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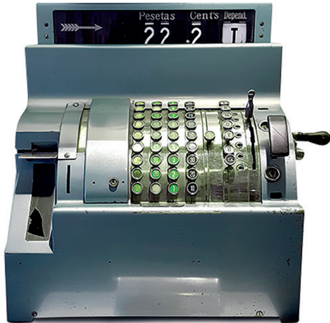

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Acquisition Finance

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General structuring of financing

1 What territory's law typically governs the transaction agreements? Will courts in your jurisdiction recognise a choice of foreign law or a judgment from a foreign jurisdiction?

Most financing transactions in Luxembourg are made by inbound foreign professional and institutional financing and banking investors. Transactions tend, therefore, to be governed by the law that is most familiar to the financing parties, which is generally their domestic law (eg, their law of incorporation, English, New York, German or French law). However, most of the contractual agreements relating to the Luxembourg security packages to the extent they relate to Luxembourg securities (acquisition-agreement security packages such as pledges) are governed by Luxembourg law.

Luxembourg law is very liberal and expressly states the principle of freedom of contract, including the choice of law and election of forum (1123 and 1134, paragraph 1 of the Civil Code indirectly). Freedom of contract is, however, limited by mandatory rules and rules of public policy (article 6 of the Civil Code).

The principle jura novit curia does not apply to foreign law. The judge does not automatically raise the conflict of laws rule, which is not mandatory in contractual matters. He or she will apply the conflict of law rule when parties have not opted for a governing law. The parties invoking the foreign law must prove the content of the foreign law, which, for the Luxembourg courts, is a matter of fact.

Choice of law

Luxembourg courts will uphold the choice of law made by the parties to the acquisition agreements. However, Luxembourg courts may exclude application of a provision of the law chosen by the parties if, and to the extent, that the result of that application would be manifestly incompatible with fundamental principles of public policy of the Luxembourg forum or they are required to take into account overriding mandatory provisions of a law.

Rules of choice of law for countries of the EU are determined by Regulation (EC) No. 593/2008 (Rome I) on the law applicable to contractual obligations. Where there has been no choice of law, the applicable law will be determined in accordance with the rule specified for the particular type of contract. Where the contract cannot be categorised as being one of the specified types or where its elements fall within more than one of the specified types, it should be governed by the law of the country where the party required to effect the characteristic performance of the contract has his or her habitual residence. In the case of a contract consisting of a bundle of rights and obligations capable of being categorised as falling within more than one of the specified types of contract, the characteristic performance of the contract will be determined with regard to its centre of gravity.

In the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorised as one of the specified types, or as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract should be governed by the law of the country with which it is most closely connected. To determine that country, account will be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts.

Enforceability of a judgment

When a judgment has been rendered in a non-EU member state and if no international treaty applies, that judgment will be recognised and enforced in Luxembourg after a review by the Luxembourg Court of First Instance that the conditions set out in article 678 of the Luxembourg Code of Civil Procedure are fulfilled (ie, the usual conditions relating to public policy constraints, the observance by the court of the rights of defence, etc).

When the judgment has been rendered in any EU member state, except Denmark, Regulation (EU) No. 1215/2012 (the Brussels Ibis Regulation), will apply. Similar provisions are provided by the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters signed in Lugano on 30 October 2007 between the European Union member states and three European Free Trade Association countries: Iceland, Norway and Switzerland. The Brussels Ibis Regulation provides that a judgment delivered in a EU member state, which is enforceable in that member state, shall be enforceable in any other member state without any declaration of enforceability being required (article 39). Pursuant to article 42(1) of the Brussels Ibis Regulation, a party who wishes to enforce a judgment delivered in another member state shall provide the competent enforcement authority with:

- a copy of the judgment that satisfies the conditions necessary to establish its authenticity; and
- a certificate issued by the court of origin in the form provided in Annex I of this regulation.

Notwithstanding the above, the new regulation still provides for grounds to refuse enforcement of a judgment (article 46 et seq of the Brussels Ibis Regulation). These grounds are the same as those for the refusal of recognition of a judgment (article 45 of the Brussels Ibis Regulation):

- if the enforcement is manifestly contrary to the public policy of Luxembourg;
- where the judgment was delivered in default of appearance, if the defendant was not served with the document that instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him or her to arrange for his or her defence;
- if the judgment is irreconcilable with a judgment given between the same parties in Luxembourg;
- if the judgment is irreconcilable with an earlier judgment given in another member state or in a third state involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in Luxembourg; or
- if the judgment conflicts with the rules governing the jurisdiction when the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employees was the defendant (articles 10 to 23 of the Brussels Ibis Regulation), and the rules governing the exclusive jurisdiction (article 24 of the same).

Further, Regulation (EC) No. 805/2004 of 21 April 2004 (as amended), creating a European enforcement order for uncontested claims, provides for the abolition of exequatur for judgments on uncontested claims.

A judgment that has been certified as a European enforcement order in another EU member state, other than Denmark, will be recognised and enforced in Luxembourg without the need for a declaration of enforceability and without any possibility of opposing its recognition.

2 Does the legal and regulatory regime in your jurisdiction restrict acquisitions by foreign entities? Are there any restrictions on cross-border lending?

There are no restrictions on acquisitions made by foreign entities. In addition, there are no restrictions on cross-border lending. EU credit institutions may provide credit through either a branch or in accordance with rules relating to freedom of provision of services as long as this activity is regulated by the regulatory authorities of their home country. The exercise of this activity on Luxembourg territory is not subject to authorisation by the Luxembourg financial sector supervisory commission.

Intra-group financing is also not subject to regulatory supervision. Other funding can be freely made to Luxembourg entities as long as their activity does not qualify as an activity of the financial sector; namely, the activity is not carried out in a professional and usual way on Luxembourg territory or the funding entity is subject in its territory of origin to a supervision equivalent to that existing in Luxembourg.

3 What are the typical debt components of acquisition financing in your jurisdiction? Does acquisition financing typically include subordinated debt or just senior debt?

Large acquisition financing in Luxembourg mainly consists of debt and equity-tainted debt instruments (including hybrid debt instruments such as preferred equity certificates, convertible preferred equity certificates, convertible and redeemable bonds), bank loans (straight loans, syndicated loans, etc) and mezzanine loans (by shareholders or other junior lenders). Almost all financing transactions include senior debt (for the largest amount) and junior debt (provided by shareholders, sponsors or other banks). Luxembourg is particularly attractive for setting up acquisition special purpose vehicles (SPVs) to the extent its regulatory environment offers to investors a wide panel of financing and debt instruments endowed with hybrid features likely to optimise the tax efficiency of the acquisition transactions. A sizeable number of international and EU acquisitions are channelled through Luxembourg to benefit from those hybrid features.

4 Are there rules requiring certainty of financing for acquisitions of public companies? Have 'certain funds' provisions become market practice in other transactions where not required?

Takeover bids are governed by the Law dated 19 May 2006 on takeover bids (as amended), implementing Directive 2004/25/EC on takeover bids into Luxembourg law. Pursuant to this law, an offeror must announce a bid only after ensuring that he or she can fulfil in full any cash consideration, if it is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration.

Preconditions to the bid are not permitted unless they involve official authorisations or regulatory clearances relating to the bid. This entails that the bid must not normally be made subject to any financing conditions or preconditions (other than regulatory clearances), and that certain funds must be available to implement the bid.

There is no concept of 'certain funds' in Luxembourg law and regulations. However, many Anglo-Saxon private equity funds are active in Luxembourg and they tend to adopt the City Code 'certain funds' requirement in private treaty transactions. Although not legislatively mandated in this context, and so more flexible, it tends to be enforced to the point where the vendor's counsel will carefully scrutinise the bidder's debt funding term sheets for hidden 'outs'. However, this is not a fixed concept and there is plenty of scope to negotiate the important details. In general, critical finance conditions are negotiated and resolved in the early stages of the bid process.

5 Are there any restrictions on the borrower's use of proceeds from loans or debt securities?

There are no legal restrictions on the borrower's use of proceeds from loans or debt securities. However, general prohibition of financial assistance may impose restrictions to the extent the advancing of money or granting of loans providing financial means to enable a third party to purchase existing shares of a public limited liability company (*société anonyme*) is prohibited. The prohibition has been somewhat relaxed through a whitewash procedure (see question 15) but it still stands. Any funding made for purposes of illegal activities are of course prohibited.

6 What are the licensing requirements for financial institutions to provide financing to a company organised in your jurisdiction?

In principle, there are no licensing requirements for EU entities providing financing to a company organised under the laws of Luxembourg. European rules of freedom to provide services, freedom of capital and freedom of movement will prevail. The law also allows the free branching and freedom to provide services that allow all credit institutions authorised and supervised by the competent authorities of another EU member state (home country) to exercise their activities in Luxembourg (host country) as long as these activities are covered by the authorisation of the home country. Non-EU financing institutions may also lend to Luxembourg companies as long as they are regulated and supervised by their home regulator pursuant to terms and conditions that are deemed equivalent, by the Luxembourg regulatory authorities, to those prevailing in Luxembourg for similar financial institutions. Loan origination activities performed by the following undertakings do not require authorisation as professional lenders:

- undertakings for collective investments;
- alternative investment funds;
- securitisation vehicles;
- specialised investment funds;
- pension funds; or
- investment companies in risk capital.

Similarly, lending activities performed on single or ancillary basis, intragroup lending and loans granted to a limited number of persons do not require authorisation. In a broader sense, any type of funding can be freely granted to Luxembourg entities as long as it does not qualify as a financial sector activity, meaning the lending activity is not carried out in a professional and usual way in Luxembourg or the lender is subject in its home country to prudential supervision equivalent to that exercised by the Luxembourg financial regulator, the CSSF.

7 Are principal or interest payments or other fees related to indebtedness subject to withholding tax? Is the borrower responsible for withholding tax? Must the borrower indemnify the lenders for such taxes?

Luxembourg does not impose any withholding tax on interest payments. Accordingly, debt instruments are not subject to withholding tax unless they are requalified as dividends or profit-sharing bonds or notes. This absence of withholding tax on interest makes Luxembourg the preferred jurisdiction for international acquisition finance transactions. By way of derogation, if the beneficial owner of the bonds is an individual taxpayer residing in Luxembourg, a 20 per cent withholding tax shall apply pursuant to the amended law dated 23 December 2005. However, this withholding tax is definitive and is deemed to replace the income tax, which applies to income interest for Luxembourg residents.

If an investor wants to fund the acquisition as far as possible with debt, the Luxembourg tax law is, in general, very flexible and does not impose any strict debt-to-equity ratios on ordinary taxable companies. Informal limits are, however, applied by the tax authorities for the financing of an acquisition of a subsidiary by intragroup loans. In this situation, the Luxembourg tax authorities generally consider a ratio of 85:15 as being in line with the arm's-length principle, which means that up to 85 per cent of the purchase price of the participations can be financed by intragroup loans. Interest rates of the intragroup loans must be in line with the arm's-length principles in accordance with transfer pricing regulations in Luxembourg. This may be further affected by Directive 2016/1164/EU (Anti-Tax Avoidance Directive), to be transposed into national law by 31 December 2018. The upcoming exit of the United Kingdom from the European Union should not have a priori any adverse effect when structuring the acquisition finance between Luxembourg and the UK, because the applicable zero rate withholding tax pursuant to Directive 2003/48/EC (EU Savings Directive) would be substituted by the provisions of the double tax

treaty between Luxembourg and the UK, which currently provides for a full exemption on interest payments.

For the purposes of determining the debt-to-equity ratio, an interest-free loan from shareholders may be treated as equity for corporate income tax purposes, so it may be possible to structure funding with a 99:1 interest-free or bearing debt-to-equity ratio. A debt-to-equity ratio of 99:1 could also be achieved by using certain exit instruments such as tracking loans. Such a funding structure should be analysed on a case-by-case basis. Any excess interest payments that result from an excess over the above debt-to-equity ratio would be reclassified as hidden profit distribution, therefore leading to a requalification of interest payments into dividend distribution, which, tax-wise, is subject to a tax rate of 15 per cent that is generally applicable on dividends payments, unless the recipient qualifies for the affiliation privilege in Luxembourg.

Finally, gross-up provisions are common in lending documentation and the borrower is usually required to gross-up its payment against any withholding tax that would apply on interest payments.

8 Are there usury laws or other rules limiting the amount of interest that can be charged?

Article 494 of the Luxembourg Penal Code provides that whoever, by exploiting a borrower's weaknesses, obtains a rate exceeding the legal interest (annually fixed through a Grand-Ducal Regulation, equal to 2.25 per cent a year for 2017 and not yet set for 2018) can be sentenced to imprisonment of one month to one year and pay fines ranging from €500 to €25,000, or either one of these penalties. Further, if the lender voluntarily abuses the borrower's need or inexperience to achieve an interest rate clearly exceeding the normal rate in respect of the risk coverage of the loan, the judge, at the request of the borrower, can reduce its obligations to repay the loan capital and the payment of interest.

Another rule of public policy forbids the lender to demand interest on interest (prohibition of anatocism). The principle of anatocism (governed by article 1154 of the Luxembourg Civil Code) limits the frequency at which interest can be compounded on interest; interest can only be compounded once a year, provided the interest is due at that moment in time.

The principle of freedom of contract is further limited by the general duty of care. Parties should act reasonably and fairly when negotiating, executing and performing a contract. The principle of due care sometimes allows the judge to intervene when a party's negotiating position would result in unreasonable contractual provisions for the other party, including imbalance between the parties' interests.

9 What kind of indemnities would customarily be provided by the borrower to lenders in connection with a financing?

Bank lenders

Most of the lending agreement will typically follow Anglo-Saxon formats and tend to favour the lenders. Provisions in agreements can indemnify lenders and agents against all liabilities, losses, costs or expenses arising out of the negotiation, execution, delivery, performance, administration or enforcement of the transaction documents, including pursuant to any proceedings or in connection with the borrower's use of proceeds of such financing. Indemnities typically cover reasonable fees and expenses of legal counsel but are sometimes limited to one principal legal counsel for all such parties and one local counsel in each relevant jurisdiction. Lenders and agents are generally not indemnified to the extent that any such losses or liabilities are caused by their own gross negligence, bad faith or wilful misconduct (and, sometimes, if caused by a material breach by them of the loan agreement) and many contracts will provide that such finding must be made in a final and non-appealable determination by a court of competent jurisdiction.

Securities holders

Holders of securities initially issued to underwriters or initial purchasers are not indemnified by their issuers, except for taxes for which a 'gross up' is payable, as discussed in question 7. Issuers of securities typically indemnify underwriters and initial purchasers against certain liabilities, including liabilities under securities laws, or agree to contribute to payments such parties may be required to make in respect of those liabilities. Trustees and collateral agents are typically indemnified by the issuer for any loss, liability, damage, claim or expense incurred by them without negligence or bad faith and wilful misconduct (or such similar provision as the parties may negotiate) on their part arising out of or in connection with the administration of the indenture or collateral documents under which the securities are governed and their duties thereunder.

10 Can interests in debt be freely assigned among lenders?

Debts (including claims for interest) may be assigned by a creditor to a third party without the consent of the debtor. However, restrictions on assignments may be contractually imposed and negotiated in the credit documentation.

For the assignment to be effective towards the debtor and third parties other than the assignee, the debtor must be notified of the assignment (by letter or by the service of a bailiff) or must assent to the assignment (by private deed or notarised deed).

11 Do rules in your jurisdiction govern whether an entity can act as an administrative agent, trustee or collateral agent?

There are no specific regulations governing whether an entity can act as an administrative agent for bank financing.

The Law of 10 August 1915 on Commercial Companies, as amended (the Company Law) provides the appointment of a fiduciary agent (to some extent equivalent to a trustee) in certain types of companies such as public companies limited by shares that have issued bonds. Such a trustee will act as representative of the bondholders and undertake certain responsibilities set out in the law.

The Law of 22 March 2004 on Securitisation Companies also provides for the appointment of a fiduciary agent under certain conditions, in particular when the securitisation operation is structured as a transparent fund.

Luxembourg has adopted the Law of 23 July 2003 on Trusts and Fiduciary Agreements (the Law of 23 July 2003), bringing into force the Hague Convention on the Law Applicable to Trusts and on their Recognition 1985. Although it is not possible to create a trust in the Anglo-Saxon sense in Luxembourg, trusts governed by foreign law are recognised in Luxembourg to the extent that they are authorised by the law of the jurisdiction in which they are created.

The adoption of the Law of 23 July 2003 also introduced in Luxembourg a specific regime equivalent to the trust institution, known as the fiduciary agreement. The undertaking of the role of fiduciary agent is, however, limited to financial institutions and certain professionals of the financial sector. A fiduciary agreement can be easily implemented (there are no registration or publication requirements) and is effective towards third parties upon its execution, without further notification requirements. An assignment of debt to a trust is enforceable against third parties upon its execution.

12 May a borrower or financial sponsor conduct a debt buy-back?

A borrower may, from time to time, proceed to the buy-back of debts. However, although legal provisions regulate and organise the redemption of shares, no legal provisions govern debt buy-back. Buy-backs are a matter of contractual negotiations. Junior and senior debt have been heavily bought back in recent years, with the view to benefit from discounted values in a distressed environment.

There is some variation in buy-back provisions but the most typical formulations in large global transactions with sophisticated investors permit purchases by both the borrower and a sponsor subject to ensure equal treatment between debtors and transparent information to all investors.

Securities financings

There are many alternatives for an issuer to repurchase its securities including privately negotiated transactions, open market purchases, cash tender offers and exchange offers. Sponsors may purchase securities, but, under the indenture, affiliates are typically not permitted to vote debt securities owned by them.

13 Is it permissible in a buy-back to solicit a majority of lenders to agree to amend covenants in the outstanding debt agreements?

Yes. In this matter, as in others, the freedom of contract prevails. Modification of contractual provisions will generally require the obtaining of consent of a majority of lenders in the context of securities financing. Such consent solicitations may enable a company to remove or relax

covenants or events of default (either in respect of a particular contemplated transaction or permanently), which, if approved, will be binding on all holders regardless of whether they consent or not. Consent solicitations can be conducted either alone or jointly with a tender offer (ie, holders deliver their exit consent).

Provisions authorised to be amended are generally strictly listed. The majority ratio necessary to obtain a consent can be fixed either in value (percentage of total loan) or in number of lenders (percentage of number of lenders out of total number of lenders) or both criteria. In addition, under the terms of most loan agreements, certain provisions require the consent of a greater percentage of lenders, each lender or each affected lender. However, agreed changes amending the securities' features should not be so substantial as to affect the nature of the securities and trigger adverse tax effects on the Luxembourg SPVs.

Guarantees and collateral

14 Are there restrictions on the provision of related company guarantees? Are there any limitations on the ability of foreign-registered related companies to provide guarantees?

There are no particular taxes, costs or liabilities charges over a guarantee. No stamp duty or similar tax or charge applies to the creation or enforcement of a specific pledge security interest over movable assets such as shares, bank accounts or receivables; nor are there any public registration requirements.

Registration at the mortgage registry, which is only valid for a duration of 10 years (but is renewable), will entail additional costs. Specific fees apply to securities taken over immovable properties when filed and registered in the mortgage registry. A tax of 0.05 per cent on the total amount of the secured debt for first registration and renewal is levied for mortgage or pledge on a going concern. Pledges on real property are subject to a tax of 1 per cent on the total amount of the secured debt. In addition, mortgages can be entered into by way of filing a notarial deed, which entails additional costs. Notary fees are calculated on a sliding scale, based on the value of the mortgaged or pledged property, or the amount secured if the security is over a going concern. A notarial deed is not strictly required for a real estate pledge or pledge on a going concern but is recommended.

