Fund Finance in Luxembourg

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Luxembourg is undeniably one of the leading jurisdictions for investment funds. Being the world's second-largest fund domicile after the United States, Luxembourg remains a major centre for traditional Luxembourg-domiciled undertakings for collective investment in transferable securities (UCITS) funds, but also for alternative investment funds, including private equity, private debt, real estate and infrastructure.

FUND REGIMES

When opting for Luxembourg as domicile for their investment funds, initiators can choose between the following categories of fund regimes, depending on the nature of the investments, the type of target investors and the region and manner in which the investment funds will be marketed:

- an undertaking for collective investment (Part II UCI), governed by Part II of the law of 17 December 2010, as amended, on undertakings for collective investment (UCI Law);
- a specialised investment fund (SIF), governed by the law of 13 February 2007, as amended, on specialised investment funds (SIF Law);
- an investment company in risk capital (SICAR), governed by the law of 15 June 2004, as amended, on the investment company in risk capital (SICAR Law);
- a reserved alternative investment fund (RAIF), governed by the law of 23 July 2016, as amended, on reserved alternative investment funds (RAIF Law); or
- a non-regulated ordinary commercial company (Soparfi), governed by the law of 10 August 1915 on commercial companies (1915 Law).

Part II UCIs, SIFs and SICARs are regulated investment funds subject to direct supervision of the Commission de Surveillance du Secteur Financier (CSSF) and require the prior approval of the CSSF before they can be set up.

RAIFs and Soparfis are unregulated investment funds that are not subject to direct supervision of the CSSF and do not require prior CSSF approval. They can be formed as soon as the constitutive documents have been finalised and arrangements with the required service providers put in place.

A considerable number of Luxembourg investment vehicles constitute AIFs subject to the Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on alternative investment fund managers (AIFMD), implemented in Luxembourg by the Law of 12 July 2013, as amended, on alternative investment fund managers (AIFM Law). An AIF is defined as a collective investment undertaking which, or the compartment(s) of which: (i) raise(s) capital from a number of investors; (ii) have/has a view to investing such capital in accordance with a defined investment policy for the benefit of those investors; and (iii) is not covered by the Directive 2009/65/EC on UCITS.

While a RAIF must qualify as an AIF within the meaning of the AIFM Law (and must accordingly appoint an authorised alternative investment fund manager (AIFM) and a depositary), exemptions under the AIFM Law may apply to the SICAR and the SIF, which are only required to appoint an AIFM and a depositary if they qualify as an AIF.

Legal forms

The formation process of a Luxembourg investment fund depends on its legal form. A SIF, a SICAR, a RAIF or a Soparfi may be structured as:

- a special limited partnership (SCSp);
- a common limited partnership (SCS);
- a corporate partnership limited by shares (SCA);
- a public limited liability company (SA);
- a private limited liability company (SARL);
- solely in case of the SIF and the RAIF, a common fund (*fonds common de placement*) (FCP);

or

- a co-operative company in the form of a public limited liability company (Coop-SA).

A Part II UCI with variable capital may only take the form of:

- a public limited liability company (SA); or
- a common fund (FCP).

Apart from the FCP and the SCSp, all the other legal forms have a legal personality.

SCS and SCSp

A large number of Luxembourg investment funds are established as SCS and SCSp. The legal regime governing SCS and SCSp rests on the principle of contractual freedom. It allows a level of flexibility akin to that included in the popular "Anglo-Saxon" limited partnerships. It must be noted that the legal regimes governing the SCS and the SCSp are aligned with one another, as the Luxembourg legislator intended for those vehicles to be governed by similar rules.

One main feature distinguishes the SCS from the SCSp: while the former has legal personality, the latter does not. That being said, even if the SCSp does not have legal personality,

this does not prevent it from operating as if it was an entity with legal personality. Accordingly, the SCSp has its own registered office, acts in its own name and, for its own account (through the intermediary of its manager (*gérant*)), may issue partnership interests and debt financial instruments and contract loans.

FCP

Another form of Luxembourg investment fund sometimes used is the FCP. The FCP is a common fund, which is similar to a unit trust in the United Kingdom or a mutual fund in the United States. It is organised as a co-ownership whose investors are only liable up to the amount they have committed or contributed.

Unlike companies, FCPs do not have legal personality, but consist of a pool of assets managed by a Luxembourg management company (*société de gestion*) (Management Company). In the absence of a corporate form, FCPs largely benefit from contractual freedom in terms of structuring and management. The Management Company draws up the management regulations (*règlement de gestion*) of the FCP and its compartments (if any).

