchase of a listed option.**

Overview of Qualified Index Rules

- Under the final regulations, a "qualified index" is not treated as an underlying security, and therefore instruments linked to a qualified index are not subject to US tax withholding.
- If an index satisfies at least one of the tests, it is generally treated as a "qualified index."
 - Under both tests, the index must be a "passive index," based on a "diverse basket of publicly-traded securities," that is "widely used by numerous market participants."
- Determination of whether an index is qualified is made on the first business day of the calendar year and applies for the entire year.
 - In the case of a new index, the determination is made on the date that the index is created.
- An index that otherwise constitutes a qualified index will not be a qualified index if a related short position (whether as part of the index or entered into separately) reduces exposure to the component securities in the index by more than 5% of the value of the long positions in the index.
- A transaction that references an ETF that tracks a qualified index is treated as referencing the index for purposes of US withholding tax rules.

Section 871(m) Rules for Partnerships

- **US rules impose withholding on derivatives that reference a partnership interest if the partnership:**
 - **Is a dealer or trader in securities;**
 - **Has significant investments in U.S. equities and certain derivatives with respect to U.S. equities (comprising 25% or more of the partnership's assets, or having a value over \$25 million);**
 - **Holds an interest in a lower-tier partnership that engages in either of the above activities.**
- **Such transactions are treated as referencing the allocable share of U.S. corporate shares that are held by the partnership.**
- **Many traditional publicly traded partnerships (“PTPs”) could be subject to these rules because they may have a significantly large "blocker corporation" that earns income that is "non-qualifying" for PTP purposes.**
- **If a derivative with respect to a PTP interest or PTP index is subject to US withholding, the parties to the derivative likely would not have the information to determine the proper withholding amount.**

Section 871(m) Transition Rule

- **Under a special transition rule, the following rules are in effect prior to January 1, 2025:**
 - **A contract that is issued before January 1, 2025 is only subject to US withholding if the contract has a delta of one.**
 - **Withholding agents are only required to combine OTC contracts that are “priced, marketed or sold” as part of a single transaction.**
 - **Withholding agents are not required to combine any listed contracts.**
 - **The simplified combination rules only apply to withholding agents and do not apply to long parties.**
 - **What if a withholding agent knows that a long party holds listed options that, when combined, create a delta one contract?**
 - **“Qualified Derivative Dealers” are not subject to withholding under Section 871(a) on actual dividends or Section 871(m) in respect of their dealer positions.**

Digital Asset Transactions That Will Be Subject to Information Reporting in 2025 Under New IRS Regs

- **Dispositions of digital assets will be subject to information reporting:**
 - **Cash**
 - **Digital assets for other digital assets that “differ materially in kind or extent”**
 - **Stored value cards**
 - **Broker services (including gas fees)**
 - **Property that itself is subject to information reporting (securities and real estate**

New 2025 Rules for Cryptocurrency Derivatives

- **Dual reporting will not be required. Derivatives will be reportable either as a security or a cryptocurrency, but not both.**
- **Derivatives will be characterized crypto if the derivative trades on the blockchain.**
- **Derivatives will be characterized as securities if the derivative itself is not blockchain traded.**
- **The asset subject to the derivative will play no part in the characterization of the derivative.**
- **Derivatives physically settled in crypto will be subject to reporting.**

More on Cryptocurrency Derivative Reporting

- **Trading on private or permissioned ledgers will be subject to reporting.**
- **Trading subject to reporting will include orders filled from dealer inventory as well as open market transactions.**
- **Digital asset reporting will take precedence over reporting for regulated futures contracts.**
- **Digitized financial assets will be subject to digital asset reporting only.**
- **Digitized real estate transactions will be subject to real estate reporting only.**

Digital Asset Brokers Will Be Required to Provide Reporting

- **List of Persons treated as brokers include:**
 - **Digital asset platforms**
 - **Payment processors**
 - **Hosted wallet providers**
 - **Cryptocurrency issuers that regularly offer to redeem their coins (such as stablecoin issuers)**
 - **Digital Asset Middlemen**