The usual sliding scale is as follows:

- €50 to €3,800: 0.3 to 4 per cent;
- €3,800 to €10,000: 0.15 to 1.5 per cent;
- €10,000 to €50,000: 0.1 to 0.6 per cent;
- €50,000 to €100,000: 0.025 to 0.5 per cent;
- €100,000 to €990,000: 0.01 to 0.1 per cent; and
- €990,000 to €1.25 million: 0.01 to 0.05 per cent.

There is no restriction applying to foreign-registered related companies to provide guarantees in Luxembourg or under Luxembourg law.

15 Are there specific restrictions on the target's provision of guarantees or collateral or financial assistance in an acquisition of its shares? What steps may be taken to permit such actions?

As a general principle, it is unlawful for a Luxembourg limited liability company incorporated in the form of a public limited liability company and for companies generally governed by rules applicable to it to provide financial assistance for the acquisition of its own shares by a third party (subject to certain exceptions). Luxembourg law does not elaborate further on what constitutes prohibited financial assistance. Article 430-19 of the Company Law (formerly article 49-6) provides that a public limited liability company may not directly or indirectly advance funds, grant loans or provide security with a view to the acquisition of its own shares by a third party.

There are several limited exceptions to the general prohibition. For example, it does not apply to transactions undertaken as part of banks' and other finance professionals' usual business, nor to transactions in which the shares are acquired by or for employees of the target.

A breach of the financial assistance prohibition may result in civil and criminal liability for the target's directors. Third-party lenders may face civil liability and the transaction may be annulled.

Since 10 June 2009, a whitewash procedure has been introduced into the law intended to facilitate the restructuring of the shareholding of public limited liability companies, while still protecting the interests of minority shareholders and creditors. Financial assistance is allowed provided the company complies with the 'whitewash procedure', which requires, inter alia, that the transaction be carried out at fair market conditions, the company have distributable reserves in the amount of the financial assistance granted, and the transaction be approved by the shareholders, subject to a detailed published management report on the transaction.

Article 430-20- of the Company Law (formerly article 49-6 bis) provides for special rules that apply where there is a conflict of interest between the parties involved in the purchase of the shares and those in charge or involved in the whitewash procedure.

Given the fact that the level of net assets of a Luxembourg holding company or SPV is generally low, the effect of the whitewash procedure is rather reduced considering that the company needs to allocate from its profits an amount of non-distributable reserves at least equal to the value of the financial assistance granted.

There may also be limitations where cross-group or upstream guarantees by subsidiaries of the borrower are being granted. Lacking a definition of 'group of companies' in Luxembourg law whereby the interests of the group could override those of a single company, the validity of cross-stream or upstream guarantees will ultimately depend on a corporate benefit analysis by the grantor. In particular, the guarantor should have some individual interest (consideration) in the transaction and the expected benefit deriving from the guarantee should outweigh the risks taken in granting the cross-stream or upstream guarantee. The financial liability resulting from a guarantee should not exceed the financial capacity of the guarantor and, more specifically, should not send the guarantor into an insolvent position. In practice, this may often give rise to contractual limitations of recourse, however disputable, under cross-group guarantees to a certain percentage of the net asset value of the grantor.

16 What kinds of security are available? Are floating and fixed charges permitted? Can a blanket lien be granted on all assets of a company? What are the typical exceptions to an all-assets grant?

Security interests available under Luxembourg law can be divided into:

- securities over immovable assets, which include mortgage over land, building and vessels; and
- securities over movable assets, which include:
  - securities over financial instruments (pledge over shares, claims, bank accounts, debt instruments, assignment of title by way of security), which are governed by the Law of 5 August 2005 on Financial Collateral;
  - pledges over goods or tangible assets that are not financial instruments;
  - pledges over business assets, which is a general security covering the value of a company's intangible assets (eg, clientele, business model, trademark, patents, lease rights, etc and up to 50 per cent of the stock of the company), which can only be granted to banks, credit institutions and breweries being accredited by the Luxembourg Minister of Finance;
  - preservation of title on tangible assets; and
  - retention rights under a sale or warehouse contract.

Luxembourg law also provides for specific guarantees such as personal, independent or joint guarantees or even partial assignment of salary in favour of a creditor.

Luxembourg law does not provide for the creation of fixed and floating charges. It is, however, often the case in international transactions that a Luxembourg company grants a fixed or floating charge governed by foreign law (for further information about enforceability, see question 1).

It is possible to grant a security on all future movable assets of the debtor (not on future immovable assets), but the 'blanket lien' does not exist under Luxembourg law.

17 Are there specific bodies of law governing the perfection of certain types of collateral? What kinds of notification or other steps must be taken to perfect a security interest against collateral?

Under Luxembourg law, the transfer of the possession (dispossession) of the assets over which the pledge is granted is a condition to the

constitution of the pledge. Such dispossession can be done in various ways depending on the type of assets to be pledged. Dispossession is also required to make the pledge enforceable against third parties. The law of the pledgor's jurisdiction may impose further perfection or notification requirements.

The dispossession of registered financial instruments whose transfer takes place by a transfer in the registers of the issuer (as this is the case with respect to the shares in public company limited by shares) may be established by recording the pledge in those registers.

A pledge created over shares in a private limited liability company has to be notified to the company whose shares are pledged.

Unless the debtor whose claims are pledged is party to the pledge agreement, such pledge agreement must be notified to, or acknowledged by, the debtor. Lacking such notification, the debtor of a pledged claim may validly discharge his or her obligation to the pledgor as long as he or she has no knowledge of the mere conclusion of the pledge.

A pledge over bank accounts must be notified to, and acknowledged by, the account bank maintaining the accounts.

A security interests granted over immovable assets (mortgage) or business assets must be registered with the local mortgage registration office.

Failure to comply with these provisions could jeopardise the enforceability of the security interest and its ranking towards third parties and other creditors.

The perfection of security interests over immovable assets (mortgage) or business assets must be registered with the local mortgage registration office.

18 Once a security interest is perfected, are there renewal procedures to keep the lien valid and recorded?

Luxembourg security interests are accessory in nature and continue to exist as long as the principal claim they secure is in place, hence no renewal procedure is required. However, by derogation, a pledge over business assets and a mortgage over immovable properties are only valid for a duration of 10 years (but are renewable).

19 Are there 'works council' or other similar consents required to approve the provision of guarantees or security by a company?

No. 'Works council' consent is not required.

It is recommended to ensure that the granting of guarantees and securities be approved by the grantor itself (ie, its board or relevant authorised corporate body) with the view to assess and ascertain that the granting of guarantees or security satisfies the corporate interest of the grantor and any conflict of interest be cleared.

20 Can security be granted to an agent for the benefit of all lenders or must collateral be granted to lenders individually and then amendments executed upon any assignment?

The Financial Collateral Law specifically provides that a security over financial instruments can be granted to an agent or a trustee acting for itself and for the benefit of all lenders, to secure the claims of third-party beneficiaries, present or future, provided the third-party beneficiaries are determined or determinable.

For other types of securities (including fiduciary arrangements), the effect of the agency provisions (whether governed by Luxembourg or foreign laws) will be recognised and enforceable in Luxembourg. It is, however, recommended to specify the capacity in which the security beneficiary is acting in the relevant security agreement. For all security interests that fall outside the scope of the Financial Collateral Law and where such security is granted to an agent or a trustee, parallel debt provisions will need to be put in place in the loan documentation.

21 What protection is typically afforded to creditors before collateral can be released? Are there ways to structure around such protection?

In general, the circumstances under which collateral may be released are specified in the security agreement or the credit agreement, where applicable. Collateral is generally released when full discharge of secured obligations occurs. To the extent that the relevant provision does not permit the automatic release of collateral, the consent of the lenders or holders will be required to release the collateral according to the contractual negotiated terms.

22 Describe the fraudulent transfer laws in your jurisdiction.

Under Luxembourg bankruptcy law, the incurring of debt or the granting of a security interest in collateral in connection with it could be voided under certain condition (see question 33).

Debt commitment letters and acquisition agreements

23 What documentation is typically used in your jurisdiction for acquisition financing? Are short form or long form debt commitment letters used and when is full documentation required?

In most cases, debt commitments are governed by foreign laws. Legal techniques and the sequence of documentation prevailing in Anglo-Saxon legal practices are customarily used in Luxembourg. There is, therefore, no standard practice in Luxembourg, and the full set of documents would be familiar to Anglo-Saxon investors.

In the initial steps towards the transaction, acquisition finance documents will usually include a letter of intent, a commitment letter issued by the bank or financing parties, or both, a term-sheet, a fee letter and, to the extent a capital markets transaction is involved in the acquisition financing, an engagement letter and often a fee credit letter.

The closing documentation will typically include a credit facility agreement, with the financing banks or loan agreements with financing parties, whether subordinated or not, and various finance documents that would comprise a 'security package' including:

- pledge over receivables;
- pledge over shares;
- pledges over bank accounts and other charges on movable and immovable assets with forms of all required notices to be sent under the security documents;
- any hedging arrangements;
- subordination agreements and intercreditor agreements;
- equity documents; and
- utilisation requests.

English concepts of debenture are not used in Luxembourg in as much as this type of general security is unlikely to be enforceable under Luxembourg law.

Apart from the commitment letter and letter of intent, the documentation is contemporaneously signed on the day of the closing of the acquisition. Signing in counterparts has now become a common practice in Luxembourg and exchange of executed documentation by fax and electronic copy (with originals to be provided later on) is validly recognised. Luxembourg law requires, however, that the same number of original agreements be signed as the number of parties to the agreements involved in the transaction.

24 What levels of commitment are given by parties in debt commitment letters and acquisition agreements in your jurisdiction? Fully underwritten, best efforts or other types of commitments?

Best efforts commitments remain unusual. Transactions are carried out in Luxembourg when the acquisition deal has been secured through fully underwritten commitments in connection with acquisition financing. Luxembourg, being mainly a platform elected for its 'tax appeal', as a secured creditor-friendly jurisdiction and ease of public quotation and pragmatic contractual enforcement, is a jurisdiction resorted to by parties when the deal is nearly completed and all financing details have been resolved. Because closing occurs when financing is secured, it is unusual to negotiate a transaction in Luxembourg whose financing remains uncertain. Good faith in negotiations also remains a requirement and any negotiator may be liable in tort if he or she acted in bad faith in the pre-contractual phase of negotiations without any intent to commit him or herself.

25 What are the typical conditions precedent to funding contained in the commitment letter in your jurisdiction?

The conditions precedent list may have a variable perimeter according to the bargaining power and existing trust of parties. Some of the more frequent typical conditions are:

- due diligence: legal and financing (including audited and unaudited financial statements and of pro forma financial statements);
- review of good standing of corporate borrower;

- report on title (real estate);
- tax clearance on the acquisition structure and structure memorandum;
- corporate conditions precedent: existence, authorisation, capacity to enter into the contractual documentation including directors' and managers' certificates and in some recent cases solvency certificates issued by the Chief Financial Officer of borrowers;
- funds-flow statement;
- legal opinions from counsel on borrower or target, or both;
- no business material adverse change;
- consummation of the acquisition pursuant to the acquisition agreement;
- completion of marketing period and receipt of customary syndication or disclosure information;
- execution and delivery of documentation;
- perfection of security interests;
- delivery of an offering document suitable for marketing any securities;
- payment of fees;
- receipt of know-your-customer and anti-money laundering rules and regulations; and
- the accuracy of certain acquisition agreement representations made by the target as well as other basic corporate and legal representations made by the borrower in the credit agreement.

Representations are generally repeated at each new drawdown.

26 Are flex provisions used in commitment letters in your jurisdiction? Which provisions are usually subject to such flex?

Luxembourg banking and financial institutions are not geared towards large financing or syndications. In addition, they tend to focus their strategy more on private banking activities than on investment banking or commercial credit. Most of the financing operations are carried out by European branches of US or UK banks, or UK branches of French or German financial institutions. Each of them tends to deal according to their national market practices.

Flex provisions have been increasingly predominant in the post-leveraged buyout (LBO) boom and continue to be a key protection for arrangers. The arrangers negotiate the authority to modify the terms of the committed debt, including rights to reallocate the debt among tranches or to allocate a portion of the committed amount to newly created tranches or subordinated facilities. In addition, financings include pricing flex at levels substantially higher than expected market-clearing prices and impose additional adjustments for changes in market indices. Other provisions include excess cash flow sweep (increase in percentage subject to sweep) or increase of financing ceilings.

Some observers also comment that arrangers continue to be 'reluctant to underwrite particular covenant levels and definitions or sponsors' forms of documents'.

27 Are securities demands a key feature in acquisition financing in your jurisdiction? Give details of the notable features of securities demands in your jurisdiction.

Arrangers have the right to require the borrower to replace the bridge loan with a permanent financing package. Bridge financing would ordinarily finance initial capital expenditure investments.

Bridge financing can also frequently be secured by the issuance of free warrants entitled to acquire equity interests or other debt-equity instruments having tax hybrid characteristics, allowing tax deductions in the target countries and exemption on income in the lender's jurisdictions. Demands to place pre-closing securities in escrow before financing are not frequent, owing to corporate law constraints on the ease to proceed to the issuance of securities in advance or on demand.

Tax-driven instruments would be the most favoured type of securities with the view to optimise the tax efficiency of the LBO. These techniques are generally adopted for the most part by private equity houses in deal acquisition. The terms and conditions of the securities would usually be those prevailing in the markets in which the syndicated banks compete for financing. Terms of securities would be negotiated on a case-by-case basis and include various features such as secured against unsecured, quoted or non-quoted with a maximum number of demands for securities with a minimum issuance amount for each call. Financing conditions would also set the weighted average yield for all securities to be issued irrespective of their tranches and time of issuance.

28 What are the key elements in the acquisition agreement that are relevant to the lenders in your jurisdiction? What liability protections are typically afforded to lenders in the acquisition agreement?

Foreign acquirers or lenders want to know that most of the contractual provisions protecting their rights, subject to foreign law, will be fully enforceable in Luxembourg against the Luxembourg special purpose vehicle (SPV). Much care would be addressed to representations relating to valid corporate authority and the binding effects of the contractual agreements. Lenders will rely heavily on local counsel to obtain confirmation, under a formal legal opinion, of the validity and compatibility of contractual provisions with Luxembourg law: validity and enforceability of a non-recourse clause, upstream guarantee or subordination provisions will be heavily scrutinised and security packages would be fiercely negotiated. In particular, provisions entitling the enforcement of loan agreements in distressed situations would be key in the Luxembourg negotiations with the view to enabling lenders to recover their investments in insolvency situations.

In addition, lenders will be sensitive to any tax frictions that the use of a Luxembourg SPV could generate. Specific representations and covenants will be negotiated to this effect and assurance that tax treatment of the financing and acquisition operations has been secured remains paramount.

29 Are commitment letters and acquisition agreements publicly filed in your jurisdiction? At what point in the process are the commitment papers made public?

No filing requirements apply to commitment letters, and acquisition agreements remain private and are protected by the law on privacy.

Enforcement of claims and insolvency

30 What restrictions are there on the ability of lenders to enforce against collateral?

Luxembourg is known as one of the best business places in the world and, in particular, to enforce collateral. Luxembourg's business law is very flexible in this respect and the Financial Collateral Law has brought additional protection for enforcement of collateral over financial instruments.

Securities subject to the Financial Collateral Law and real securities (eg, mortgages) are not affected by the insolvency of the debtor and may be enforced in spite of the filing of a petition for bankruptcy or other collective proceeding, whether occurring in Luxembourg or abroad.

Contracts in going concerns are not automatically terminated by the effect of a bankruptcy of the debtor (except for employment contracts). However, contracts that may not be continued during the insolvent period usually terminate. All interest accruals stop from the date on which the bankruptcy has been declared, except when the debt is subject to a security.

31 Does your jurisdiction allow for debtor-in-possession (DIP) financing?

There is no equivalent concept under Luxembourg law.

32 During an insolvency proceeding is there a general stay enforceable against creditors? Is there a concept of adequate protection for existing lien holders who become subject to superior claims?

Upon the declaration of bankruptcy of a company, an automatic stay arises, prohibiting the collection of claims against the bankrupt entity. Secured creditors benefiting from certain type of securities (eg, pledge or mortgage) may, however, enforce their rights under certain conditions. Creditors benefiting from a security on financial instruments are never prevented from enforcing their rights, provided the security was created before the opening of the bankruptcy.

33 In the course of an insolvency, describe preference periods or other reasons for which a court or other authority could claw back previous payments to lenders? What are the rules for such clawbacks and what period is covered?

Transactions can only be clawed back or challenged in a bankruptcy. A clawback is initiated by the receiver and debated in court. Only specific transactions can be challenged.

Transactions entered into during the hardening period may be declared invalid if they constitute the preferential satisfaction of one creditor over another.

The rights of creditors benefiting from a security governed by the Financial Collateral Law, even granted during the hardening period, are not affected by a bankruptcy or reorganisation proceedings and therefore remain enforceable.

The court can cancel the following transactions:

- disposals of assets without adequate consideration;
- payments made for debts not yet due;
- payments of due debts by means other than cash or bills of exchange; and
- granting of any security for a debt contracted before the hardening period.

Any payment for accrued debt or any transactions against money made after a company has ceased its payments and before the bankruptcy judgment may be cancelled by the court if the beneficiary of the payment or the contracting party was aware of the debtor's cessation of payments.

Mortgages granted during the hardening period (or 10 days before) may be cancelled if their registration was not carried out within 15 days of conclusion of the mortgage deed.

As a general principle, payments made fraudulently and without regard to the creditors' rights are void irrespective of the day on which they were made.

34 In an insolvency, are creditors ranked? What votes are required to approve a plan of reorganisation?

Secured creditors benefiting from valid securities are entitled to payment prior to unsecured creditors. The law provides for a 'waterfall' or ranking for the payment of certain claims owed to privileged creditors.

The ranking set out by law is as follows:

- judicial expenses costs, including the fees of the trustee or receiver appointed by the court;
- compensation for victims of an accident and funeral costs;
- unpaid wages or salaries of employees of the insolvent company;
- tax and social security claims;
- specific privileges on movable assets (as opposed to general privileges, specific privileges can only be enforced on specific assets of the debtor, eg, rents can be secured by the furniture of the rented premises);
- general privileges on movable and immovable assets (which can be enforced on all of the assets belonging to the debtor);
- specific privileges on immovable assets (which can only be enforced on specific assets, such as the seller's lien or the lender's lien, whose rights can solely be secured by the immovable asset purchased by the debtor);
- mortgages;
- pledges; and
- unsecured creditors.

Thereafter, there are contractually or statutorily subordinated debt claims and then equity interests. The ranking of the subordinated creditors depends on the respective ranking contractually agreed.

Within each category of securities, the ranking of creditors generally follows the rule prior tempore, potior jure and is determined as follows:

- mortgage: if the borrower becomes insolvent, the lenders are repaid in the order of the respective mortgage registration;
- seller's lien: if there has been more than one sale of property to the borrower subject to seller's liens, the first seller is paid first, the second seller is paid second and so on;
- privileges: these interests (such as a seller's lien) grant priority to the creditors, even against creditors with a registered mortgage; and
- pledge: if there is more than one pledge over the same assets, the date on which it was made effective towards third parties (eg, registration or notification, as the case may be) determines their ranking.

In order for a plan of reorganisation (controlled management) to be approved, the creditors must vote in favour of the plan by a majority of the creditors representing more than half of the company's claims. Once approved, the plan is effective towards all the creditors.

Security interests granted to creditors over financial instruments or claims under the Financial Collateral Law remain enforceable despite the opening of a bankruptcy or reorganisation proceedings.

35 Will courts recognise contractual agreements between creditors providing for lien subordination or otherwise addressing lien priorities?

Under Luxembourg law, no legal provision exists preventing creditors from agreeing on the rank of their claims. Case law and Luxembourg legal scholars recognise the validity of contractual subordination arrangements. Such agreements are effective towards third parties and courts would normally enforce them.

36 How is the claim of an original issue discount (OID) or discount debt instrument treated in an insolvency proceeding in your jurisdiction?

All interest accruals stop from the date on which the bankruptcy was declared, except when the debt is subject to a security. The discount on securities corresponds to unaccrued and unmatured interest.

37 Discuss potential liabilities for a secured creditor that enforces against collateral.

Generally, a secured creditor that forecloses on collateral takes the collateral 'as it is' with any potential liabilities against which the collateral is subject. This is particularly the case in the event of appropriation and realisation of the assets subject to the security. The security being customarily in rem, all liabilities follow the collateral.

Update and trends

Regulation (EU) No. 2015/848 on insolvency proceedings (Recast Regulation) came into force on 26 June 2017 and repealed Regulation (EU) No. 1346/2000, which fills the gaps left by the repealed regulation and enhances the effective administration of cross-border insolvency proceedings. The Recast Regulation encompasses pre-insolvency (quasi-collective procedures at pre-insolvency stage) and hybrid proceedings (the debtor retaining some control over its assets, albeit subject to supervision by a court or an insolvency practitioner) and aims to establish insolvency registers in each member state that set out information concerning insolvency proceedings opened in such jurisdictions.

The Luxembourg parliament is currently discussing the implementation of the European Union Fourth Anti-Money Laundering Directive (2015/849/EU), which should have been transposed under national law by 26 June 2017. The transposing draft bill endorses a new holistic and risk-based approach enabling the professionals, subject to this legislation, to adapt their level of vigilance in accordance with the identified risks of money laundering or terrorism financing.

Loans & Secured Financing

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Loans and secured financings

1 What are the primary advantages and disadvantages in your jurisdiction of incurring indebtedness in the form of bank loans versus debt securities?

Luxembourg's financial market is very open, but due to the exiguity of the country the loan activity of local commercial banks is relatively limited compared to the size of the financial sector. Foreign banks, benefiting from European Union (EU) freedom of services, are, however, very active in the market and tend to impose their terms and conditions and the specificities of their national governing laws to loan documentation. Luxembourg law would mainly govern debt securities or governing laws common in large financings (eg, New York or English laws). The large contractual flexibility of Luxembourg law offers an array of debt instruments, having different maturities and features, including tracking or conversion characteristics, and a hybrid nature (qualifying as debt in Luxembourg and as equity in some other jurisdictions), which make them very attractive from a tax perspective. In addition, the offering of debt securities is the preferred financing of investment funds and private equity firms and may be underwritten by a large panel of investors.

Issuance of debt securities is permitted by law either to the public or to a limited number of investors (for certain types of legal entities). Issuance to the public needs to comply with the relevant European directives transposed into Luxembourg national law (eg, the prospectus directive). What is interesting to note is that the Luxembourg stock exchange and its euro multilateral trading facility platform are global leaders in listing of bonds issued by various non-Luxembourg issuers and governed by foreign law. As of 30 April 2018, 24,688 bonds are listed on the Luxembourg stock exchange markets, from which 4,954 have been issued by a Luxembourg issuer.

2 What are the most common forms of bank loan facilities? Discuss any other types of facilities commonly made available to the debtor in addition to, or as part of, the bank loan facilities.

Luxembourg banks and credit institutions are not geared towards large financing or syndications. In addition, they tend to focus their strategy more on private banking activities rather then on investment banking or commercial credit. Most financing operations are carried out by European branches of United States or United Kingdom banks, or the UK branches of French or German financial institutions; though in light of Brexit, a slight shift towards the Continent has been noticed. Each branch tends to deal according to their national market practices.

Depending on the loan origination and the financing purpose, a Luxembourg borrower will come across Loan Market Association (LMA) style (multi-currency) (revolving) facility agreements or straight term loans, US-style credit agreements, or loan agreements with strong focus on the customary terms and conditions of the jurisdiction of the lenders. Indeed, the vast majority of bank loan financing is governed by foreign laws and abides by the market practices and standards of the jurisdiction of the governing law of the bank loan financing or debt security.

Given the openness of the Luxembourg market and the diversity of market players and investors, financings vary from secured and unsecured lending in acquisition, real estate, structured, project, fund or Islamic financing, to high-yield bonds either issued or guaranteed by Luxembourg entities.

3 Describe the types of investors that participate in bank loan financings and the overlap with the investors that participate in debt securities financings.

Luxembourg-regulated banks and credit institutions participate in both bank loan financing and debt securities financing. However, Luxembourg credit institutions or banks governed by the law of 5 April 1993 on the financial sector (the 1993 Law) would typically provide mainly commercial or mortgage loan to local borrowers. Foreign banks, investment funds or pension funds, or securitisation companies provide a large portion of the loan financing, which is therefore governed by foreign law (such as private equity or mezzanine funds). Non-EU foreign lenders also establish a Luxembourg special purposes vehicle for the purpose of a single credit operation to EU-based borrowers with the view to benefit from attractive tax features.

Another large portion of the financing transiting through Luxembourg is made of intra-group financing or credit to related parties.

Finally, the Luxembourg investment fund industry, being the second largest in the world, remains a large credit provider.

Loan financings funded by, for example, private equity, mezzanine funds or other types of asset management firms, will be closely aligned to standard agreements used by banks or credit institutions of their jurisdiction (eg, LMA-style).

4 How are the terms of a bank loan facility affected by the type of investors participating in such facility?

The Anglo-Saxon structuring of loan financing is widespread in Luxembourg and borrowers and legal counsel are familiar with their terms and structure. The terms of the tranche A of the financing (funded generally by credit institutions) and tranche B, or high-yield tranche, (subscribed by institutional investors) differ slightly, in particular, in consideration of the subordinate nature of the tranche B.

Institutional investors who remain invested until final repayment tend to offer more flexible terms regarding, for example, less stringent loan-to-value ratios or fewer covenants, but will require call protection, either under the form of conversion or otherwise. In the case of voluntary prepayment, such investors will call the option for whole loan repayment.

Institutional investors will also closely detail concepts such as permitted sale, change of control and initial public offering provisions.

5 Are bank loan facilities used as 'bridges' to permanent debt security financings? How do the structure and terms of bridge facilities deviate from those of a typical bank loan facility?

Bank loan facilities, with a shorter term and higher interest rate, can be used as a bridge to permanent debt security financings, fuelled by historic low interest rates as well as the quantitative easing programme of the European Central Bank through the purchase of bonds for a monthly amount of €30 billion, at least until 30 September 2018.

When sufficient time is available, an LMA-style syndicated facility will often be combined with the issuance of New York law governed bonds that may be exchanged against the loan. If the issuance does not

occur, the lender may request repayment or consolidate the loan into a permanent financing.

6 What role do agents or trustees play in administering bank loan facilities with multiple investors?

There are no specific regulations relating to the activity of administrative agents for a bank financing.

The law of 10 August 1915 on commercial companies, as amended (the Company Law) provides for the appointment of a fiduciary agent (to some extent equivalent to a trustee) in certain types of companies, such as public companies limited by shares that have issued debt securities. Such trustee will act as representative of the bondholders and undertake certain responsibilities set out in the Company Law.

Luxembourg has adopted the law of 23 July 2003 on trusts and fiduciary agreements (the 23 July Law), bringing into force the Hague Trusts Convention on the law of 1 July 1985 applicable to trusts and their recognition. Although it is not possible to create a trust in the Anglo-Saxon sense in Luxembourg, trusts governed by foreign law are recognised in Luxembourg to the extent that they are authorised by the law of the jurisdiction in which they are created.

The adoption of the 23 July Law introduced, under Luxembourg law, a specific regime equivalent to the trust institution, known as the fiduciary agreement. The undertaking of the role of fiduciary agent is, however, limited to financial institutions and certain professionals of the financial sector. A fiduciary agreement can be easily implemented (there are no registration or publication requirements) and is effective towards third parties upon its execution, without further notification requirements. An assignment of debt to a trust is enforceable against third parties upon its execution.

The law of 5 August 2005 on financial collateral (the Financial Collateral Law) specifically provides that a security interest over financial instruments can be granted to an agent or a trustee acting for itself and/or for the benefit of all lenders, to secure the claims of third-party beneficiaries, present or future, provided such third-party beneficiaries are determined or determinable.

For other type of securities (including fiduciary arrangements), the effect of the agency provisions (whether governed by Luxembourg or foreign laws) will be recognised and enforceable in Luxembourg. It is, however, recommended to specify the capacity in which the security beneficiary is acting in the relevant security agreement.

The lenders or, as the case may be, the borrowers, will indemnify the security agent or trustee for any cost, loss or liability they incur other than by reason of its own gross negligence or wilful misconduct.

7 Describe the primary roles and typical fees of the financial institutions that arrange and syndicate bank loan facilities.

Large financings in Luxembourg tend to be arranged by the lead lender, which will often act as mandated lead arranger. Often an affiliate company from the lead lender will act as security agent under the loan agreement and as administrative agent. In certain transactions, unrelated third-party service providers perform such roles.

All such roles give entitlement to specific fees, which are generally set out in separate fee letters. Arrangement fees are often a certain percentage of the total amount of the financing. In certain jurisdictions, case law ruled that an interest rate should cover not only the risk for the lenders but also the cost for the arrangement of the loan, hence the controversial nature of such arrangement fees in certain jurisdictions and as a consequence foreign banks require to have fee letters governed by Luxembourg law.

To the extent the syndicated loan facilities are governed by Luxembourg law, arrangement and syndication fees will generally be in line with the LMA's standards and practices.

8 In cross-border transactions or secured transactions involving guarantees or collateral from entities organised in multiple jurisdictions, which jurisdiction's laws govern the bank loan documentation?

Luxembourg law will usually not govern bank loan documentation in cross-border transactions. English, German or New York law will largely apply to the main finance documentation. Documentation with respect to security interests over assets located in Luxembourg is governed by Luxembourg law, on the basis of the lex rei sitae principle. In large acquisition finance transactions the parties will have agreed to so-called 'agreed security principles' setting out certain principles (and restrictions) that are to be reflected in the various local law security agreements.

Regulation

9 Describe how capital and liquidity requirements impact the structure of bank loan facilities, including the availability of related facilities.

Since January 2014, credit institutions have been subject to the Capital Requirements Directive 2013/36/EU (CRD IV) and the Capital Requirements Regulation. Banks are therefore required to comply with the prescribed liquidity coverage ratio (LCR) and to report it to the Luxembourg authorities on a monthly basis. The LCR compares the stock of high-quality liquid assets held by the banks with the total net cash outflows expected over the next 30 days. This requirement aims to ensure that banks maintain enough liquid assets to survive for 30 days in a stress scenario, as specified by the Commission of Financial Sector Surveillance (CSSF). On 23 July 2015, Luxembourg adopted a law transposing these capital requirements in compliance with the deadline set as 1 January 2016 under CRD IV.

Hence, banks must have total capital of at least 8 per cent of risk-weighted assets. Following the transposition of CRD IV, the minimum requirement for Tier 1 capital has been increased from 4 per cent to 6 per cent, and the minimum requirement for common equity Tier 1 (CET 1) has been increased from 2 per cent to 4.5 per cent.

In 2014, credit institutions started to report elements of the net stable funding ratio (NSFR), which aims to ensure that banks maintain stable sources of funding for more than one year relative to illiquid assets and off-balance-sheet contingent calls. Although it was not binding until this year, the NSFR is likely to be modified or altered during the coming years. The CSSF has published the European Banking Authority guidelines on retail deposits in its Circular 14/582.

Following implementation of these critical reforms, one of the main results for the banking industry may be more stringent rules in relation to the granting of credit facilities on, for example, shorter times or limitation of loans having a speculative grade. The requirement of higher liquidities for covering short-term facilities is likely to affect their profitability and also impact the costs of long-term loans. Banks may decide to diversify the scope of their banking products or services and to place less focus on credit activity. Another potential result involves cost. In particular, transposition of the CRD IV requirements may increase the cost of credit, even on an undrawn commitment.

10 For public company debtors, are there disclosure requirements applicable to bank loan facilities?

The amended law of 11 January 2008, regarding the transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and transposing applicable EU directives and regulations, requires the disclosure of periodic and ongoing information about issuers of securities, as from the moment those securities are admitted to trading on a regulated market situated or operating in Luxembourg.

The issuer, for which Luxembourg is the home member state, must make its annual financial and half-yearly financial reports public, such reports intending to give a true and fair view of the issuer's assets, liabilities (including bank loan facilities), financial position, and profits or losses. To the extent that the obtaining of a bank loan facility constitutes information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments, the disclosure requirements as set out in EU Regulation 596/2014 of 16 April 2014 on market abuse (which into force as of 3 July 2016) apply.

11 How is the use of bank loan proceeds by the debtor regulated? What liability could investors be exposed to if the debtor uses the proceeds contrary to regulations? Can investors mitigate their liability?

In Luxembourg there is no specific requirement or regulation in respect of the use of bank loan proceeds, as long as no public order interest is breached. However, the law of 12 November 2004 on the fight against

money laundering and terrorist financing (the Law of 2004) is fully applicable to credit institutions and the 1993 Law provides that credit institutions are bound by the professional obligations laid down by the Law of 2004.

In particular, credit institutions must perform customer due diligence measures in the following cases:

- when establishing a business relationship;
- when carrying out occasional transactions amounting to €15,000 or more, whether the transaction is carried out in a single operation or in several operations that appear to be linked;
- when there is a suspicion of money laundering or terrorist financing, regardless of any derogation, exemption or threshold; and
- when there are doubts about the veracity or adequacy of previously obtained customer identification data.

Such customer due diligence measures must include:

- the identification of the customer and the verification of the customer's identity on the basis of documents, data or information obtained from a reliable and independent source;
- the identification, where applicable, of the beneficial owner and the provision of 'reasonable measures' to verify his or her identity, so that the professional is satisfied that it knows who the beneficial owner is, including, as regards legal persons, trusts and similar legal arrangements, the provision of reasonable measures to understand the ownership and control structure of the customer;
- the provision of information on the purpose and intended nature of the business relationship; and
- the conduct of ongoing monitoring of the business relationship to ensure that the transactions being conducted are consistent with the professional's knowledge of the customer, the business and risk profile, including, where necessary, the source of funds and ensuring that the documents, data or information held are kept up to date.

The Luxembourg parliament implemented most of the provisions of the EU Fourth Anti-Money Laundering Directive (2015/849/EU) by adopting the law of 13 February 2018, which endorses a new holistic and risk-based approach in order for professionals subject to this legislation to adapt their level of vigilance in accordance with the identified risks.

According to the Law of 2004, any person or entity who knowingly contravenes the above-mentioned provisions shall be fined between €1,250 and €1.25 million. Considering that the infringement of these requirements constitutes a criminal offence, neither the banks nor the investors can limit their liabilities.

While there is, in general, no obligation for the investors or lenders to monitor the use of the funds, allocating the funds of a facility for another purpose other than provided for in the agreement will very likely constitute an event of default and cause acceleration of the facility and early repayment.

12 Are there regulations that limit an investor's ability to extend credit to debtors organised or operating in particular jurisdictions? What liability are investors exposed to if they lend to such debtors? Can the investors mitigate their liability?

Apart from the international financial sanctions imposed on specific jurisdictions and taken at the EU or global levels, there is no particular regulation limiting an investor's ability to extend credit to debtors organised or operating in particular jurisdictions.

13 Are there limitations on an investor's ability to extend credit to a debtor based on the debtor's leverage profile?

If an investor wants to extend credit to a debtor, the Luxembourg law is, in general, very flexible and does not impose any debt-to-equity ratios. However, to the extent relevant, thin capitalisation rules apply in certain situations (see question 28).

Lenders should, however, consider the solvability of their creditor, because lenders providing credit to a debtor that is in a situation of financial distress, suspension of payments or the financial situation of which is in an irreversible and deteriorated state, can be held liable for any increases of loss caused by a disproportionate financial support to such debtor. The lender must, for instance, avoid creating an appearance of creditworthiness that would be likely to inspire unjustified trust in the borrower's solvency. Case law is, however, limited in this respect in Luxembourg, unlike in countries such as France and Belgium.

14 Do regulations limit the rate of interest that can be charged on bank loans?

There are usury rules in the Luxembourg Civil Code, allowing a judge to reduce an interest deemed abusive to the legal interest rate (currently 2.25 per cent for professionals). But there is no fixed rate or a legal provision prohibiting a high remuneration on a loan.

Interest would only be deemed excessive if it is obtained by a lender that abuses of the inexperience of the borrower (case law generally excludes loans between professionals), such that the rate would be deemed excessive compared to the risk associated with the loan. There is no automatic requalification of remuneration on a loan and it is quite common in Luxembourg to have high interest rates with high exit fees. However, if the lender voluntarily abuses the borrower's need to get an interest clearly exceeding the normal interest in respect of the risk coverage of the loan, a Luxembourg judge, at the request of the borrower, can reduce its obligations to repay the loan capital and the payment of interest.

Article 494 of the Luxembourg Criminal Code provides that whoever, by abusing a borrower's weaknesses, obtains a rate exceeding the legal interest (annually fixed via a Grand-Ducal Regulation and currently equal to 2.25 per cent per annum) can be sentenced to imprisonment of one month to one year and pay fines ranging from €500 to €25,000, or either one of these penalties.

Another rule of Luxembourg public policy forbids the lender – demanding interest on interest (prohibition of anatocism). The principle of anatocism (governed by article 1154 of the Luxembourg Civil Code) limits the frequency at which interest can be compounded on interest to once a year, provided such interest is due at that moment in time.

The principle of freedom of contract is further limited by the general duty of care. Parties should act reasonably and fairly when negotiating, executing and performing a contract. The principle of due care sometimes allows a Luxembourg judge to intervene when a party's negotiating position would result in unreasonable contractual provisions for the other party, including any imbalance between the parties' interests.

15 What limitations are there on investors funding bank loans in a currency other than the local currency?

There are no foreign exchange controls in Luxembourg and there are no limitations on investors funding bank loans in currencies other than the euro.

However, Recommendation A – Risk awareness of borrowers of the recommendations of the European Systemic Risk Board (ESRB/2001/1) recommends requiring financial institutions to provide borrowers with adequate information regarding the risks involved in foreign currency lending.

16 Describe any other regulatory requirements that have an impact on the structuring or the availability of bank loan facilities.

While there are no specific Luxembourg regulatory requirements that will have a direct impact on the structuring of the bank loan facilities, the following European and international regulations or agreements do impact on the loan documentation whereby the debtor may incur additional filing and reporting obligations or which will increase the cost of lending for banks or credit institutions.

In addition to the Law of 2004 and the CRD IV regulations mentioned above, the banking industry has to face new regulatory and reporting obligations resulting from the 2008 financial crisis, mainly imposed by EU regulations. This has imposed new organisational and technical constraints on financial institutions that are subject to a whole set of new regulatory requirements. Stringent requirements for transparency and exchange of banking information are reshaping the banking activity in Luxembourg.

On 1 August 2015, the Foreign Account Tax Compliance Act (FATCA) became effective, following an intergovernmental agreement entered into on 28 March 2014 between the Grand Duchy and the US. This act requires that any foreign financial institution reports to the US tax administration any US account holders (and US beneficial owners

of passive non-financial foreign entities). FATCA imposes a 30 per cent US withholding tax on US-sourced payments to foreign financial institutions (including banks, brokers, custodians and investment funds) that fail to comply with the FATCA rules.