WT

FASTER Directive

and its impact on refund of withholding tax on interest

IBA – 15 January 2024

Proposal on faster and safer relief of excess withholding taxes

COM(2023) 324

- On 19 June 2023 the Commission issued a proposal for a Council Directive on Faster and Safer Relief of Excess Withholding Taxes
- For more efficient and harmonised procedures concerning cross-border cases of relief from withholding taxes
- Aims at facilitating cross-border investment and preventing tax fraud and abuse
- Applies to income from holding publicly traded securities (dividends on equities and interest on bonds)
- Practically no application to intra-group dividends and interest
- Investors may also be from third countries
- Scope:
 - mandatory register and standardised reporting obligations of large financial intermediaries
 - harmonised tax relief procedures and digital EU tax residence certificate for taxpayers (investors)
- Proposed application as of 2027

Key features and procedure

Only optional application to interest

1. **Residence certificate:** digital EU tax residence certificate (eTRC) to be issued within a day via online portal; should be valid for at least one year, apply for all source states and also be useable for other purposes; to be introduced by all Member States
2. **Register:** for certified financial intermediaries (CFIs) = large institutions and withholding tax agents; non-EU and smaller EU financial intermediaries may register on a voluntary basis
3. **Report:** by CFIs regarding payment of dividends or interest to the relevant tax administration in register state (and any withholding tax agent if relief at source is possible) (to include holding period & financial arrangements only for dividends)
4. **Relief:** CFIs may care for relief if mandated by the investor and if due diligence was done (residence certificate, tax rate, BO confirmation); there are three options:
 - (1) Relief at source “RAS”
 - (2) Quick refund system “QRS” within 50 days; late payment interest apply
 - (3) Combination of both
 - Otherwise standard refund procedure by taxpayer or appointed representative (regarding dividends)
 - CFIs will be liable

Proposed amendments by the Spanish presidency

.... and requests by Member States

- Adapt the rules applicable to the issuing of the digital tax residence certificate;
- Include provisions that would allow certified financial intermediaries to assume the position of non-certified intermediaries, in order to facilitate the application of the relief and complete the information that must be reported to the tax administrations;
- Strengthen the scope of information to be reported by certified financial intermediaries and specify a number of other related provisions;
- Clarify the conditions under which Member States may reject the requests for quick refund, in order to reduce the possibilities for fraudulent claims;
- Add special provisions that govern the cases related to indirect investments;
- further specify the provisions on late payment interest, liability, personal data protection and on evaluation of the future Directive.

- Keep the possibility of maintaining their current systems of relief at source from the withholding tax;
- Only voluntary establishment of the financial intermediary register and reporting obligations;
- Broad support for provision regarding the electronic tax residence certificate.

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BO and Derivatives / temporary transfer in France: latest developments

Olivier Dauchez

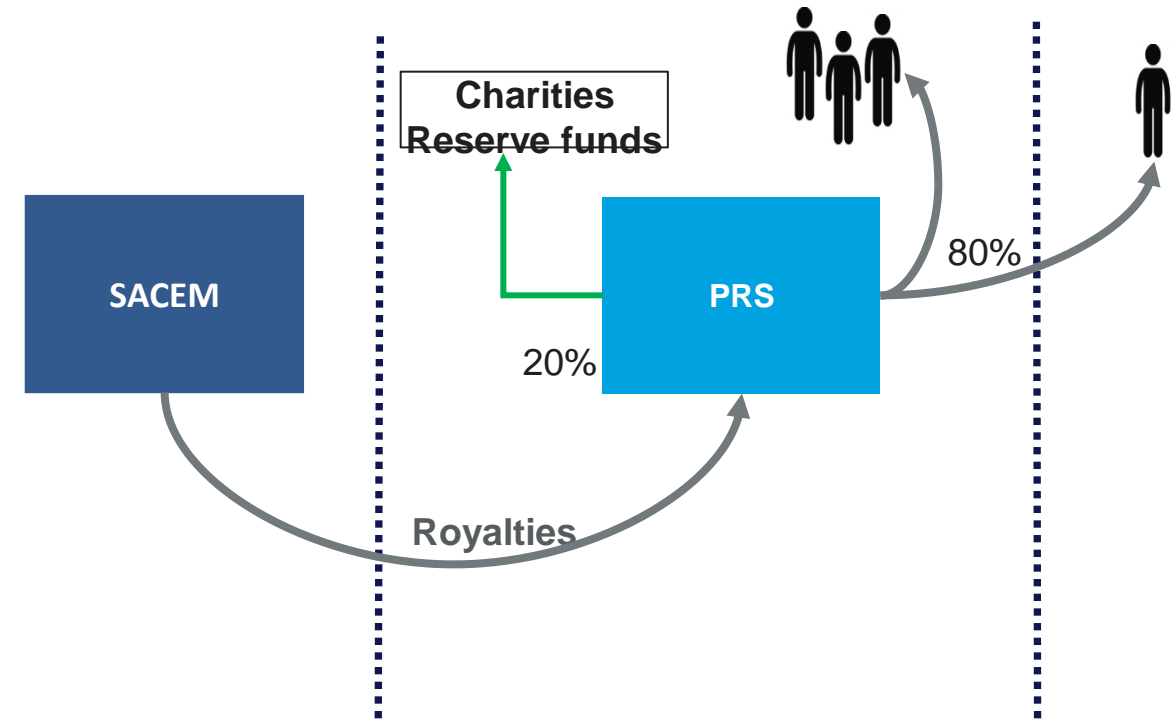
London, 15-16 January 2024

BENEFICIAL OWNERSHIP: a Pandora Box since it can be used alone and independently from an abuse of law / *fraud legis* approach

Generally no withholding tax (“WT”) on interest in France

In line with the landmark Danish cases, the French tax authorities discover they no longer need to characterize an abuse of law ... and started to use beneficial ownership:

- to deny the application of the EU Parent-Subsidiary Directive: CE 5 June 2020, n° 423809, Sté Eqiom et Sté Enka
- to deny the application of treaty benefits: CE 5 February 2021, n° 432845, Sté Performing Right Society Ltd



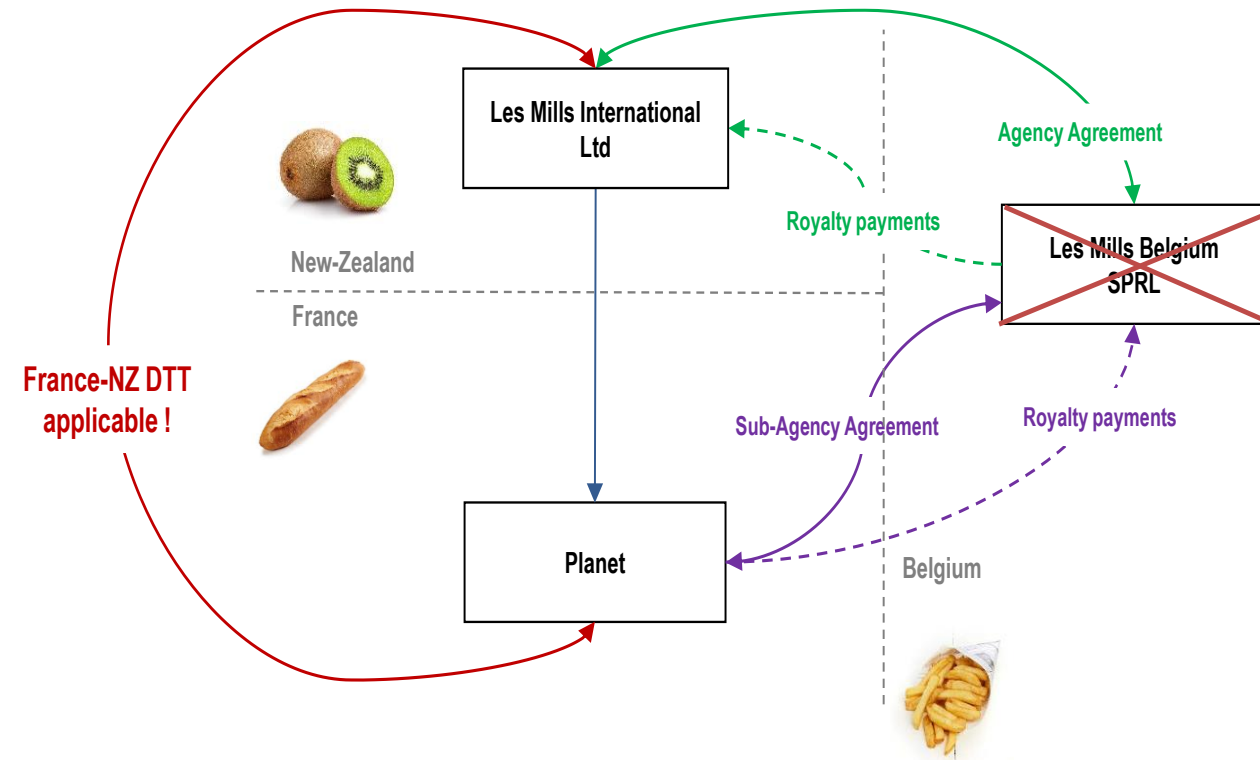
BENEFICIAL OWNERSHIP : affirmative use possible in a triangular situation