Other similar reporting obligations bearing on the financial institutions have recently been implemented in Luxembourg, such as the Common Reporting Standard transposed by the law of 18 December 2015 on the automatic exchange of financial account information. In addition, the European Market Infrastructure Regulation 648/2012 as amended by the Regulation 2365/2015 on over-the-counter derivatives, central counterparties and trade repositories (EMIR) has been in force since 12 January 2016. The purpose of EMIR is to introduce new requirements to improve transparency and reduce the risks associated with the derivatives market. EMIR also establishes common organisational, conduct of business and prudential standards for central counterparties and for trade repositories, and applies to all financial and non-financial counterparties established in the EU that enter into derivative contracts.

Security interests and guarantees

17 Which entities in the organisational structure typically provide collateral and guarantee support for bank loan financings? Are there limitations on which entities in the organisational structure are permitted to provide such support?

In cross-border financing transactions, Luxembourg companies are often located in the upper part of the group structure and are required to provide security interests over their assets and/or provide guarantees in relation to the obligations of their (in)direct subsidiaries.

From time to time Luxembourg companies are involved in cross-collateralised transactions involving the granting of security interest also for the obligations of their parent company or sister companies. In such situations, the ultimate corporate benefit of the grantor must be carefully scrutinised to ensure full enforcement of the securities.

Security interests over assets (rights in rem) are limited recourse to the extent they are limited to the assets over which a security interest is granted.

There may be limitations where cross-group guarantees or upstream guarantees are being granted. Luxembourg does not recognise the concept of a 'group of companies' and the interest of the corporate group is insufficient to justify and validate an upstream guarantee. Corporate benefit must be scrutinised on a case-by-case basis: the guarantor should have some personal interests in the guarantee, notably through its expected benefits, and the risks it may take should be commensurate with the benefit deriving therefrom. In addition, the financial exposure deriving from the guarantees should not exceed the financial means of the guarantor at the moment of granting the guarantee. In practice, guarantors under cross-group guarantees tend to limit, however disputable, the contractual recourse to a certain percentage of the net asset (book) value of the grantor. If at all a limitation of a guarantee is to be included in the loan documentation, such a guarantee should be based on the real value (and not the book value) of the assets, disregarding the then outstanding liabilities.

18 What types of obligations typically share with the bank loan obligations in the collateral and guarantee support? If so, are all such obligations equally and ratably covered by the collateral and guarantee support?

Luxembourg collateral will secure the secured liabilities or obligations, as defined in the foreign law governed loan documentation and in general follow the market practice of that jurisdiction.

19 Which categories of assets are commonly pledged to secure bank loan financings? Describe any limitations on the pledge of assets.

The main categories of assets commonly pledged to secure bank loan financings or debt issued to the public are the following:

- financial instruments (as defined in the Financial Collateral Law) (mainly consisting of shares, bank accounts, bonds and receivables) comprising of:
  - all securities and other instruments, including, but not limited to, shares in companies and other securities equivalent to shares in companies, participations in companies and units in collective investment undertakings, bonds and other forms of debt instruments, certificates of deposit, loan notes and payment instruments;
  - securities that give the right to acquire shares, bonds or other securities by subscription, purchase or exchange;
  - term financial instruments and instruments giving rise to a cash settlement (excluding instruments of payment), including money market instruments;
  - all other instruments evidencing ownership rights, claim rights or securities;
  - all other instruments related to financial underlyings, indices, commodities, precious metals, produce, metals or merchandise, other goods or risks;
  - claims relating to the items described above or rights in or in respect of these items, whether these financial instruments are in physical form, dematerialised, transferable by book entry or delivery, bearer or registered, endorsable or not and regardless of their governing law (eg, undrawn fund commitments from investors in a fund); and
- real estate property.

Luxembourg law does not provide for the creation of floating charges or debentures. It is, however, often the case in international transactions that a Luxembourg company grants a floating charge or a debenture over non-Luxembourg-located assets.

20 Describe the method of creating or attaching a security interest on the main categories of assets.

Pursuant to the Financial Collateral Law securities over shares, claims and bank accounts need to be granted contractually in writing, however no notarial deed is required.

There are no particular taxes, costs or charges in relation to the creation of a guarantee or security interest. No stamp duty or similar tax or charge applies to the creation or enforcement of a security interest over movable assets such as shares, bank accounts or receivables, nor are there any public registration requirements. However, in order to obtain a definite date the lender or security agent can choose to voluntary register the security agreement with the Administration of Registration and Domains in Luxembourg.

Mortgages over real property are passed before a Luxembourg notary public in the form of a notarial deed and are subsequently registered at the mortgage registry. Such registration is only valid for a duration of 10 years (but is renewable), and entails certain costs. A tax of 0.05 per cent on the total amount of the secured debt for first registration and renewal is levied for mortgage. Mortgages are subject to a tax of 1 per cent on the total amount of the secured debt. Notary fees are calculated on a sliding scale, based on the value of the mortgaged property (ranging between 0.05 per cent and 4 per cent).

21 What steps are necessary to perfect a security interest on the main categories of assets? What are the consequences of failing to perfect a security interest?

Under Luxembourg law, the transfer of the possession (dispossession) of the assets over which the pledge is granted is a condition to the constitution of the pledge. Such dispossession can be done in various ways depending on the type of assets to be pledged. Dispossession is also required to make the pledge enforceable towards third parties. The law of the pledgor's jurisdiction may impose further perfection or notification requirements.

The dispossession of registered financial instruments whose transfer takes place by a transfer in the registers of the issuer (as this is the case with respect to the shares in public company limited by shares) may be established by recording the pledge in those registers.

A pledge created over shares in a private limited liability company has to be notified to the company whose shares are pledged.

Unless the debtor whose claims are pledged is party to the pledge agreement, such a pledge agreement shall be notified to or acknowledged by the debtor. Lacking such notification, the debtor of a pledged claim may validly discharge his or her obligation to the pledgor as long as he or she has no knowledge of the mere conclusion of the pledge.

A pledge over bank accounts shall be notified to and acknowledged by the account bank maintaining the accounts, which will waive its

general right of pledge and other preferential rights it has pursuant to its general terms and conditions. A mortgage over real property shall be registered at the mortgage registry.

Failure to comply with these provisions could jeopardise the enforceability of the security interest and its ranking towards third parties and other creditors.

22 Can security interests extend to future-acquired assets? Can security interests secure future-incurred obligations?

The Financial Collateral Law specifically provides that a security over financial instruments can be granted over all collateral whether owned by the collateral provider, presently or in the future.

Luxembourg security interest can secure future-incurred obligations.

23 Describe any maintenance requirements to avoid the automatic termination or expiration of security interests.

Luxembourg security interests are accessory in nature and continue to exist as long as the principal claim they secure is in place. No maintenance is required to avoid automatic termination or expiration.

Exceptions to the above are mortgages over real property assets. Such mortgages need to be renewed every 10 years (see question 20).

24 Are security interests on an asset automatically released following its sale by the debtor? If so, are the releases mandated by law or contract?

As mentioned in question 23, Luxembourg security interests are accessory in nature and hence, as long as the claim they secure remains in place, the security interests continue to exist, in spite of the transfer of the pledged assets to another party. This transfer is customarily not authorised under the Luxembourg security documentation, unless a specific 'permitted disposal' and related release of the security interest have been considered and agreed upon by the parties in the main finance documentation.

25 What defences does a guarantor have against claims for non-fulfilment of guarantee obligations? Can such defences be waived?

Under Luxembourg law, a guarantor under a suretyship (caution) benefits from various defences for non-fulfilment of its guarantee obligations, in particular when the guaranteed obligations are challenged, and in particular in the following occurrences:

- the borrower has not defaulted under the loan agreement;
- the lender has not satisfied its own obligations under the loan agreement; or
- the guaranteed obligations are null and void.

In case of a first-demand guarantee, the guarantor undertakes to irrevocably guarantee the secured obligation up to a fixed sum, irrespective of the secured obligations. This payment obligation is abstract and independent from any objection that can be raised with respect to the validity or enforceability of the guaranteed obligations.

The large contractual flexibility of Luxembourg law allows the waiver of defences or objections by the guarantor in relation to the payment of the guaranteed obligations.

26 Describe any parallel debt or similar requirements applicable in a secured bank loan financing where an agent acts for multiple investors.

The Financial Collateral Law specifically provides that a security over financial instruments can be granted to an agent or a trustee acting for itself and for the benefit of all lenders, to secure the claims of third-party beneficiaries, present or future, provided such third-party beneficiaries are determined or determinable. Hence, there is no need for a parallel debt mechanism in relation to a pledge created over financial instruments.

To the extent a mortgage over real property is granted in favour of a security agent or trustee, parallel debt provisions are required. Such parallel debt will be the claim secured by the mortgage.

27 What are the most common methods of enforcing security interests? What are the limitations on enforcement?

The Financial Collateral Law provides that security interests in relation to financial instruments can be enforced as follows (with the first option being the most common one), unless otherwise agreed by the parties at the moment of contracting. A notice prior to enforcement is not required:

- to appropriate or cause a third party to appropriate the pledged assets at a price fixed, before or after their appropriation, according to the valuation method mutually determined by the parties;
- to assign or cause the assignment of the pledged assets by private sale in a commercially reasonable manner, by a sale on the stock exchange or by public auction;
- to obtain a court decision ruling that the pledged assets shall remain in the party's possession up to the amount of the debt, on the basis of an expert's estimate;
- in the case of financial instruments, to appropriate these financial instruments at the market price, if they are admitted to official listing on a stock exchange located in Luxembourg or elsewhere or are traded on a recognised, functionally operational, regulated market that is open to the public or at the price of the last net asset value published, in the case of units or shares of a collective investment undertaking that regularly calculates and publishes a net asset value; or
- the use of the capital call right by the security agent for the undrawn commitments against the investors in a fund.

Unless agreed otherwise in the financing documentation, a bank or credit institution will exercise a mortgage over a real property by appointing a notary public to organise the sale of the real property through a public auction. In the event the mortgagor is declared bankrupt, the court-appointed receiver will organise the sale of real property.

28 Describe the impact of fraudulent conveyance, financial assistance, thin capitalisation, corporate benefit and similar doctrines on the structure of bank loan financings.

Financial assistance

As a general principle, it is unlawful for a Luxembourg limited liability company incorporated in the form of a public company limited by shares and for companies generally governed by rules applicable to corporations to provide financial assistance (advance funds, grant loans or provide security) for the acquisition of its own shares by a third party. Luxembourg law does not elaborate further on what constitutes prohibited financial assistance.

Prohibited financial assistance does not apply to transactions undertaken by banks and financial institutions in their ordinary course of business, or to transactions in which shares are acquired by, or for the benefit of, employees.

A breach of the financial assistance prohibition may result in civil and criminal liability for the target's directors. Third-party lenders may face civil liability and the transaction may be annulled.

Financial assistance is, however, allowed provided the company complies with the whitewash procedure, which requires, among other things, sufficient distributable reserves at least equal to the amount of the financial assistance granted, approval from the shareholders and the inclusion of the amount of the financial assistance as a non-distributable reserve (liability) in its accounts.

Cross-stream and upstream guarantee

See question 17.

Corporate benefit

The granting of a guarantee or security must meet the requirement of a minimum and adequate corporate benefit. The corporate benefit analysis must be considered on a case-by-case basis and be explicitly resolved upon by the board of managers or directors of the company (and also by the shareholders, if required by the articles of incorporation of the company). See also question 17.

Thin capitalisation

There are no specific thin capitalisation rules in Luxembourg and if, for example, an investor wants to fund an acquisition as far as possible with debt, the Luxembourg tax law is, in general, very flexible and does not impose any strict debt-to-equity ratios on ordinary taxable companies.

Informal limits are, however, applied by the tax authorities for the financing of an acquisition of a subsidiary by intra-group loans. In this situation, the Luxembourg tax authorities generally consider a ratio of 85:15 as being in line with the arm's-length principle, which means that up to 85 per cent of the purchase price of the participations can be financed by interest-bearing intra-group loans. Interest rates of intra-group loans must be in line with the arm's-length principles evidenced by a transfer pricing report in accordance with transfer pricing regulations in Luxembourg. This may be further affected by the Anti-Tax Avoidance Directives, which were formally adopted by the European Council on 12 July 2016 and on 29 May 2017, and were transposed into national law by 31 December 2018 and 31 December 2019. The exit of the UK from the EU has not affected the structure financing between Luxembourg and the UK, as the applicable zero rate withholding tax pursuant to the EU Savings Directive is replaced by the provisions of the double tax treaty between Luxembourg and the UK, which provides for a full exemption on interest payments.

For the purposes of determining the debt-to-equity ratio, an interest-free loan from shareholders may be treated as equity for corporate income tax purposes, so it may be possible to structure funding with a 99:1 debt (interest free/bearing)-to-equity ratio. A debt-to-equity ratio of 99:1 could also be achieved by using certain exit instruments, such as tracking loans. Funding structures should be analysed on a case-by-case basis. Any excess interest payments that result from an excess over the above debt-to-equity ratio would be reclassified as hidden profit distribution, subject to withholding tax at a rate of 15 per cent generally applicable on dividends payments, unless the recipient qualifies for the affiliation privilege in Luxembourg. This may be further affected by the Anti-Tax Avoidance Directives of 12 July 2016 and 29 May 2017 which shall be transposed into national law by 31 December 2018 and 31 December 2019.

Finally, gross-up provisions are common in lending documentation and the borrower is usually required to gross-up its payment against any withholding tax that would apply on interest payments.

Clawback and fraudulent conveyance

Transactions can only be clawed back or challenged in a bankruptcy. A clawback is initiated by the receiver and debated in court. Only specific transactions can be challenged.

Transactions entered into during the hardening period – fixed up to six months before the bankruptcy judgment – and up to 10 days before this period may be declared invalid if they constitute the preferential satisfaction of one creditor over another.

The court can cancel the following transactions:

- disposal of assets without adequate consideration;
- payments made for debts not yet due;
- payments of due debts by means other than cash or bills of exchange; and
- granting of any security for a debt contracted before the hardening period.

Any payment for accrued debt or any transactions against money made after a company has ceased its payments and before the bankruptcy judgment may be cancelled by the court if the beneficiary of the payment or the contracting party were aware of the debtor's cessation of payments.

Mortgages granted during the hardening period (or 10 days before) might be cancelled if their registration has not been performed within 15 days of the conclusion of the mortgage agreement. Payments made in fraud of creditors' rights are void irrespective of the day they were made.

The rights of creditors benefiting from a security governed by the Financial Collateral Law, even granted during the hardening period, are not affected by bankruptcy or reorganisation proceedings and therefore remain enforceable.

Intercreditor matters

29 What types of payment or lien subordination arrangements, or both, are common where the debtor has obligations owing to more than one class of creditors?

For multi-jurisdictional syndicated facilities the borrowers and the lenders will commonly enter into a foreign law intercreditor agreement, which will determine the rights of each class of creditors (senior, mezzanine, junior) with respect to, in particular, their rank and subordination, the payment arrangements and the enforcement of security interests. Such an intercreditor agreement will generally be in the form of an LMA-style agreement.

For mid-cap transactions and straight loans, the sponsors of the borrower and the lender will enter into a subordination agreement whereby the sponsors agree to the full subordination of their claims as regards the bank loan. In limited cases, the sponsors are entitled to certain 'permitted payments'.

Under Luxembourg law, no legal provision exists preventing creditors from agreeing on the rank of their respective claims. Case law and Luxembourg legal scholars recognise the validity of contractual subordination arrangements. Such agreements are effective towards third parties and courts would normally enforce them. A subordination agreement or an intercreditor agreement should be provided in conjunction with a pledge over/assignment of claims and is not a replacement thereof, as is often argued by foreign borrower counsels.

30 What creditor groups are typically included as parties to the intercreditor agreement? Are all creditor groups treated the same under the intercreditor agreement?

See question 29.

31 Are junior creditors typically stayed from enforcing remedies until senior creditors have been repaid? What enforcement rights do junior creditors have prior to the repayment of senior debt?

Junior creditors cannot generally exercise any of their rights until the senior liabilities have been satisfied. However, as mentioned under question 29, for multi-jurisdictional syndicated facilities a foreign law LMA-style intercreditor agreement will be put in place, including the usual LMA provisions regarding junior creditors' rights and restrictions.

32 What rights do junior creditors have during a bankruptcy or insolvency proceeding involving the debtor?

The intercreditor agreement sets out the rights and obligations of each category of creditor as well as the control of such rights per creditor category for any action that is to be taken during a bankruptcy or insolvency proceeding involving the debtor. Control of, for example, 66.7 per cent is required to restructure the loan agreement or enforce the security interests.

The junior creditors will be entitled to enforce their rights under the intercreditor agreement, subject to compliance with directions of or consent from the majority of the senior creditors and from the majority of the mezzanine lenders (if any).

Unsecured junior lenders will be entitled to a pari passu distribution of any monies with other unsecured creditors, but only after the satisfaction of senior secured liabilities.

33 How do the terms of the intercreditor arrangement change if creditor groups will be secured on a pari passu basis?

To the extent all creditor groups are secured on a pari passu basis, the intercreditor agreement will foresee an instructing group (generally representing the larger portion of the debt), which shall decide on the enforcement of the pari passu security interests.

Loan document terms

34 What forms or standardised terms are commonly used to prepare the bank loan documentation?

International financing transactions generally follow the sample standards of the banks extending the credit and contain the essentials of the terms and conditions in the contractual agreement. An Anglo-Saxon lender would follow the LMA standards, while German and French banks would go by their template used in domestic transactions.

Update and trends

Luxembourg remains a strong hub for international financings, firstly because Luxembourg is the second-largest investment fund centre in the world after the US and is the largest global distribution centre for investment funds. There has been a steady increase in fund-related financings during the past two years, either on the investment side of the debt funds or on the lender side where funds are granted subscription line facilities.

Secondly, because of the robustness of Luxembourg's financial collateral. This was recently underpinned by a Luxembourg court ruling that collateral can be enforced and shares of a company appropriated by a lender even if it has not claimed repayment or if the debt guaranteed is not yet due and payable.

Undoubtedly, lenders can extend the scope of contractual default under their security documentation without fear (ie, seeing their enforcement rights denied).

Reference to Luxembourg law is fairly limited in those agreements, but is used to comply with the imperative and public policy provisions prevailing in Luxembourg. When foreign lenders have established their operations or a branch in Luxembourg, LMA standards can be used with a substantial reference to Luxembourg law. However, the use of this type of Luxembourg law LMA standard agreement is very limited in the market.

Bank loan documentation used in Luxembourg is mostly prepared on the base of the standardised terms of the LMA. The Association of German Banks provides a master agreement that is used from time to time.

35 What are the customary pricing or interest rate structures for bank loans? Do the pricing or interest rate structures change if the bank loan is denominated in a currency other than the domestic currency?

Interest rate structures will depend upon types of credit loans and the banking practices of the lenders. A fixed rate is preferred in fixed asset-backed financing (real estate, equipment, immovable investments) while floating rates are used in most corporate lending transactions. It will generally be a US structure with a base rate or a LIBOR plus a margin fixed on a specific period. Mandatory costs may also be included in the computation of the interests to reflect cost of lending. Floating interest rates refer generally to a benchmark rate such as LIBOR for US dollars, British pounds, Swiss francs, yen or EURIBOR for loans denominated in euros, or occasionally NIBOR (Norwegian krone), CIBOR (Danish krone) and STIBOR (Swedish krona) and a margin. In private equity transactions, exit fees are also common and ensure a minimum tax return from lenders on the loan operation.

36 Have any procedures been adopted in bank loan documentation in your jurisdiction to replace LIBOR as a benchmark interest rate for loans?