In a triangular situation where a French source payment is made to a primary recipient acting (in substance) as an agent or conduit for another party which qualifies as the beneficial owner of the payment,

the provisions of the DTT between France and the country where the beneficial owner is a resident may apply,

despite the interposition of the agent or conduit.

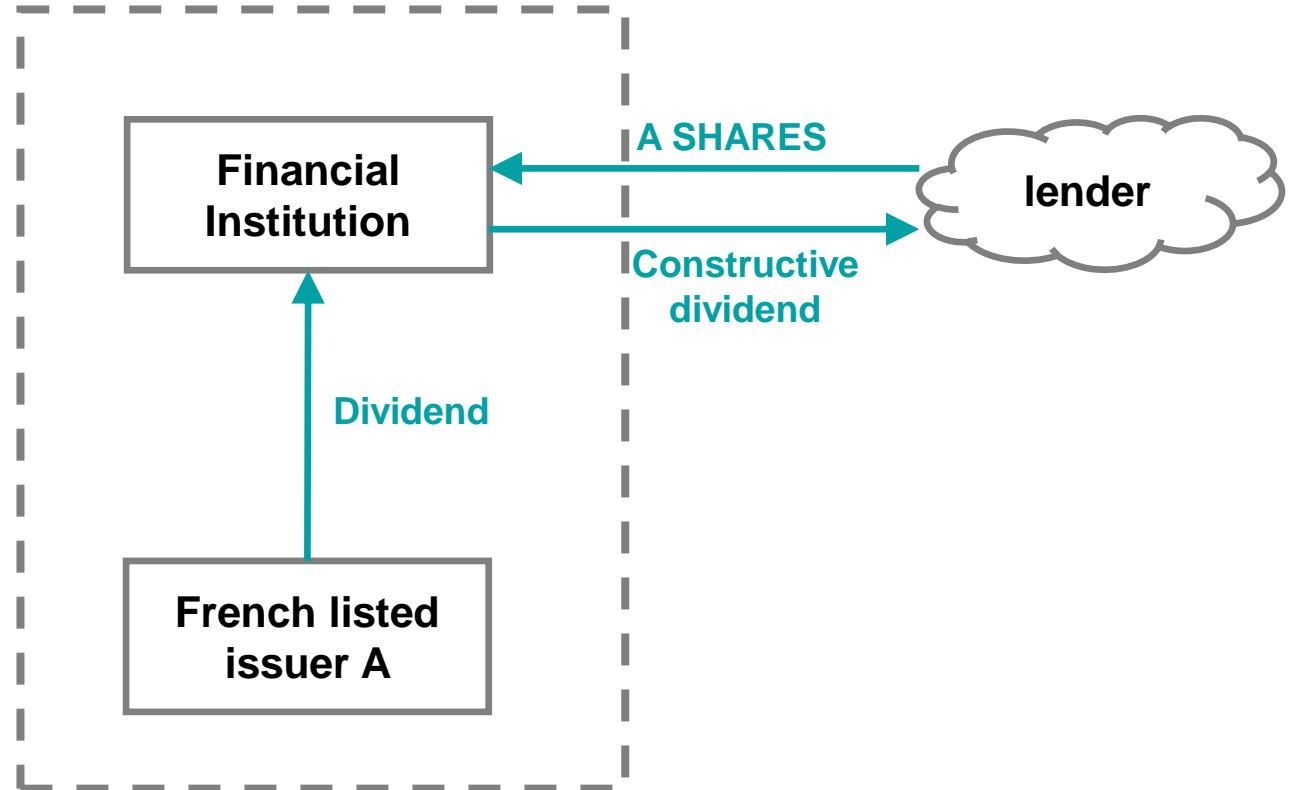
This case law can be used as a fallback defense in case of reassessment.