Since the investigations into the LIBOR manipulations and the outcome thereof through conviction of certain traders and imposing of fines against big financial institutions, there has been a discussion about changing the benchmark interest rate. However, this remains, for the time being, an academic discussion in Luxembourg.

37 What other bank loan yield determinants are commonly used?

Credit facilities are not issued at a discount, however pricing floors can be instituted with respect to the determination of interest rates. Zero floor provisions are often included to avoid negative interest rates. Pricing on tranche B loans may be more diverse and can include conversion rights in equity or additional warrants with attractive pricing conversion with a view to enhancing the targeted return.

38 Describe any yield protection provisions typically included in the bank loan documentation.

When a bank financing is put in place on the basis of a foreign law governed LMA-style agreement, the following yield protection provisions are generally included in the loan agreement:

- increased cost provisions to cover the costs which the lenders may incur as a result of:
  - the introduction of or any change in (or in the interpretation, administration or application of) any law or regulation; or
  - compliance with any law or regulation made after the date of the financing agreement (eg, according to Basel III or CRD IV, see question 9);
- make-whole amounts or prepayment fees;
- tax gross-up provisions; and
- break-up costs.

Gross-up provisions are in most cases irrelevant in Luxembourg since there is no withholding tax on interest payments in Luxembourg, but aim at protecting any requalification of interest into profit distribution when rates are formed of a fixed and high variable portion deriving from the borrower profits.

39 Do bank loan agreements typically allow additional debt that is secured on a pari passu basis with the senior secured bank loans?

When a bank financing is put in place on the basis of a foreign law governed LMA-style agreement and in particular in acquisition finance, accordion facilities can be included on an uncommitted basis. Depending on the negotiated terms, such debt may be secured pari passu. To the extent permitted, additional debt can be incurred outside of the financing arrangement and will, depending on the situation or the negotiation, be either super senior secured (DIP financing), pari passu secured or secured on a second-ranking basis. A specific inter-creditor agreement will be put in place to arrange enforcement of security interests and the distribution of proceeds. Under the Financial Collateral Law a security interest of a higher or lower ranking can only be granted with the express consent of the existing beneficiary of a security interest.

40 What types of financial maintenance covenants are commonly included in bank loan documentation, and how are such covenants calculated?

When a bank financing is put in place on the basis of a foreign law governed LMA-style agreement the following financial maintenance covenants are generally included in the loan agreement:

- equity-to-debt ratio;
- loan-to-value ratio, indicating the maximum percentage of the loan towards the value of a pool of assets;
- an interest cover ratio, indicating the minimum ability of the debtor to pay its interest obligations for a certain interest period; and
- capital expenditure indicating the maximum amount for capital expenditures.

In case of a breach of a financial maintenance covenant, equity cure rights are included in the loan documentation enabling the sponsors to inject equity in the structure to cure such breach.

In Luxembourg law governed straight loans, the financial maintenance covenants will generally be limited to loan-to-value covenants and interest cover ratios.

41 Describe any other covenants restricting the operation of the debtor's business commonly included in the bank loan documentation.

Covenants patterns follow the type of sample loan used in the transaction, in particular the common law or civil law orientation of the contractual documentation. Concepts of good faith in civil law imposed under Luxembourg statutory laws require the adoption of fair and responsible practices from lenders and borrowers. The contractual documentation may strengthen or add some obligations on the borrowers not foreseen in the law, such as covenants restricting payments of dividends, disposal of assets, change of control and negative pledge preventing them from granting additional security interests or securities with lower rankings, or incurrence of further debt.

42 What types of events typically trigger mandatory prepayment requirements? May the debtor reinvest asset sale or casualty event proceeds in its business in lieu of prepaying the bank loans? Describe other common exceptions to the mandatory prepayment requirements.

When bank financing is put in place on the basis of a foreign law governed LMA-style agreement, mandatory prepayment is generally triggered by events such as change of control, unauthorised payments of dividends by the borrower to the sponsor, sale of assets and any other event that benefits the borrower to the extent not permitted under the loan facility or otherwise not authorised by the lender. In specific loans, contractual provisions may foresee that free cash proceeds exceeding certain pre-agreed thresholds trigger some prepayment obligations (cash sweep provision).

43 Describe generally the debtor's indemnification and expense reimbursement obligations, referencing any common exceptions to these obligations.

In straight loans governed by Luxembourg law, a borrower will indemnify the lenders for any costs, expenses or loss incurred by the lender in relation to:

- investigating any event that it reasonably believes is an event of default;
- acting or relying on any notice, request or instruction that it reasonably believes to be genuine, correct and appropriately authorised; or
- instructing lawyers, accountants, tax advisers or other professional advisers or experts as permitted under the loan agreement.

A Luxembourg judge may, however, reduce the amount of such indemnities if it is considered as punitive damages.

Securities Finance

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Statutes and regulations

1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

The legal framework governing the offering of securities on the Luxembourg Stock Exchange (LSE) and their admission to trading on a regulated market results from a blend of national laws and European directives requirements. The offering of securities is primarily governed by the Law of 10 July 2005 relating to the prospectus for securities (the Prospectus Law), which implements Directive 2003/71/EC (the 2003 Prospectus Directive). The Prospectus Law was further amended by the Luxembourg law of 3 July 2012 (the 2012 Law) implementing Directive 2010/73/EU (the 2010 Prospectus Directive) and by the law of 21 December 2012, with the view to take into consideration the EU Regulation No. 1095/2010 (Regulation 1095/2010) establishing the European Supervisory Markets Authority (ESMA). The Prospectus Law was also recently amended in order to allow more flexibility where the securities of a third-country issuer are no longer allowed to trade on the regulated market in its home member state but instead are admitted to trade in one or more other member states by the Luxembourg law of 10 May 2016 implementing Directive 2013/50/EU.

The 2012 Law, beyond the strict implementation of the 2010 Prospectus Directive, further amended the Prospectus Law in respect of public offerings and the admission to trading on a regulated market of securities that are not subject to Community harmonisation under the 2003 Prospectus Directive.

The public offering of securities representing units issued by undertakings for collective investment other than the closed-end type are subject to the sole provisions of the Laws on Undertaking of Collective Investments dated 17 December 2010 as amended. Units of an open-end type are out of the scope of the Prospectus Law irrespective of the frequency and periodicity of their repurchase. The prospectus they issue is valid for an offer to the public or their admission on a regulated market.

The Prospectus Law distinguishes three different types of legal regimes for offerings and admission:

- First Regime: relating to the offering and admission on a regulated market of securities subject to European harmonisation under the 2010 Prospectus Directive (Part II of the Prospectus Law with a full prospectus regime).
- Second Regime: relating to securities that are not encompassed by the 2010 Prospectus Directive and addressing two types of operations (Part III of the Prospectus Law with a simplified prospectus regime):
  - their public offering in the Grand-Duchy of Luxembourg (Luxembourg); and
  - their admission to a Luxembourg regulated market.
- Third Regime: relating to the admission of securities to trading on markets not listed as a regulated market by the European Commission (Part IV of the Prospectus Law). At present, there is only one such regulated market in Luxembourg: the Euro Multilateral Trading Facility (MTF) market.

The regulatory supervisory authority, the Commission for the Supervision of the Financial Sector (CSSF) has issued several administrative circulars that complete the body of existing rules and regulations, and that provide an overview and recommendations in respect of the Prospectus Law requirements.

In addition to the Prospectus Law, admission to trading on the LSE is subject to the Grand-Ducal Regulation of 13 July 2007 on the keeping of an official list (the Official List Regulation) and the LSE's own rules and regulations (the LSE Rules and Regulations, and together with the Official List Regulation, the LSE Listing Rules). The LSE Listing Rules set out the requirements for admission to a Luxembourg-regulated market and regulate the conduct of listed companies.

Specific regulations also apply to public offerings pursuant to public takeover bids (ie, the Law of 19 May 2006, as amended, implementing European Directive 2004/25/EC).

The CSSF is the authority primarily responsible for the supervision and enforcement of the statutes and regulations governing public offerings of securities in Luxembourg. In particular the CSSF is responsible for approving prospectuses under the regime covered by the 2010 Prospectus Directive (First Regime) and the simplified prospectuses relating to securities that are outside the scope of the Second Regime. The CSSF regularly issues and promulgates instructions and guidelines under the form of administrative circulars that implement these statutes and regulations. Further to the creation of the ESMA, the CSSF cooperates with the ESMA, pursuant to the requirements of the Regulation 1095/2010 in matters of exchange of information and proceeds to the necessary reporting to enable the ESMA to carry out its mission.

The LSE is the sole institution authorised to administer one or several securities markets situated or operating in the Luxembourg market. It has the residuary competence for approving offers of securities admitted to trading under the Second Regime, namely, that are not covered by the Community harmonisation for the offering of securities and admitted to trading on the LSE or the Euro MTF (the Luxembourg alternative regulated market). The LSE has been operating the Euro MTF since 18 July 2005. This second market, which is not included in the list of regulated markets of the European Commission, is an alternative for issuers that wish to benefit from a certain regulatory framework, but do not require a European passport for prospectuses.

The LSE is responsible for administering and enforcing the LSE Listing Rules as well as approving the admission of an entity to the official list and the quotation of the entity's securities on the LSE.

Public offerings

2 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

Pursuant to the Prospectus Law, any issuer intending to make an offer of securities to the public or an admission to trading of securities (equity or debt) on a regulated market situated or operated within the territory of Luxembourg must, subject to certain exemptions listed in the Prospectus Law, publish a prospectus. The issuer must notify the competent authorities (the CSSF or the LSE) of such intention in advance. An 'offer of securities' to the public is a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to

enable an investor to decide to purchase or subscribe to these securities. Securities include shares in companies and their equivalent, but also bonds or other forms of securitised debt, depositary receipt in respect of such securities and other securities giving the rights to sell or acquire any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.

Certain types of offers are exempt from the obligation to publish a prospectus, and consequently the obligation to notify the CSSF or the LSE. These are as follows:

- offers of securities addressed solely to qualified investors;
- offers of securities addressed to fewer than 150 natural or legal persons other than qualified investors, per member state;
- offers of securities addressed to investors who acquire securities for a total consideration of at least €100,000 per investor, for each separate offer;
- offers of securities whose denomination per unit amounts to at least €100,000; and
- offers of securities with a total consideration in all member states of the European Union of less than €100,000, which limit must be calculated over a period of 12 months.

Qualified investors are defined by article 2 of the Prospectus Law in a consistent manner with the definition of professional clients for purpose of the Directive 2014/65/EU (the MiFID II Directive). Qualified investors are the professional clients listed under category I of Annex II of the MiFID II Directive, including those persons or entities who may be treated as professional clients on request, in compliance with Annex II of the MiFID II Directive, or who are recognised as an eligible counterparty pursuant to article 30 of this directive, unless they have opted to be treated as non-professionals.

In addition, the offering of certain types of securities are exempt from the obligation to publish a prospectus. These types of securities are the following:

- shares issued in substitution for shares of the same class already issued, if the issuing of such new shares does not involve any increase in the issued capital;
- securities offered in connection with a takeover by means of an exchange offer, provided that a document is available containing information that is regarded by the CSSF as being equivalent to that of the prospectus, taking into account the requirements of Community legislation on exchange offers;
- securities offered, allotted or to be allotted in connection with a merger, provided that a document is available containing information that is regarded by the regulatory authority as being equivalent to that of the prospectus, taking into account the requirements of Community legislation on mergers;
- shares offered, allotted or to be allotted free of charge to existing shareholders, and dividends paid out in the form of shares of the same class as the shares in respect of which such dividends are paid, provided that a document is made available containing information on the number and nature of the shares and the reasons for and details of the offer;
- securities offered, allotted or to be allotted to existing or former directors or employees by their employer whose securities are already admitted to trading on a regulated market or by an affiliated undertaking, provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer;
- dividends paid out to existing shareholders in the form of shares of the same class as the shares in respect of which such dividends are paid, provided that a document is made available containing information on the number and nature of the shares and the reasons for and details of the offer; this obligation applies also to a company established outside the European Union whose securities are admitted to trading either on a regulated market or on a third-country market. In the latter case, the exemption applies provided that adequate information, including the document referred thereto, is available at least in a language customary in the sphere of international finance and provided that the European Commission has adopted an equivalence decision regarding the third-country market concerned; and
- securities offered, allotted or to be allotted to existing or former directors or employees by their employer or by an affiliated undertaking provided that the company has its head office or registered office in the European Union and provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer.

As regards information to be disclosed in prospectuses, the Prospectus Law refers explicitly to the Annexes of the Commission Regulation (EC) 809/2004/EC (the Regulation on the information to be contained in the Prospectus), which deal with the level of information required to be disclosed, depending on the prescribed category of issuer and the type of securities to be offered. In general, the prospectus must contain all information necessary for investors to make an informed assessment of the assets and liabilities, financial position, profits and losses, and future prospects of the issuer and of any guarantor of the securities to be listed, as well as the rights attaching to such securities and any conditions under which they are issued. In particular, the prospectus should include disclosures of applicable risk factors, business and market descriptions, the financial statements of the issuer and a management discussion and analysis (MD&A) section. The prospectus must also include a summary section (key information), which conveys, in plain language, appropriate information relating to the securities offered, including risks associated with the issuer, any guarantor and the securities in order to aid investors when considering whether to invest in such securities. This summary must be drawn up in a common format, in order to facilitate comparability of the summaries of similar securities. This summary is not required for non-equity securities having a denomination of at least €100,000.

The issuer may decide to issue the prospectus as a single document or as separate documents. A prospectus composed of separate documents must split the required information into a registration document, a securities note and a summary note. The registration document contains the information relating to the issuer. The securities note contains the information concerning the securities offered to the public or to be admitted to trading on a regulated market.

Issuers who offer securities under the Second Regime are only required to publish a simplified prospectus. The compulsory content of the simplified prospectus is listed in Annexes I and III to VI of the LSE Rules and Regulations depending on the nature of the securities listed. Alternatively, reference may be made to the Annexes of the Regulation on the information to be contained in the Prospectus.

Issuers who offer securities intended to be traded on the LSE under the Second Regime are required to publish a prospectus, which must be approved by the LSE. The compulsory content of the simplified prospectus is listed under Part III of the Prospectus Law and in sub-chapter 1 of Chapter I of Part 2 of the LSE Rules and Regulations.

Issuers who offer securities on the Euro MTF under the Third Regime are required to file a prospectus with the LSE in accordance with the requirements laid down under sub-chapter 2 of Chapter I of Part 2 of the LSE Rules and Regulations.

Prospectuses can be drafted in Luxembourgish, French, German or English and other languages deemed acceptable by the CSSF or the LSE. Once approved the prospectus must be filed with the CSSF by email or through the CSSF secured internet platform (www.e-file.lu). Every significant new fact, material mistake or inaccuracy relating to the information included in the prospectus, which is capable of affecting the assessment of the securities and that arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, must be mentioned in a supplement to the prospectus. Such a supplement must be approved in the same way within a maximum of seven working days and published in accordance with at least the same arrangements as were applied when the original prospectus was published.

To the extent the securities offered to the public are also intended to be listed on the LSE, an additional request for being admitted to the LSE must be filed with the LSE. An application for admission to trading in securities on one of the securities markets operated by the LSE is also deemed to be an application for admission to the official list. Therefore, an application for admission to the official list without an application for admission to trading on one of the securities markets operated by the LSE will not be accepted. The decision of listing for any equity, debt or derivative issuance programme is effective for one year and may be renewed annually in order to allow new listings.

3 What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?

According to the Prospectus Law, no offer of securities can be made to the public within the territory of Luxembourg without prior publication of a prospectus approved by the CSSF or the LSE.

To the extent that no prospectus may be published unless it has been approved beforehand by the CSSF or, as applicable, the LSE, the public offering process is therefore a two-step process that entails first the approval of the prospectus, and second its publication.

This approval, however, does not guarantee the economic and financial soundness of the offering or listing, nor the quality or solvency of the issuer. The authorities require that a specific disclaimer be inserted in the prospectus in this respect. The draft prospectus is initially submitted for review purposes to such relevant authorities. They have 10 working days to notify their decision to approve the prospectus if the issuer already has securities admitted to trading on a regulated market and has previously offered securities to the public. This time limit is extended to 20 working days if the securities are offered by an issuer who has not issued securities admitting to trading on a regulated market and has not previously offered securities to the public. The time limit runs from the working day following that of the official submission.

If, at the time of the receipt or processing of the submitted file, the file is not complete or additional information is needed, the issuer will be advised that the file is incomplete, and the time limit then starts to run only from the working day following that on which the requested information has been provided by the issuer in accordance with the provisions of the Prospectus Law. The CSSF has 10 working days from the submission date to notify the issuer that the file is incomplete or that supplementary information is needed.

The authorities may still validly notify their approval after the expiry of the above-mentioned time limit. In particular, this enables the issuer to ask the CSSF to approve the prospectus on a date that, due to the timetable of the transaction, falls beyond the prescribed time limits provided in the Prospectus Law as regards the notification of the decision of approval. The same principles apply to applications for approval of supplements to the prospectus within the time limit for approval of seven days.

It should be noted that prior to the official submission, the issuer must notify its intent to proceed to the public offering or the listing of securities on the LSE. It would also be well advised to solicit from the relevant authorities their preliminary view, in particular when the contemplated offering or listing is unusually complex. Communication with the CSSF or the LSE is easy and straightforward, and is usually made by electronic communication.

Issuers intending to list their securities on the LSE must also file a request form for admission of securities to trading and a letter of undertaking whereby they commit to maintain their entity in good standing, comply with applicable regulations and report adequately to the authorities as needed.

Once approved and submitted to the CSSF or the LSE, the prospectus must be made available to the public by the issuer, offeror or person asking for admission to trading on a regulated market as soon as is practicable or at a reasonable time before, and at the latest, at the beginning of, the offer to the public or the admission to trading of the securities involved. In addition, in the case of an initial public offer of a class of shares not already admitted to trading on a regulated market that is to be admitted to trading for the first time, the prospectus shall be available at least six working days before the end of the offer.

The Prospectus Law rules that the prospectus is deemed available to the public when published:

- by insertion in one or more newspapers circulated throughout, or widely circulated in, Luxembourg;
- in printed form made available to the public, free of charge, at the offices of the LSE, or at the registered office of the issuer and at the offices of the financial intermediaries placing or selling the securities, including paying agents;
- in electronic form on the issuer's website and, if applicable, on the website of the financial intermediaries placing or selling the securities, including those agents in charge of the financial service;
- in electronic form on the website of the LSE; or
- in electronic form on the website of the CSSF.

The Prospectus Law does not require, as proposed by the 2010 Prospectus Directive, publication of a notice stating that the prospectus has been made available and where it can be obtained. It is noteworthy that prospectuses are published by the CSSF on the website of the LSE for a period of at least 12 months, and this is sufficient to fulfil the obligation to publish imposed on the issuer.

4 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

Any advertisements must state that a prospectus has been or will be published and indicate where investors are or will be able to obtain it. The mention of the decision of approval of the prospectus by the Commission does not constitute an appreciation of the opportuneness of the transaction proposed to investors.

Advertisements must be clearly recognisable as such and the information contained therein must not be inaccurate or misleading. They also must be consistent with the information contained in the prospectus, if already published, or with the information required to be in the prospectus, if the prospectus is published afterwards. All information concerning the offer to the public or the admission to trading on the LSE disclosed in oral or written form, even if not for advertising purposes, must always be consistent with that contained in the prospectus.

The CSSF has the power to exercise control over the compliance of advertising activity, relating to a public offer of securities within the territory of Luxembourg or an admission of securities to trading on the LSE. The provisions of the Prospectus Law do not provide for the prior communication and formal approval of advertisements. However, the issuer may submit their draft advertisement to the CSSF via electronic mail with the view to obtaining a CSSF opinion as to their compliance with legal and regulatory requirements.

The preparation and distribution of research reports should be made in accordance with the provisions of Luxembourg law, in particular the Law of 23 December 2016 (the Market Abuse Law), implementing Regulation 596/2014 (the Market Abuse Regulation) and transposing Directive 2014/57/EU (the Market Abuse Directive and together with the Market Abuse Law and the Market Abuse Regulation, the Market Abuse Legal Framework) and Commission Directive 2015/2392/EU.

Under the new European market abuse legislation, the Market Abuse Regulation and the Market Abuse Directive are the basis of the legal framework. The Market Abuse Directive, the Market Abuse Regulation and the Market Abuse Law aim to improve financial market integrity and investors' protection by: updating and strengthening the current system for combating market abuse; including new markets and new trading strategies in its scope of application; and introducing new powers for the CSSF and additional obligations for the issuer.

According to the Market Abuse Legal Framework, persons who produce or disseminate investment recommendations in Luxembourg or who, from abroad, specifically target the Luxembourg public, must specifically ensure that the recommendations are presented fairly, that they clearly mention conflicts of interests and that they include all the other references provided for by the Market Abuse Law and the Market Abuse Regulation.

In transposing the Market Abuse Directive, the Market Abuse Law imposes criminal sanctions in respect of the following four offences:

- insider dealing, which is defined as the fact for a person holding inside information to use that information to acquire or dispose of financial instruments to which that information relates;
- recommending or inducing another person to engage in insider dealing, which is described under the Market Abuse Law as the recommending or inducing of another person to engage in insider dealing;
- unlawful disclosure of inside information, which arises where a person possesses inside information and discloses that information to any other person, except when the disclosure is made in the normal exercise of employment, a profession or duties; and
- market manipulation, which not only encompasses the entering into of a transaction or the placement of an order to trade but also includes any other behaviour that, among other things, gives false or misleading signals as to the supply of, demand for, or price of a financial instrument or a related spot commodity contract; or transmits false or misleading information or provides false or

misleading inputs or any other behaviour that manipulates the calculation of a benchmark.

5 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

Secondary offerings of securities through a public offering are subject to the same requirements as primary offerings. However, a secondary offering can be exempted from the prospectus obligations inasmuch as the obligations do not apply to the admission to trading on a regulated market of shares representing, over a period of 12 months, less than 10 per cent of the number of shares of the same class already admitted to trading on the same regulated market.

Any subsequent resale of securities is to be regarded as a separate offer, and the conditions of the Prospectus Law apply for the purposes of deciding whether or not that resale is an offer to the public. In this respect, the placement of securities through financial intermediaries remains subject to publication of a prospectus if none of the exemption conditions for a public offering are met for the final placement.

A primary offering of shares or equity-linked securities, namely, warrants, and securities convertible into shares of a Luxembourg company wholly for cash, requires that such securities be first offered to the existing shareholders on a pro rata basis, unless the statutory pre-emption right is disapplied. The statutory pre-emption right may be disapplied by resolution of the shareholders resolving in a duly convened meeting of shareholders or by the board of directors if such a power has been granted to them by the shareholders pursuant to the authorisation granted to the board to issue equity and equity-linked securities (authorised capital).

Pre-emption rights can be restricted to certain classes of shares in the articles of incorporation of the Luxembourg company.

6 What is the typical settlement process for sales of securities in a public offering?

The LSE relies on the following clearing and settlement entities: LCH Clearnet SA, Clearstream Banking SA or Euroclear Bank SA.

Generally, the settlement-delivery of securities occurs on the third trading day following the end of their placement. Upon issue, the securities are registered in the books of the settlement entities, which will credit the accounts of the financial intermediaries on the settlement-delivery date.

Private placings

7 Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

Private placements of securities made under the circumstances described under article 5(2) of the Prospectus Law fall outside the scope of public offerings and, accordingly, are exempted from the obligation to publish a prospectus. See question 2 for a list of offers that are exempt from the obligation to publish a prospectus. There are no specific rules governing the private placing of securities. However, general principles of laws would apply and issuers should endeavour to deliver accurate and non-misleading information on the securities issuance and the private placing process. Their liability could be involved on grounds of general principles of contractual and civil law or liability in tort (see questions 8 and 19).

8 What information must be made available to potential investors in connection with a private placing of securities?

There are no specific regulations or legal provisions governing private placement of securities.

General principles of law must, however, apply. This involves investors being treated equally and fairly and having access to the same information when subscribing to the securities. Article 17 of the Prospectus Law sets out that when no prospectus is required, material information provided by an issuer or an offeror and addressed to qualified investors or special categories of investors, including information disclosed in the context of meetings relating to offers of securities, must be disclosed to all qualified investors or special categories of investors to whom the offer is exclusively addressed.

It is also advisable that the persons who carry out a private placement in Luxembourg inform potential investors that any prospectus relating to the offering of securities has not been submitted to the clearance procedures of the CSSF. They should also take the necessary measures to avoid the placement qualifying as a public offering and require the necessary undertaking from investors that they act for their own account and do not intend to resell the securities under the terms of a public offering. Finally, they should provide accurate and complete information in respect of the placed securities in order to enable the investors to make an informed assessment of the securities.

9 Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

There are no particular restrictions on the transferability of securities acquired in a private placement, except that any resale to the public of such securities must be made in accordance with the rules on public offerings (see question 1).

The Law of 6 April 2013 on dematerialised securities has modernised the Law of 1 August 2001 on the circulation of securities by creating a third category of securities alongside securities in bearer or registered form and introduces a general regime for them, thereby providing Luxembourg capital companies the option to issue shares in dematerialised form and for all other issuers to issue dematerialised debt securities governed by Luxembourg law. Generally, the law on dematerialised securities introduces a comprehensive and complete regime covering the issue, conversion, pledging, transmission and conditions required for the issue of dematerialised securities. The Luxembourg legislator took the opportunity to implement certain principles arising from the Unidroit Convention on Substantive Rules for Intermediated Securities dated 9 October 2009. The law provides that the issuance of dematerialised securities (equity and debt) must be registered in an issue account held with one single securities settlement system or one single central account holder. The holding of dematerialised securities may be realised through a chain of holdings involving one or more intermediaries between the security settlement system or central account holder and the ultimate holders of the dematerialised securities. Transfer of dematerialised securities is effected by a book entry transfer between accounts. Payments by the issuer to a securities settlement system or central account holder discharge the issuer. The law offers some additional guarantees to the acquirers of securities against any earlier defective book entry and imposes the obligation for an intermediary to hold sufficient securities equal to the aggregate number of securities credited to the securities accounts maintained for its account holders and for itself.

Offshore offerings

10 What specific domestic rules apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

Following the implementation of the 2010 Prospectus Directive, in order to carry out an offering of securities in another member state of the European Economic Area (EEA), a Luxembourg issuer must obtain the approval of the CSSF on the prospectus and make an application for the delivery of a certificate of approval to the ESMA and the competent authority of the EEA member state in which the public offering is contemplated. Within three trading days following such application, or within one trading day after approval of the prospectus by the CSSF (if the application has been submitted at the same time on the first filing of the prospectus), the CSSF issues a certificate of approval to the competent authority of the other jurisdiction, specifying that the prospectus has been drawn up in accordance with the 2010 Prospectus Directive and is valid for any public offerings carried out in any member state of the EU. If needed, the said certificate shall enclose a translation of the summary produced under the responsibility of the issuer.

When an offer of securities is carried out in a jurisdiction other than Luxembourg and restricted to foreign subscribers, the Luxembourg issuer needs to comply only with the securities laws of such jurisdiction.

Particular financings

11 What special considerations apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

Offerings of exchangeable or convertible bonds, warrants, depositary shares or rights, fall within the scope of the 2010 Prospectus Directive and the Prospectus Law. In this respect, the issuer or offeror must comply with the disclosure requirements contained in the relevant Annexes of the European Commission Regulation 809/2004/EC and therefore must follow the process described further in question 2.

Under the LSE Rules and Regulations, convertible bonds, exchangeable bonds and bonds with warrants may only be admitted to the official list if the shares or units to which they relate have previously been admitted to this list or admitted to trading to another market, that operates in a legitimate, recognised and open manner, or are admitted at the same time.

By derogation these securities may, however, be admitted to the official list provided that the LSE is satisfied that the holders of the bonds have at their disposal all the necessary information to form an opinion concerning the value of the shares or units related to such bonds.

Underwriting arrangements

12 What types of underwriting arrangements are commonly used?

No standard form of underwriting agreement or guidelines exist that are provided by the Luxembourg financial authorities or professional bodies.

Underwriting agreements in the Luxembourg market usually comply with the prevailing international practice in equity or debt offerings, in particular with the International Capital Market Association (ICMA) standards. The LSE is an associate member of the ICMA. Underwriting agreements are several rather than joint-and-several.

13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and overallotment options?

Indemnity

Underwriting agreements for Luxembourg equity securities offerings usually contain an indemnity clause, for the purpose of indemnifying and protecting the underwriters and their directors, officers and employees, or controlled interests against any loss or damages resulting from untrue or misleading statements of material fact or material omissions contained in the prospectus, or any breach of the representations, warranties and agreements contained in the underwriting agreement. Underwriting agreements for debt securities also feature very similar indemnity clauses. Greenshoe shareholders can also agree to indemnify the underwriter under certain circumstances. This indemnity obligation is normally guaranteed by the assignment for security purposes of the proceeds of the offering.

Force majeure

Force majeure clauses in equity underwriting agreements generally cover any event that could affect financial markets, such as any change in general economic conditions or currency exchange, any suspension or material limitation in trading in securities on the main stock exchanges and other events that could prevent or have an adverse effect on the success of the offering. Debt underwriting agreements follow the ICMA's rules and recommendations relating to force majeure.

Success fees

Underwriting agreements relating to equity offerings frequently provide for incentive and success fees, which are paid at the issuer's discretion. Incentive fees apply to the gross proceeds of the offering while success fees are paid if a certain threshold of gross proceeds is reached.

Overallotment

It is market practice for equity securities offerings to have underwriting agreements providing for an overallotment option in connection with the 30-day stabilisation activities that underwriters may perform during the stabilisation period following the listing of the shares. In accordance with the provisions of the Commission Delegated Regulation (EU) 2016/1052 of 8 March 2016 supplementing the Market Abuse Regulation (the Stabilisation Regulation), any stabilisation action usually ends no later than 30 days after the issue date of the relevant securities, in the case of a significant distribution in the form of an initial offer publicly announced, or 30 days after the date of the allotment, in the case of a significant distribution in the form of a secondary offer.

This overallotment option is typically granted by the company on newly issued shares or by the selling shareholders on existing shares. Article 3(3) of the Stabilisation Regulation restricts the extent of overallotment, such that issuers shall not, when executing transactions under a buy-back programme, purchase on any trading day more than 25 per cent of the average daily volume of the shares on the trading venue on which the purchase is carried out.

The regulation implementing the 2010 Prospectus Directive does not require that the prospectus disclose information on the size of the 'overallotment facility' and therefore this additional information is not required in cases where the offer falls within that regulation. Typical forms of subscription agreement and agreements among managers used for Euromarkets offerings do not explicitly limit the amount of overallotment, but may only authorise the stabilising manager to overallot securities in accordance with the applicable law or to the extent permitted by the applicable law.

14 What additional regulations apply to underwriting arrangements?

There are no specific Luxembourg regulations applying to underwriting arrangements. The provisions of the Stabilisation Regulation apply directly to underwriting agreements in the Luxembourg territory. This regulation restricts the time-related conditions for stabilisation and sets the limit for, among other things, overallotment of securities and greenshoe options (not exceeding 15 per cent of the original offer).

Ongoing reporting obligations

15 In which instances does an issuer of securities become subject to ongoing reporting obligations?

Any issuer whose securities (equity or debt) are admitted to trading on the LSE is subject to ongoing reporting obligations (see question 16) according to the LSE Rules and Regulations, the Luxembourg Law of 11 January 2008 relating to the transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market as amended (the Transparency Law) and the Grand Ducal Regulation dated 11 January 2008 on transparency requirements of issuers of securities (the Transparency Regulation).

The Transparency Law applies to issuers of securities for whom Luxembourg is the home member state. The Transparency Law does not apply to securities issued by collective investment undertakings other than the closed-end type, or to securities acquired or disposed of in such collective investment undertakings.

Issuers admitted to the Euro MTF market are not subject to the Transparency Law and Transparency Regulation but are subject to the reporting requirements set out by the LSE Rules and Regulations.

Shareholders, acting alone or in concert, of an issuer acquiring 95 per cent of the issuer capital and its voting rights must notify the CSSF when they reach this limit or cease to reach it. This notification is required in order to trigger the compulsory withdrawal or redemption of the securities held by other shareholders as per the Luxembourg Law of 21 July 2012 on mandatory squeeze-out and sell-out of securities of companies currently admitted or previously admitted to trading on a regulated market or having been offered to the public.

16 What information is a reporting company required to make available to the public?

Annual financial reports

Issuers for whom Luxembourg is their home member state must make public their annual financial reports, at the latest, four months after the end of each financial year and must ensure that they remain publicly available for at least 10 years. These annual financial reports must comprise the audited financial statements, and the management report and management statements confirming that the financial statements are prepared in accordance with the applicable set of accounting

standards. The reports must give a true and fair view of the assets, liabilities, financial position and profit or loss of the issuer, and describe the principal risks and uncertainties that they face.

Where the issuer is required to prepare consolidated accounts according to Directive 2013/34/EU, the audited financial statements shall comprise such consolidated accounts drawn up in accordance with Regulation (EC) No. 1606/2002 and the annual accounts of the parent company drawn up in accordance with the national law of the member state in which the parent company is incorporated.

Half-yearly financial reports

Issuers of shares or debt securities for whom Luxembourg is their home member state must also make public a half-yearly financial report covering the first six months of the financial year as soon as possible after the end of the relevant period, but at the latest, three months thereafter. The issuers must ensure that the half-yearly financial report remains available to the public for at least 10 years. The half-yearly financial report shall comprise: the condensed set of financial statements for the relevant period; an interim management report; and management statements confirming that the condensed set of financial statements have been prepared in accordance with the applicable set of accounting standards, gives a true and fair view of the assets, liabilities, financial position and profit or loss of the issuer, or the undertakings included in the consolidation as a whole similarly to the annual financial reports mentioned above, and that the interim management report includes a fair review of the information provided under any consolidated accounts.

Issuers whose home member state for Transparency Law purposes is Luxembourg must disclose the regulated information through a specialised company and store it with the LSE through the central storage of regulated information (Officially Appointed Mechanism).

Several exemptions are provided by the Transparency Law such as for certain sovereign issuers and issuers of debt securities with a denomination per unit of at least €100,000.

The Transparency Law also requires certain notifications regarding the acquisition or disposal of major holdings. These requirements apply to the direct or indirect shareholders who acquire or dispose of shares who must notify the issuer of the proportion of voting rights held as a result of the acquisition or disposal where that proportion reaches, exceeds or falls below the thresholds of 5, 10, 15, 20, 25, 33.3, 50 and 66.6 per cent. Notifications are also required in the case of specific circumstances of major proportions of voting rights.

The Euro MTF market does not fall into the scope of the European Union Directives and the Transparency Law. Issuers whose securities are admitted to the Euro MTF market are only subject to the specific publication requirements of the LSE Rules and Regulations. Reporting obligations on the Euro MTF are less stringent than those required by the Transparency Law. Issuers on the Euro MTF must disseminate the following information:

- information or events or decisions affecting the security holders;
- information on material changes to the issuer's shareholders structures;
- audited annual financial statements and management reports, prepared in accordance with the issuer's national law; and
- semi-annual financial statements to be published within four months of the issuer's half year and comprising information on revenues and profit or loss for the period together with a commentary on any material factor having had an effect on the financial or trading position of the issuer during this period.

Issuers of debt securities with a denomination per unit of at least €50,000 are exempted from the publication of annual financial reports and half-yearly financial reports.

The Luxembourg Law of 10 May 2016 (the Amending Transparency Law) transposing the Directive 2013/50/EU (the Amending Transparency Directive) increased the CSSF powers to ensure that the provisions of the Transparency Law are complied with. Hence, the CSSF now has the power, in case of non-compliance with the Transparency Law, to order an issuer or an holder of shares or other financial instruments: that regulated information be republished or re-notified; that a corrected version of the regulated information be published or notified; or that the correction of modification be made in the publication or notification of subsequent regulated information. More generally, the Amending Transparency Law clarifies that the CSSF has the power to enjoin issuers and holders of shares and other financial instruments to comply with the Transparency Law, to cease the conduct in breach of such law and to direct the withdrawal of securities from trading in case of breach of the Transparency Law.

In the case of a takeover bid of a Luxembourg company's securities or securities admitted to trading on the LSE, the Law of 19 May 2006 implementing Directive 2004/25/EC on takeover bids will apply and impose disclosure requirements of specific information on the issuer.

Every issuer whose securities are admitted to trading on a securities market of the LSE must ensure the provision in Luxembourg of equivalent information to that made available to the market of any other stock exchange or stock exchanges situated or operating outside the member states of the European Union, to the extent that this information may be important for evaluating the securities in question.

Anti-manipulation rules

17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

The Market Abuse Legal Framework aims at combating insider dealing and market manipulation (market abuse) in order to ensure the integrity of financial markets and enhance investor confidence in those markets and thereby ensuring a level playing field for all market participants. It sets out a framework for the prevention, detection and efficient sanction of market abuse, imposes new obligations on market participants, entrusts the CSSF with specific competences and missions and sets down preventive measures. On 3 July 2016, the Market Abuse Regulation came into effect and superseded Directive 2003/6/EC.

The Market Abuse Legal Framework applies to all securities admitted to trading on at least one regulated market or for which a request for admission to trading on such a market has been made. Prohibitions of market abuse also apply to all financial instruments admitted to trading on at least one MTF or one organised trading facility (OTF) or for which a request for admission to trading on an MTF or an OTF has been made. This obligation applies whether or not the transaction was carried out on such a regulated market or such an MTF or an OTF. The new Market Abuse Legal Framework broadened its scope of application in comparison with the earlier applicable legislation by applying also to emission allowances auctions and certain spot commodities contracts.

The Market Abuse Law lays down a set of requirements for market participants with the major aim of preventing market abuse, namely:

- market operators and investment firms that operate a trading venue in Luxembourg are required to report to the CSSF without delay orders and transactions, including any cancellation or modification thereof, that could constitute insider dealing, market manipulation or attempted insider dealing;
- the regulated markets, credit institutions, investment firms and market operators of an MTF or an OTF must adopt and maintain effective arrangements, systems and procedures aimed at preventing and detecting insider dealing, market manipulation and attempted insider dealing and market manipulation;
- issuers of financial instruments are required to disclose to the public inside information that directly concerns them as soon as possible;
- issuers or persons acting on their behalf and for their account must establish a list of persons who have access to inside information;
- persons discharging managerial responsibilities within an issuer that has its registered office in Luxembourg and persons closely associated with them must notify to the CSSF and to the issuer or the emission allowance market and make public: in respect of issuers, all operations conducted on their own account related to the issuer's shares admitted to trading on a regulated market, or to derivatives or other financial instruments linked to these shares; and in respect of emission allowance market participants, every transaction conducted on their own account relating to emission allowances, to auction products based thereon or to derivatives relating thereto; and
- persons who produce or disseminate investment recommendations or other information recommending or suggesting an investment strategy in Luxembourg must ensure that the recommendations are presented objectively, that they clearly mention conflicts of interest and that they include all the other references provided for by the law.