French Supreme Court, December 8th , 2023 French Banks Federation vs. Ministry of Finance: is the Pandora Box closed ?

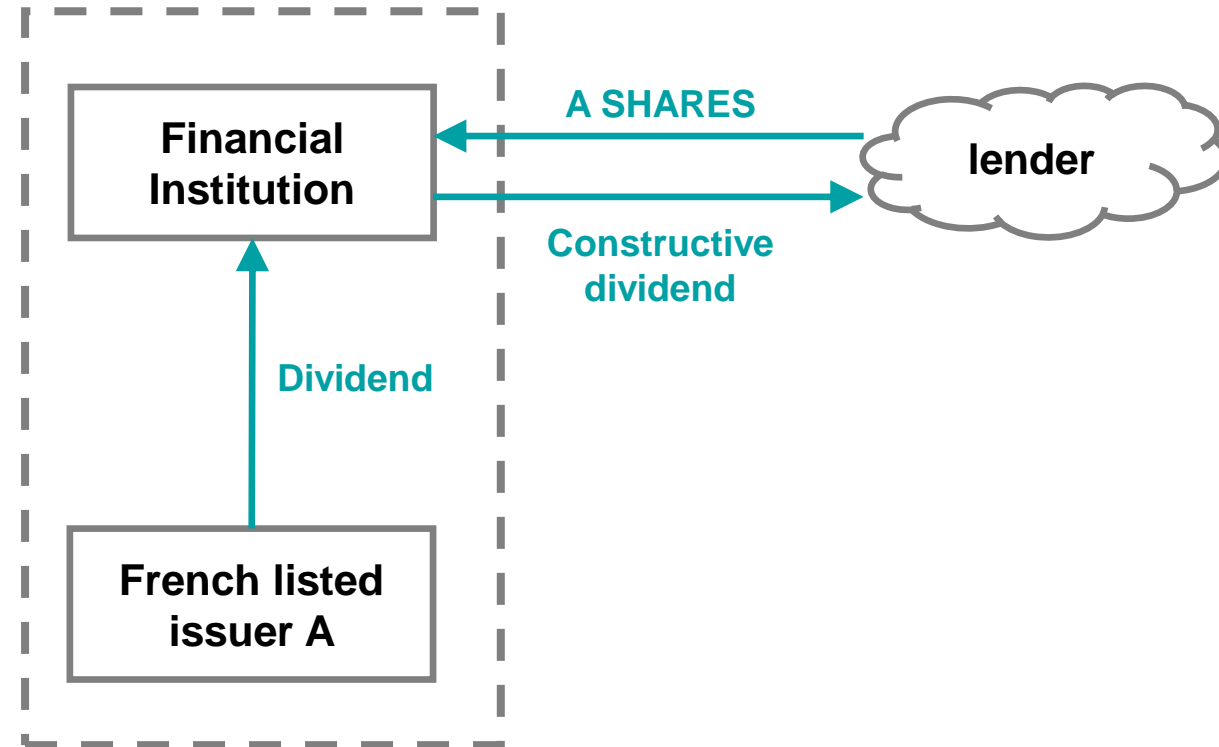
In February 2023, the French tax authorities published a modified revenue ruling indicating that WT applies if the dividends are beneficially owned by a non resident

Is it possible to apply a 25% WT considering that the lender is the effective beneficial owner of the dividend ?



French Supreme Court, December 8th , 2023 French Banks Federation vs. Ministry of Finance: is the Pandora Box closed ?

- Litigation strategy: litigating directly against the revenue ruling: quick and efficient
- WT applies to dividends that “*benefits persons who do not have their tax domicile in France*” (Art. 119 bis 2 FTC)
- Art. 119 bis A applies specifically to certain temporary transfers since 2019
- “Beneficial owner” is an anti abuse provisions specific to certain provisions: reduced WT rate (DTT, Directive) or filing requirements (DAC 6, trusts) which is not implicit in French tax law on WT even if it is implicit in DTT or Directives
- **Abuse of law is the only proper approach for the tax authorities to challenge CumCum**



Thank you.

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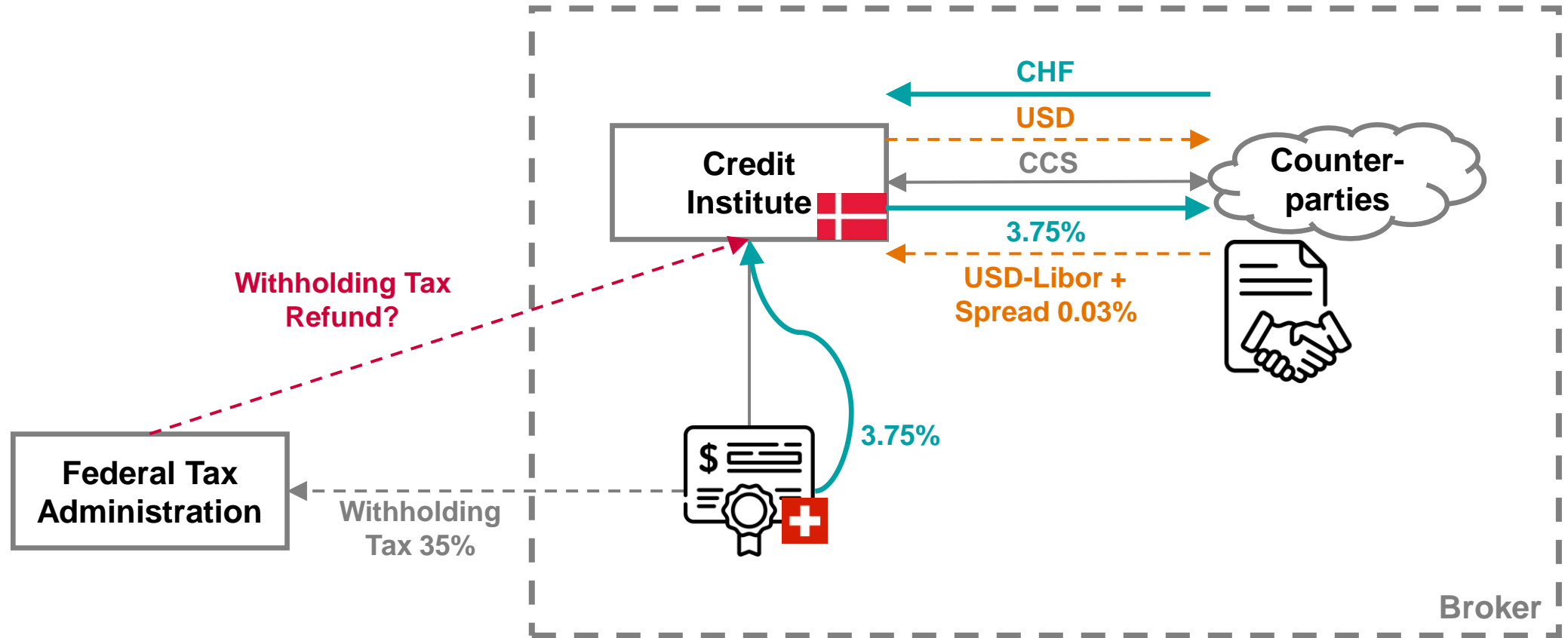
BO and payment of interest in Switzerland

Michael Nordin

London, 15-16 January 2024



Swiss Federal Bonds / Cross Currency Swaps (BVGer A-2121/2020)



Broker

Swiss Federal Bonds / Cross Currency Swaps (BVGer A-2121/2020)

Swiss Federal Bonds (interest-bearing at 3.75%, term 2001 – 10 June 2015)

Trade Date	Value Date	Nominal Value	Price	Market Value	Accrued Interest	Purchase Price (Outflow)	Bond (gross) interest (Coupondate: 10.06.2014; Value Date: 10.06.2014)	Bond (gross) interest (Coupondate: 10.06.2015; Value Date: 10.06.2015)
11.06.2013	14.06.2023	40'000'000	107.68	43'072'000	16'666.67	-43'088'667	1'500'000	1'500'000
22.05.2014	27.05.2014	75'000'000	104.02	78'011'250	2'710'937.50	-80'722'188	2'812'500	2'812'500
03.06.2014	10.06.2014	40'000'000	103.94	41'576'000	0.00	-41'576'000	0	1'500'000

Cross Currency Swaps (CHF against USD; CHF at 3.75% (fixed), USD at (variable) USD Libor rate + Spread of 0.03%)