The Luxembourg Company Law also imposes fines and imprisonment on any person who, by fraudulent means, causes or attempts to cause the price of company shares, bonds or other securities to rise or fall (article 1500-4 of the Company Law of 10 August 1915).

Price stabilisation

18 What measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

The provisions of the Stabilisation Regulation and of the Market Abuse Regulation relating to buy-back programmes and price stabilisation have a direct binding effect in the Luxembourg territory. Any price stabilisation programmes and buy-backs aimed at supporting the price of securities must comply with article 5 of the Market Abuse Regulation and the Second European Company Directive that prohibits an EU entity from redeeming its own shares beyond certain limits.

It is worth noting that Luxembourg permits stabilisation transactions prior to the commencement of trading on a regulated market. Under the present terms of the Stabilisation Regulation, overallotment with the view to support the price of the securities is authorised provided:

- the securities are over-allotted only during the subscription period and at the offer price;
- a position resulting from the exercise of an overallotment facility by an investment firm or credit institution that is not covered by the greenshoe option may not exceed 5 per cent of the original offer;
- the greenshoe option may be exercised by the beneficiaries of such an option only where relevant securities have been overallotted;
- the greenshoe option may not amount to more than 15 per cent of the original offer;
- the exercise period of the greenshoe option must be the same as the stabilisation period required; and
- the exercise of the greenshoe option must be disclosed to the public promptly, together with all appropriate details, including in particular the date of exercise and the number and nature of relevant securities involved.

Issuers, offerors or entities undertaking the stabilisation must record each stabilisation order or transaction with, as a minimum, all related relevant information and data (in particular, the name and number of securities bought or sold, the date and time of the transaction, the price of the transaction and the possibility to identify the investment firm) extended to financial instruments other than those admitted or going to be admitted to the regulated market.

Liabilities and enforcement

19 What are the most common bases of liability for a securities transaction?

Liability arising from inaccurate or misleading information or untrue representations made in the prospectus is the most common liability. This liability is based on the general principles of liability in tort set out in the Luxembourg Civil Code (articles 1382 and 1383). This liability relies on the issuer, the offeror, the person asking for the admission to trading or the guarantor. These persons must be clearly identified in the prospectus. They must also state in the prospectus that to the best of their knowledge it does not contain any incorrect facts or omissions that are likely to affect its import. This statement increases the likelihood that they must assume the direct responsibility for any damages resulting from any inaccuracy in the prospectus. These statements do not release the other contributors to the prospectus from their liability, if it is evidenced that they have been providing false or misleading information. The summary note does not entail any civil liability unless it is misleading, inaccurate or inconsistent with the main prospectus.

Where the security transaction is based on a contractual relationship, the liability would be assessed on the basis of the general principles of contract law. This would be the case in the event of an underwriting agreement with the issuer or direct contractual relationship between the issuer and the subscriber of securities. The liability will be triggered at the occurrence of a negligence or fraud, as this will be further set out in the contractual agreement governing the security transaction and the general principles of contract law.

Update and trends

On 30 June 2017 Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 (the Prospectus Regulation) on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market was published in the Official Journal of the European Union, repealing the 2003 Prospectus Directive. Pursuant to its article 49, the Prospectus Regulation entered into force on 20 July 2017 but will be applicable as of 21 July 2019 for most of its provisions. The Prospectus Regulation set forth a new framework of rules that govern when a prospectus is required, what information must be included and how it must be approved.

This new regulation forms part of the capital markets union action plan launched by the European Commission and aims at improving the access to capital markets for businesses, in particular small and medium-sized enterprises (SMEs), within the EU by alleviating the administrative costs and procedures required for joining a public market.

For instance, the Prospectus Regulation introduces a new shelf registration document, called the universal registration document, and a fast-track approval process as an optional registration document for frequent issuers admitted to trading on regulated markets or MTFs. It also creates a simplified disclosure regime for SMEs in a move to set up a more attractive route to market.

The details of the measures will be further set out in delegated acts and regulatory technical standards that have not all been published.

20 What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

Remedies and sanctions for improper securities activities can be brought in three basic ways: civil litigation, administrative proceedings and criminal prosecutions. None of these remedies are exclusive.

Civil litigation

Civil litigation may be brought by private parties that would generally seek to recover losses suffered. The damage would be generally assessed in respect of the liability in tort contained in the Luxembourg Civil Code. However, the occurrence of a specific damage to the investor is unlikely to be recognised to the extent that courts would usually refuse to consider the loss of value of shares as a prejudice distinct from the prejudice suffered by the issuer.

Administrative proceedings

Administrative proceedings may be brought by the CSSF or the LSE, pursuant to the Prospectus Law, the LSE Rules and Regulations or other applicable and relevant regulation. In addition, the CSSF has investigative powers and the capacity to suspend or prohibit a public offer or admission to trading on a regulated market if it has reasonable grounds for suspecting that legal provisions have been infringed. It may also impose cease-and-desist orders for any improper activities that are contrary to the Prospectus Law. The CSSF may render these decisions public and impose financial administrative sanctions of a pecuniary nature with the view to enforce its decisions.

An appeal to a court of unlimited jurisdiction may be made before the administrative court against decisions taken by the CSSF. Decisions taken by market operators are subject to a right of appeal before the ordinary jurisdictions.

Criminal prosecutions

Criminal prosecutions are instituted by the public prosecutor, acting independently and on its own initiative or at the request of CSSF. Various improper securities activities are deemed as criminal offences. For instance, anyone who knowingly carries out an offer of securities to the public within the territory of Luxembourg without a prospectus in accordance with the provisions of the Prospectus Law may be subject to a fine ranging from €250 to €125,000. The Company Law also sets out diverse criminal offences for breach of its provisions, such as the manipulation of the price of securities. Any interested party may lodge a complaint with the public prosecutor against the person or company deemed to be liable, accompanied by a request for compensation of loss, if any. Defendants subject to such criminal actions may face substantial fines, corporate dissolution and, in the case of individuals, imprisonment.

Structured Finance & Securitisation

Denis Van den Bulke, Peter-Jan Bossuyt and Thomas Bedos

VANDENBULKE

General

1 What legislation governs securitisation in your jurisdiction? Has your jurisdiction enacted a specific securitisation law?

On 22 March 2004, the Luxembourg legislator enacted a legal framework specifically dedicated to govern risk securitisation transactions in their broadest meaning and entities carrying out securitisation activities (Securitisation Law).

In addition, various other national or European regulations may apply depending on the activity of the securitisation vehicle and its structuring. The alternative investment fund manager law of 12 July 2013 may also apply from time to time, in particular if the securitisation vehicle does not qualify as an ad hoc securitisation.

2 Does your jurisdiction define which types of transactions constitute securitisations?

The Securitisation Law (article 1) defines a securitisation transaction whereby a securitisation undertaking acquires or assumes, directly or through another undertaking, the risks relating to claims, other assets or obligations assumed by third parties or inherent to all or part of the activities of third parties and issues securities, whose value or yield depends on such risk.

To qualify as a 'Securitisation undertaking' pursuant to the Securitisation Law, an undertaking must carry out the securitisation in full, and participate in such a transaction by assuming all or part of the securitised risks, or by the issuance of securities to ensure the financing of the securitisation transaction and must, whether in his articles of incorporation, management regulations or issue documents, provide that it is specifically subject to the Securitisation Law.

The Securitisation Law allows the securitisation of a large variety of risks that can relate to all types of assets. The securitisation undertaking may assume the risks by acquiring the assets but also through other forms of risk transfers. Accordingly, besides the traditional true sale securitisation to a securitisation undertaking, the Securitisation Law also authorises the 'synthetic' securitisation that only transfer the risks linked to the assets or whole or partial business securitisation.

3 How large is the market for securitisations in your jurisdiction?

Luxembourg is one of the most attractive markets for securitisation in Europe. Contrary to the European or global securitisation market trends of the past decade, Luxembourg has not been badly hit by the turmoil following the global financial crisis of 2008.

By the end of March 2017, more than 1,770 securitisation vehicles were created under the Securitisation Law. This is leading to a number of 1,222 active securitisation vehicles representing 4,500 to 5,000 active compartments at the end of the first quarter of 2017. Among these existing securitisation vehicles only 34 are regulated by the Luxembourg financial regulator (CSSF). As of 31 December 2016, the volume of securitised assets through those regulated securitisation vehicles amounted to approximately €35.2 billion and represented an increase in securitised assets of €4.9 billion over 2015. Most of the created securitisation vehicles have several compartments. These compartments enable a securitisation undertaking to create distinct parts of their assets and liabilities. Each asset of a compartment is only available to satisfy the rights of the investors investing into that compartment. Each compartment is considered, in principle, as a true separate entity.

Regulation

4 Which body has responsibility for the regulation of securitisation?

Only securitisation undertakings that issue securities to the public on a 'continuous basis' are subject to prior regulatory authorisation to carry out their activities and to regulatory ongoing supervision (regulated securitisation vehicles). The CSSF is the body responsible for granting the authorisation and effecting that supervision.

The issuance of securities is deemed to be carried out on a continuous basis when the securitisation undertaking performs more than three issues to the public per year. The number of issues to be taken into consideration is the total number of issues of all compartments of the securitisation undertaking.

In order to qualify that an issuance of securities is made to the public, the CSSF relies on the following criteria:

- they are not deemed made to the public if:
  - issues are made only to professional clients;
  - issues have a nominal value equalling or exceeding €125,000; and
  - issues are distributed as private placements; and
- the listing of an issue on a regulated market does not systematically mean that the issue is to be considered as a public issue.

The 'public' nature of the issues is assessed by the CSSF, in particular in reference to the targeted investors to which the securities are offered.

5 Must originators, servicers or issuers be licensed?

Apart from the requirements set out under question 4, no specific securitisation-related licence is required from originators, servicers or issuers involved in securitisation transactions. With respect to the custodian of a CSSF-authorised securitisation undertaking, see question 13.

6 What will the regulator consider before granting, refusing or withdrawing authorisation?

If a securitisation vehicle qualifies as a regulated securitisation vehicle (see question 4), the CSSF will review and approve its articles of incorporation or, as applicable, its management regulations or its management company, or both. During the authorisation procedure, the CSSF shall also review a list of documents relating to the securitisation vehicle and operates a thorough screening of its board of directors, human resources and financing before delivering its approval.

The Luxembourg financial regulator shall verify during the authorisation procedure that the securitisation undertaking has an appropriate organisation and can rely on adequate human and material resources to perform properly securitisation activities, in compliance with the Securitisation Law.

The reputation and experience of the members of the administrative, management and supervisory bodies of the securitisation undertaking or, as applicable, its management company shall be examined in order to ascertain that they have the appropriate capacities to manage or be involved in the securitisation structure.

7 What sanctions can the regulator impose?

If the CSSF determines that a regulated securitisation vehicle is not complying with the provisions of the Securitisation Law, its management regulations, articles of incorporation or the agreements relating to the issuance of its securities, or that the rights attached to the securities it has issued may be impaired, it may summon the securitisation undertaking to remedy the situation within a delay that it sets.

If such summons is not complied with, the Luxembourg financial regulator may:

- publish its conclusion in case of non-compliance;
- prohibit any issuance of securities;
- request the suspension of the listing of its issued securities;
- request the competent judge to appoint a provisional administrator acting in lieu of its management; or
- withdraw its authorisation.

In the event that directors, managers and officers of a regulated securitisation vehicle refuse to provide the CSSF with the financial reports and the requested information, or where such documents prove to be incomplete, inaccurate or false, or if the existence of any other serious irregularity is established, the CSSF may impose upon them fines ranging from €125 up to €12,500.

8 What are the public disclosure requirements for issuance of a securitisation?

No public disclosure requirement is provided under the Securitisation Law for securitisation undertakings that do not have to be authorised by the CSSF. They remain, however, subject to the customary obligation applicable to all legal entities to file their annual accounts with the Luxembourg Companies and Trade Registry.

In respect of the regulated securitisation vehicles, there is no other specific public disclosure requirement. They are, however, officially listed as a regulated securitisation entity by the CSSF. In addition, the CSSF may publicly advert their failure to comply with their legal obligations, if they do not remedy in due course as described under question 7.

9 What are the ongoing public disclosure requirements following a securitisation issuance?

There are no public disclosure requirements following a securitisation issuance.

Eligibility

10 Outside licensing considerations, are there any restrictions on which entities can be originators?

There are no restrictions on originators other than those set out in questions 4 and 5.

11 What types of receivables or other assets can be securitised?

The scope of types of receivables or assets that can be securitised under Luxembourg law is considerable. In addition to receivables and assets, whether movable or immovable, tangible or intangible; all risks resulting from the obligations assumed by third parties, or relating to all or part of the activities of third parties, may be securitised.

12 Are there any limitations on the classes of investors that can participate in an offering in a securitisation transaction?

There are no limitations on the classes of investors that can participate in an offering of securities, unless it is intended to be a private offering. If the offering is intended to be public, the rules of the law of 10 July 2005 relating to the prospectus for securities, as amended (Prospectus Law) will apply and need to be complied with.

13 Who may act as custodian, account bank and portfolio administrator or servicer for the securitised assets and the securities?

Regulated securitisation vehicles must entrust the custody of their liquid assets and securities with a credit institution established or having its registered office in Luxembourg. There is no such requirement for non-authorised securitisation entities.

14 Are there any special considerations for securitisations involving receivables with a public-sector element?

There are no specific considerations to be taken into account regarding the features of the receivables themselves (other than possible transfer restrictions). However, public-sector entities may raise their sovereign immunity in case of enforcement for payment of the receivable. Furthermore, certain official notifications, publications or procedures may need to be made for effecting the transfer of the receivables of public institutions.

Transactional issues

15 Which forms can special purpose vehicles take in a securitisation transaction?

Securitisation undertakings may be set up under the form of incorporated or unincorporated entity (ie, a fund managed by an incorporated management company). Securitisation companies would be generally set up as:

- limited liability either under the form of public limited company;
- a corporate partnership limited by shares;
- a private limited liability company; or
- a cooperative company organised as a public limited company.

The choice for an incorporated or unincorporated form depends mainly on the level of tax transparency that investors and securitisation vehicles wish to obtain.

16 What is involved in forming the different types of SPVs in your jurisdiction?

Depending on the type of securitisation vehicle and its regulatory status (or absence thereof), the incorporation of a plain vanilla unregulated special purpose vehicle (SPV) may be rather straightforward and be made at reasonable cost. The delay for incorporating a plain vanilla SPV, provided the know-your-client (KYC) formalities with the local banks have been satisfactorily filled out with the depositary and the bank, would not exceed 48 hours. Luxembourg banks aim to closely scrutinise securitisation operations that would not be directed to institutional investor and may be reluctant to act as depositary without a full KYC process and identification of future subscribers.

The main public documentation would consist in the articles of incorporation of the SPV. Another contractual agreement for structuring the securitisation transactions would need to be drafted and remitted to the depositary bank, such as:

- the claims purchase agreement;
- the claims risk assignment agreement; and
- the terms and conditions of the SPV securities issued to its investors.

A regulated securitisation vehicle will require approval of its offering circular by the CSSF, which requires a certain period of time.

17 Is it possible to stipulate which jurisdiction's law applies to the assignment of receivables to the SPV?

The assignment of the receivables to the SPV concerns the relationship between the originator as assignor and the SPV as assignee. At this level, it is possible to stipulate which jurisdiction's law applies to the assignment of receivables to the SPV.

For contracts entered into on or after 17 December 2009, the choice of law is governed by Regulation No. 593/2008/EC of 17 June 2008 (Rome I).

Under Rome I, the parties to a contract are free to agree that the contract be governed by the law of any country, irrespective of the law governing the receivables. The Rome Convention and Rome I allow for modification of the parties' choice only:

- where all elements of a contract are connected to a country other than the country whose law has been chosen by the parties, and that country has rules that cannot be disapplied by contract;
- to the extent that the elected law conflicts with overriding mandatory rules of Luxembourg law; or
- where the applicable foreign law is manifestly incompatible with Luxembourg public policy.

With regard to the rights of the SPV as assignee against the underlying debtor, the position differs. The liabilities (and rights) of the debtor, including the assignability of the claim and the question as to whether the claim has been discharged, will be governed by the governing law of the assigned or underlying claim (namely the receivables contract itself) pursuant to article 14(2) of Rome I.

18 May an SPV acquire new assets or transfer its assets after issuance of its securities? Under what conditions?

An SPV may acquire new assets or transfer its assets after the issuance of its securities, provided that the constitutional documents and the purchase agreement as well the documentation in relation to the securities issued to the investors allow it. An SPV may also create a new sub-fund in relation to the issue of new securities.

19 What are the registration requirements for a securitisation?

A securitisation vehicle that does not have to be authorised by the CSSF as set out under question 4 must not fulfil any securitisation specific registration requirement. As a general matter and, as for any Luxembourg commercial company, a securitisation company, either regulated or not, must be registered with the Luxembourg trade and companies' registry and file with it its articles of incorporation, annual accounts and other corporate documents.

As set out under question 6, a regulated securitisation vehicle must have its articles of incorporation or, as applicable, its management regulations or the articles of its management company, or both, reviewed and approved by the Luxembourg financial regulator. See question 6 for further details on the documents to be filed with the CSSF during the authorisation procedure of a securitisation undertaking.

Any change in the administrative, management and supervisory bodies of a regulated securitisation vehicle must be notified forthwith to the CSSF and any change in control, any replacement of its management company, as well as any amendment to the management regulations or its articles of incorporation are subject to the prior approval of the CSSF.

Each CSSF authorised securitisation undertaking must spontaneously communicate to the CSSF the reports and written comments issued by its statutory auditors in the framework of the approval of its annual accounts.

20 Must obligors be informed of the securitisation? How is notification effected?

In accordance with the Securitisation Law, the assignment of an existing claim to or by a securitisation undertaking becomes effective between the parties and against third parties as from the time the assignment is agreed upon.

However, a notification to the assigned obligor is advisable to the extent that, failing that notification, he or she would validly be discharged from their debt when paying it to the assignor.

In practice, the law governing the assignment of claims to a securitisation undertaking would frequently be a foreign law. Accordingly, the conditions for effecting the transfer and making it opposable to third-parties will be governed by that foreign law and an analysis claim by claim and obligor by obligor may be required to determine whether any notification or any other formality would apply.

21 What confidentiality and data protection measures are required to protect obligors in a securitisation? Is waiver of confidentiality possible?

The rules relating to the protection of confidentiality or personal data and banking secrecy remain applicable after the securitisation of the receivables and may restrain the transfer of information to investors or to the securitisation entity. Luxembourg data protection law requires that any individual whose personal data is stored in a database be entitled to accede to the stored information enabling him to alter or remove such information.

Furthermore, when the assignor of receivables is a credit institution, the confidential information is covered by strict banking secrecy laws, prohibiting the transfer of the information to third parties without prior consent of the concerned obligors.

22 Are there any rules regulating the relationship between credit rating agencies and issuers? What factors do ratings agencies focus on when rating securitised issuances?

The relationship between credit rating agencies (CRAs) and issuers is regulated by Regulation (EC) No. 1060/2009, as amended in May 2011 by Regulation (EU) No. 513/2011 (CRA II) (in which responsibility for the registration and ongoing supervision of EU-based credit rating agencies was transferred to the European Securities Markets Authority (ESMA) and in June 2013 by Regulation (EU) No. 462/2013 (CRA III).

CRA III introduced new measures for structured finance instruments in particular, which require, among others:

- that issuers who pay for a credit rating on a structured finance instrument will need to obtain ratings from at least two CRAs on that instrument;
- a mandatory rotation of CRAs every four years; and
- that the issuer, originator and sponsor be all jointly responsible for making specific information publicly available through a website (the European Rating Platform) established by the ESMA, on an ongoing basis.

In giving a rating to the securitisation, the CRAs disregard the creditworthiness of the originator, insofar as a properly structured securitisation should isolate the securitised assets from the originator's insolvency. Rather, the CRAs take into account factors including:

- the historic performance of the securitised assets;
- any credit enhancement, liquidity facilities and the credit standing of the administrative parties (including hedging counterparties and account banks); and
- the structure and legal integrity of the transaction.

23 What are the chief duties of directors and officers of SPVs? Must they be independent of the originator and owner of the SPV?

There is no legal requirement for the directors and officers of an SPV to be independent of the originator and owner of the SPV. However, pursuant to principles of good governance, directors have a duty to conduct the business of the SPV in accordance with its corporate purpose and laws and manage it in its best corporate interest. Even if the SPV has only one shareholder, the corporate interest of the SPV should not to be aligned to the interest of that sole shareholder and it would be advisable to appoint one or more independent directors.

24 Are there regulations requiring originators and arrangers to retain some exposure to risk in a securitisation?

Originators and sponsors are required to retain some exposure to risk. Typically, the initiator, originator or sponsor of the securitisation would retain 5 per cent risk in the securitisation operation. This would result from various prudential and regulatory obligations such as the EU's latest Capital Requirements Regulation (CRR) legislation comprising Directive 2013/36/EU and Regulation (EU) No. 575/2013 (CRR). The Regulatory Technical Standards published by the European Banking Authority on securitisation retention rules is another important regulatory source. The Alternative Investment Fund Managers Directive (Directive 2011/61/EU) and the Solvency II Directive (Directive 2009/138/EC), both as amended, also contain substantially similar requirements.

Security

25 What types of collateral/security are typically granted to investors in a securitisation in your jurisdiction?

A Luxembourg securitisation vehicle may not, by any means whatsoever, create security interests over its assets or transfer its assets for guarantee purposes, except to secure the obligations it has assumed for their securitisation or in favour of its investors, their fiduciary-representative or the issuing vehicle participating in the securitisation.

The main type of collateral granted to investors in a securitisation would be a pledge over receivables acquired by the securitisation vehicle as well as a pledge over the SPV's bank accounts. These types of assets fall under the definition of financial instruments according to the Luxembourg law of 5 August 2005 on financial collateral (Financial Collateral Law) that regulates the creation, perfection and enforcement of security interests over such assets.

The Financial Collateral Law specifically provides that a security interest over financial instruments can be granted to an agent or a trustee acting for itself or for the benefit of all investors, or both, in order to secure the claims of third-party beneficiaries, whether present or future, provided such third-party beneficiaries are determined or determinable.

The legal documentation relating to security interests over assets located in Luxembourg would be governed by Luxembourg law on the basis of the lex rei sitae principle. The pledge over claims will generally be governed by the law governing the receivable, depending on the foreign governing law. the security interest over the receivables may also be by way of a charge or an assignment for security purposes.

Luxembourg law does not provide for the creation of floating charges or debentures. This, however, does not restrict a Luxembourg company to grant a floating charge or a debenture over non-Luxembourg-located assets, which will be governed accordingly by foreign laws.

26 How is the interest of investors in a securitisation in the underlying security perfected in your jurisdiction?

Under Luxembourg law, the transfer of the possession (dispossession) of the assets over which the pledge is granted is a condition to the constitution of the pledge. Such dispossession can be done in various ways depending on the type of assets to be pledged. Dispossession is also required to make the pledge enforceable towards third parties. The law of the debtor's jurisdiction may impose further perfection or notification requirements.

A Luxembourg law-governed claims pledge agreement is perfected by the mere conclusion of the pledge agreement. However, unless the debtor, whose claims are pledged, is party to the pledge agreement (which is highly unlikely in a securitisation operation), such a pledge agreement shall be notified to or acknowledged by the debtor whose claim is pledged. Lacking such notification, the debtor of a pledged claim may validly discharge his or her obligation to the pledger as long as he or she has no knowledge of the pledge's conclusion. A Luxembourg law-governed pledge over bank accounts shall be notified to, and acknowledged by, the account bank maintaining the accounts.

27 How do investors enforce their security interest?

The Financial Collateral Law provides that security interests in relation to financial instruments can be enforced as follows (with the first option being the most common one), unless otherwise agreed by the parties at the moment of contracting. A notice prior to enforcement is not required where:

- appropriate or cause a third party to appropriate the pledged assets at a price fixed, before or after their appropriation, according to the valuation method mutually determined by the parties;
- assign or cause the assignment of the pledged assets by private sale in a commercially reasonable manner, by a sale on the stock exchange or by public auction;
- obtain a court decision ruling that the pledged assets shall remain in his or her possession up to the amount of the debt, on the basis of an expert's estimate; or
- in the case of financial instruments, appropriate these financial instruments at the market price, if they are admitted to official listing on a stock exchange located in Luxembourg or elsewhere or are traded on a recognised, functionally operational, regulated market that is open to the public.

28 Is commingling risk relating to collections an issue in your jurisdiction?

Commingling risk may be an issue in Luxembourg to the extent there is no security interest over the asset (receivable or bank account). On the other hand, any cash deposited in an account with another origin than the securitisation and pledged in favour of the investors (or their agent or trustee), will, in case of enforcement, be assumed to be for the benefit of such investors (or their agent or trustee) and other interested third parties will need to provide evidence of the non-securitisation link of such proceeds.

Update and trends

The long-awaited EU securitisation regulation was issued on 28 December 2017 (Regulation (EU) No. 2017/2402 of the European Parliament and of the Council of 12 December 2017, laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No. 1060/2009 and (EU) No. 648/2012 (Securitisation Regulation) to establishing a more risk-sensitive prudential framework for simple, transparent and standardised securitisations. This framework shall apply as of 1 January 2019. The regulation shall not apply to all Luxembourg securitisations to the extent that Luxembourg SPVs do not restrict their activity to credit risk acquisition, nor issue several tranches of securities. The regulation shall therefore not affect the whole Luxembourg securitisation market that will keep its flexibility. In the future, three types of securitisation vehicles shall coexist in Luxembourg:

- the Luxembourg SPVs who are out of the scope of the EU regulation;
- the SPV who securitise credit risks and issue subordinated securities and must comply also with the requirements of the EU regulation; and
- the simple, transparent and standardised securitisation vehicle that fulfils the definition of EU securitisation and may not be subject to the Luxembourg securitisation law to the extent the regulation will directly apply to them.

Taxation

29 What are the primary tax considerations for originators in your jurisdiction?

The tax neutrality of the securitisation operation is one of the key success drivers so as to optimise investors' returns and the originator's funding costs. As such, any tax levied on the securitisation vehicle or in relation to the securitisation itself would clearly increase the overall costs of the transaction and therefore reduce its effectiveness.

Consequently, a securitisation transaction must be structured on a tax-efficient basis in order to prevent any tax leakage.

In particular, all structural features of a securitisation transaction must be clearly analysed from a Luxembourg tax perspective to ensure that none of the features either lead to an additional tax burden or accelerate tax liabilities that would not have been incurred had the securitisation not taken place.

30 What are the primary tax considerations for issuers in your jurisdiction? What structures are used to avoid entity-level taxation of issuers?

Tax neutrality is a substantial element to avoid any entity taxation issue in Luxembourg (see question 29).

The securitisation vehicles are widely organised as corporate entities fully liable to corporate income tax and municipal business tax at an aggregate tax rate of 26.01 per cent in 2018. The corporate entities are in principle taxed on their net accounting profit of the year. However, securitisation SPV may reduce this taxable basis to possibly nil to the extent that any payment to investors for issued bonds or holding shares (dividends) qualify as tax deductible payments. Furthermore, no withholding tax applies on any distribution made either under the form of interest or dividends. With this technique, a Luxembourg SPV can achieve tax neutrality for the SPV and tax transparency for investors even though there are incorporated as capital companies.

However, it is advisable to undertake a planning of the cash flow so as to leave an arm's length remuneration on the securitisation vehicle and avoid triggering any tax adjustments with countries involved in the securitisation operations.

Securitisation companies may be liable to a minimum tax liability although their accounting result for the year does not reflect any profits but losses. Indeed, a minimum net wealth tax charge was introduced as from 1 January 2016 that replaced the previous provision for the minimum corporate income tax for all corporate entities having their statutory seat or central administration in Luxembourg. This minimum tax applies to companies whose sum of fixed assets, intercompany loans, transferable securities and cash at bank exceeds both 90 per cent of their total gross assets and €350,000.

31 What are the primary tax considerations for investors?

Clearly, investors seek tax neutrality, in particular to avoid taxation at the level of the Luxembourg SPV and at source of the payment of their investment income. As any income distributed by a securitisation entity qualify as interests under Luxembourg law and is therefore not subject to withholding taxes.

Any capital gain realised by the Luxembourg SPV if distributed or committed to be distributed to the investors shall be tax deductible and not subject to tax in Luxembourg. Depending on the application of a double tax treaty, dividends paid to a Luxembourg securitisation SPV should benefit from reduced withholding tax as stipulated in the treaty; and dividends received from fully taxable subsidiaries should benefit from the affiliation privilege and so not be subject to tax in Luxembourg.

However, dividends paid by a securitisation SPV to a fully taxable Luxembourg joint-stock company will not benefit from the affiliation privilege and will not benefit from an exemption in the hands of the Luxembourg company. Same treatment will apply to capital gains realised by the Luxembourg joint-stock company (amended Income Tax Act of 4 December 1967 (the Tax Act)).

If the interest payment is made for the intermediate benefit of an individual beneficial owner who is resident of Luxembourg, it may be subject to a withholding tax of 20 per cent according to the amended Luxembourg law dated 23 December 2005.

Bankruptcy

32 How are SPVs made bankruptcy-remote?

The rights of the investors and of the creditors are limited to the assets of the securitisation undertaking. Where such rights relate to a compartment or have arisen in connection with the creation, the operation or the liquidation of a compartment, they are limited to the assets of that compartment. The assets of a compartment are exclusively available to satisfy the rights of investors in relation to that compartment and the rights of creditors whose claims have arisen in connection with the creation, the operation or the liquidation of that compartment. As between investors, each compartment shall be treated as a separate entity, except if otherwise provided for in the constitutional documents.

The articles of incorporation, the management regulations of a securitisation undertaking and any agreement entered into by the securitisation undertaking may contain provisions by which investors and creditors accept to subordinate the maturity or the enforcement of their rights to the payment of other investors or creditors or undertake not to seize the assets of the securitisation undertaking nor, as the case may be, of the issuing or acquisition vehicle. They may also agree not to petition for bankruptcy nor request the opening of any other collective or reorganisation proceedings against them. Proceedings initiated in breach of such provisions shall be declared inadmissible.

33 What factors would a court in your jurisdiction consider in making a determination of true sale of the underlying assets to the SPV (eg, absence of recourse for credit losses, arm's length)?

There is no specific case law in Luxembourg in relation to true sale operations. Having said that, we assume that a Luxembourg judge would look for certain characteristics in the operation as to consider it as a true sale; namely, that the originator transfers an asset or a pool of assets through an asset sale agreement from its (originator) balance sheet to the SPV. The originator, therefore, transfers the legal and economic title to the assets to the SPV. Through subscription of the securitisation position, the security holder may receive access to the legal and economic rights of the securitised assets pool.

34 What are the factors that a bankruptcy court would consider in deciding to consolidate the assets and liabilities of the originator and the SPV in your jurisdiction?

Under Luxembourg law, the principle of separate corporate identity is upheld. Only in limited circumstances will the Luxembourg courts treat the assets of the SPV as those of the originator. Examples include where the separate legal personality of a company is being used for fraud, illegality, dishonestly placing assets beyond the reach of creditors, or where an agency or nominee relationship is found to exist.

Authors

Denis Van den Bulke

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Denis Van den Bulke is the current managing partner of the Firm and heads the Tax, Private Equity and Investment Fund practices.

Expertise
Denis specializes in corporate finance, venture capital and private equity, group restructuring (along with cross-borders mergers and acquisitions and international tax), international and European banking and financial law (including investment funds and international equity compensation plans).

Professional Experience
Denis has a long standing experience in international finance and legal counselling. Before founding VANDENBULKE with other partners, Denis was a partner in the international and corporate department of the top-tier US Law firm Dorsey & Whiney, based in their London and Brussels offices. He previously acted as an executive director at International bank ING, Luxembourg, heading the activities of the financial structures, investment funds, institutional banking and financial engineering departments. Denis has also acquired international finance senior experience as financial expert with IFAD an international financial institution and a specialized agency of the United Nations, sponsored OCDE, OPEC and World Bank institutions.

Denis is a former director of the Association of the Luxembourg Fund Industry (ALFI) and still an active member of its Private Equity Commission. He is also active in various professional organizations including the International Fiscal Association, Luxembourg Private Equity Association (LPEA), IBA, ABA, IFA or the European Banking and Financial Association.

Education
- Master's degree in Law, University of Liège, Belgium.
- Master's degree in Economics, CORE (Center of Operational Research and Econometrics), University of Louvain, Belgium.
- Master's degree in Sociology and Anthropology, University of Louvain, Belgium.
- High School graduated from Marysville, Washington State, USA.

Admissions
- Admitted to Brussels Bar since 1995.
- Admitted to Luxembourg Bar since 2003.

Recognitions
- Chambers & Partners Global and Chambers & Partners Europe – Banking & Finance and Corporate/ Commercial.
- Legal 500 - Banking & Finance, Corporate/Commercial, Investment Funds, IP and Tax.
- IFLR1000 – Financial & Corporate and Investment Funds.
- International Tax Review - Tax lawyer.
- Five-star lawyer by the Premier Guide to World Leading Lawyers
- Decision Makers in Private Equity Investment Funds Luxembourg.

Authors

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Peter-Jan Bossuyt is a partner of VANDENBULKE, co-leading the Firm's Banking, Finance and Capital markets practice.

Expertise
Peter-Jan's recognised broad and in depth expertise ranges from secured and unsecured lending in acquisition, real estate, structured, project, fund or Islamic financing to high yield notes or bonds issued or guaranteed by Luxembourg entities. His polyvalent pan-European and transatlantic expertise makes him the counsel of choice not only for banks but also for large corporate groups, investment funds, private equity investors or insurance companies. He has also a broad experience with respect to insolvency and financial restructuring work and enforcement of security interests.

Professional Experience
Before spending almost eight years in the banking, finance and capital markets department of a Magic Circle firm, Peter-Jan started his career in the Belgian transactional group of the Brussels' branch of a White-Shoe firm.

Peter-Jan is an active member of various professional organizations, including the Association of the Luxembourg Fund Industry (ALFI) and the Luxembourg Private Equity Association (LPEA). He is also a regular speaker at the International Faculty for Executives (IFE), providing seminars and conferences in the field of corporate and finance law.

Education
- LL.M in Finance and Banking Law, King's College London, United Kingdom.
- Master's degree in Law, Catholic University of Louvain, Belgium.
- Bachelor law degree, University of Namur (FUNDP), Belgium.

Admissions
- Admitted to the Luxembourg Bar since 2007.
- Member of the Brussels' and Bruges' bar from 2003 to 2014.

Recognitions
- Chambers & Partners Europe – Banking & Finance.
- Legal 500 - Banking & Finance.
- IFLR1000 – Financial & Corporate.

Authors

Thomas Bedos

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Thomas is a senior associate practicing in the field of the Corporate and Banking & Finance departments of the Firm.

Expertise
Thomas has significant experience in the banking and finance area, providing advice on all issues relating to the structuring and securitisation of international financing transactions, as well as related security packages. He has developed a specialism in the implementation of, and ongoing assistance to, alternative investment structures (private equity, venture capital and real estate funds) by using mainly Luxembourg vehicles. More generally, he advises international clients on all aspects of corporate law, in particular, the structuring of transactions and corporate reorganisations.

Professional Experience
Before joining VANDENBULKE, Thomas worked in the investment fund department of a top-tier Luxembourg law firm. Prior to this, Thomas practiced law in the corporate departments of major law firms in Paris more specifically in mergers and acquisition, bankruptcy or corporate law, or banking and finance.

Thomas is an active member of the Association of the Luxembourg Fund Industry (ALFI) and sits on its various sub-commissions.

Admissions
- Admitted to the Paris Bar since 2012.
- Admitted to the Luxembourg Bar since 2015.

Education
- Master's Degree in Business Law, Paris XII, France.
- Specialized Master in International Management and Law, HEC Paris, France.

Recognitions
- Chambers and Partners Global.

Authors

Laurence Jacques

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Laurence Jacques is a partner of VANDENBULKE, leading the Firm's Corporate practice.

Expertise
Laurence specializes in corporate and acquisition finance, domestic and cross-border merger and acquisition, venture capital and private equity. Along with the finance department, Laurence advises also structured finance transactions with specific experience of advising financial institutions, lenders, investors, alternative capital providers, asset based lenders and private equity funds on borrowings, new lending, restructurings, workouts and enforcements of debt and equity positions. Laurence further provides strategic advice in the enforcement process of claims to loan servicers and sellers of loans and mortgage-backed securities and investors owning or acquiring stressed or distressed assets.

Professional Experience
Laurence has more than 17 years of professional experience as lawyer. Before founding VANDENBULKE with other partners, Laurence was practicing in a Luxembourg law firm affiliated to a top-tier audit firm.

She is a member of various professional organizations including AIJA, INSOL Europe, LPEA and ALJB. She is a regular speaker at the International Faculty for Executives (IFE) and provides on demand education sessions to clients in the field of corporate, restructuring and finance law.

Since 2014, Laurence has been appointed by court order as bankruptcy receiver of Espirito Santo Financial Group S.A. and ESFIL-Espirito Santo Financière S.A. top holding companies of the banking arm of the Portuguese Group Espirito Santo. Laurence is also entrusted with several mandates as judicial liquidator of investment funds, capital-risk companies and financing vehicles.

Education
- Master's degree in Law, Catholic University of Louvain, Belgium.
- Master's degree in Law, Georg-August Universität Goettingen, Germany.

Admissions
- Admitted to the Luxembourg Bar since 2002.

Recognitions
- Chambers & Partners Global and Chambers & Partners Europe –Corporate/Commercial.
- Legal 500 - Corporate/Commercial.
- IFLR1000 – Financial & Corporate.

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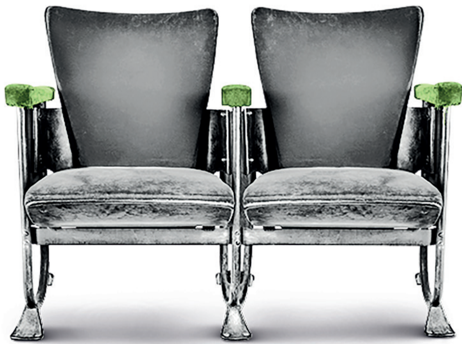

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VANDENBULKE is the premier independent law firm exclusively specialized in Corporate, Finance and Tax law. The firm is the leader in highly specialized services to International Institutional Investors electing to use Luxembourg as a finance platform.

Our strategy to provide focused advice and acute expertise with highest quality standards remains unchallenged in the Luxembourg market. For more than a decade, VANDENBULKE has set new quality benchmarks to provide non-academic and pragmatic expertise to his clients.

VANDENBULKE is also the uncontested forerunner of a new generation of law firms based on innovative organization, leading-edge technology and cost efficient services. From its inception, VANDENBULKE has pione red new ways of providing legal services based on high specialization, partner and-business-centric-approaches, responsiveness and flexibility.

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