Swap No.	Trade Date	Counter-party	Termination Date	Notional (CHF)	Additional Payment	Inflow	Swap Interest 10.06.2014 (Value Date: 10.06.2014)	Swap Interest 10.06.2015 (Value Date: 10.06.2015)
(Swap 1)	11.06.2023	Bank 3	10.06.2015	40'000'000	3'088'666.67	43'088'667	-1'500'000	-1'500'000
(Swap 2)	22.05.2014	Bank 2	10.06.2015	75'000'000	5'722'187.50	80'722'188	-2'812'500	-2'812'500
(Swap 3)	03.06.2014	Bank 2	10.06.2015	40'000'000	1'576'000.00	41'576'000	0	-1'500'000

Swiss Withholding Tax in Cross-Border Cases

- Interest payments on federal bonds are subject to Swiss withholding tax (**WHT**)
- WHT refund to a non-resident only possible based on a double taxation treaty
- Interest from a Swiss source to an beneficial owner in Denmark may only be taxed in Denmark
- Switzerland may levy WHT at source, but must refund the WHT upon request (no relief at source)



Refund requirements...

...in cross-border cases

- Tax residency in treaty state
- Certificate of residence
- **Beneficial ownership**
- No treaty abuse
- Timely submission of refund request
- Specific requirements, if applicable, e.g:
 - minimum shareholding
 - minimum holding period



Forwarding Obligation

- No decision-making authority in the case of **contractual** forwarding obligations
- Purely **factual** forwarding obligations are not sufficient (but are an indication of existing legal / contractual forwarding obligations)
- **Harmful forwarding** obligations in case of mutual dependence between income generation and forwarding obligation (**double interdependence**):
 - Income generation depends on the forwarding obligation (1st dependency)
 - Forwarding obligation depends on the income generation (2nd dependency)
- Second dependency serves to differentiate appropriately in the case of intra-group financing
- Ultimately a question of **risk-bearing**
- Extent of forwarding (not) decisive

Federal Administrative Court on the Forwarding Obligation

- There is an obvious connection between Federal bonds and cross currency swaps, even though there are no explicit references or contractual / legal forwarding obligations
- Circumstances indicate a legal forwarding obligation

Swiss Federal Bonds (interest-bearing at 3.75%, term 2001 – 10 June 2015)

Trade Date	Value Date	Nominal Value	Price	Market Value	Accrued Interest	Purchase Price (Outflow)	Bond (gross) interest (Coupondate: 10.06.2014; Value Date: 10.06.2014)	Bond (gross) interest (Coupondate: 10.06.2015; Value Date: 10.06.2015)
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Cross Currency Swaps (CHF against USD; CHF at 3.75% (fixed), USD at (variable) USD Libor rate + Spread of 0.03%)

Swap No.	Trade Date	Counter-party	Termination Date	Notional (CHF)	Additional Payment	Inflow	Swap Interest 10.06.2014 (Value Date: 10.06.2014)	Swap Interest 10.06.2015 (Value Date: 10.06.2015)
(Swap 1)	11.06.2023	Bank 3	10.06.2015	40'000'000	3'088'666.67	43'088'667	-1'500'000	-1'500'000

Federal Administrative Court on Harmful Forwarding (1st Dependency)

- First of all: "The fact that a transaction was "economically reasonable" or "economically necessary" or necessary due to the company's own investment guidelines [...] does not exclude the existence of a harmful forwarding according to supreme court case law."
- Package of federal bonds and cross currency swaps
- Acquisition of federal bonds was made possible by cross currency swaps
- Financing nature of cross currency swaps

Federal Administrative Court on Harmful Forwarding (2nd Dependency)

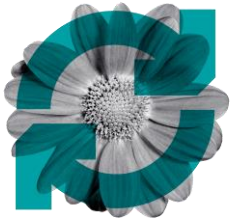
- Risk assumption is an indication for beneficial ownership:
 - Interest rate risk eliminated through cross currency swaps
 - Currency and exchange rate risk fully hedged
 - **Default risk for gilt-edged federal bonds non-existent**
- Conclusion: **No (significant) bond-specific risks** were borne.

Conclusions



- Misuse test via the criterion of double interdependence
- Hedging: no risk, no reimbursement
- Increased legal uncertainty
- Collateral damage for the Swiss financial market
- No safe haven rules

Thank you.



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