The Management Company must perform its duties in an independent manner and in the sole interest of the FCP and the investors. It may not use the assets of the FCP for its own needs and it is liable towards the investors and third parties for the proper performance of its duties. The creditors of the Management Company have no rights of recourse against the assets of the FCP.

Umbrella investment funds/compartments

An element to be considered in the context of a fund financing transaction is whether the investment fund is a standalone entity or, as already briefly mentioned above, an umbrella investment fund with segregated compartments (sometimes also named sub-funds). Multi-compartment investment funds are regularly engaged in fund financing transactions. Care should be taken by lenders when providing financing to these types of funds and in particular when putting the relevant finance documents (including the security package) in place.

The compartmentalisation of certain Luxembourg investment funds is quite frequent in Luxembourg and governed by express legal provisions. The UCI Law, the SIF Law, the SICAR Law and the RAIF Law (together the Product Laws) provide for the possibility to set up umbrella funds with different compartments, where each compartment corresponds to a segregated part of the assets and liabilities of such fund.

The fund's constitutive documents must expressly allow for the creation of compartments. The documentation of the umbrella fund will comprise separate specifications/supplement per compartment, containing the name, duration and investment strategy of each specific compartment, as well as the borrowing and other indebtedness provisions and leverage limitations applicable to such compartment.

Compartments do not have separate legal personality, but the segregation between the assets and liabilities of each compartment is recognised by each of the Product Laws. For the purpose of the relations as between investors, each compartment is deemed to be a separate entity, unless a clause included in the constitutive documents provides otherwise.

The rights of investors and of creditors concerning a compartment or which have arisen in connection with the creation, operation or liquidation of a compartment are limited to the assets of that compartment, unless a provision included in the constitutive documents provides otherwise. The assets of a compartment are exclusively available to satisfy the rights of investors in relation to that compartment and the rights of those creditors whose claims have arisen in connection with the creation, the operation or the liquidation of that compartment, unless a clause included in the constitutive documents provides otherwise.

DUE DILIGENCE AND GENERAL LUXEMBOURG ISSUES

Capacity of the investment fund

The starting point of any lender due diligence with respect to a Luxembourg investment fund is the fund documentation (notably the limited partnership agreement, articles of association, management regulations or any other equivalent governing documents). When reviewing the fund documentation, lenders shall assess whether the fund is allowed to borrow (including, if applicable, on a joint and several or cross-collateralised basis), to grant guarantees and security interests (including, if applicable, for the obligations of other entities, and/or on a cross-collateralised basis).

Lender friendly provisions

Subscription line lenders must also carefully analyse:

- the capital call provisions (notably, the entities empowered to make capital calls (such as general partners, AIFM or any other managing entity), the purpose for which the investment fund can call capital from its investors, the impact of excuse provisions, the existence of overcall provisions to cover defaulting investors and the possibility to call capital if the investment/commitment period is suspended or terminated); and
- whether the fund documentation contains waivers of investors' defences and right of set-off and subordination provisions (for the benefit of the lenders). Particular attention should be paid to the "no third-party right" provisions in the fund documentation. Lenders should preferably be indicated as third-party beneficiaries to avoid any interpretation issues as to whether they may benefit from the waivers of the investors' defences and set-off rights.

Term of the fund and its investment/commitment period

As already described in the general section, lenders should pay particular attention to the investment fund's term to ensure that the termination date of the credit facility falls before the term of the investment fund. In addition, whether the investment fund will still be able to draw investors' commitments to repay its borrowings and indebtedness following the termination and/or suspension of the commitment/investment period should be checked.

Consents

The fund documentation (notably the AIFM agreements, the investment management and advisory agreements) must be reviewed in order to determine whether there is a need to involve the AIFM and/or the investment manager/advisor in the financing transaction. It has to be assessed whether the power to issue drawdown notices to the investors and/or the power to enter into financing arrangements have been delegated to the AIFM and/

or the investment manager/advisor. In certain cases, the fund documentation may provide that the consent of the AIFM and/or the investment manager/advisor is necessary in case of entry into financing/borrowing arrangements and/or the granting of security interests over the assets of the fund.

It is mandatory for AIFs (managed by authorised AIFMs), RAIFs, SIFs and SICARs to appoint a Luxembourg depositary. The depositary is generally in charge of the safekeeping and supervision of the fund's assets and the control over the transactions. Depositary agreements must be diligenced in order to (i) determine whether there is a need to inform the depositary and/or obtain its consent in respect of the envisaged financing transaction, and (ii) check whether there is a pledge granted by the investment fund over its assets in favour of the depositary (which may need to be released).

In addition, it has to be assessed whether the fund documentation requires the prior consent of the LP advisory committee (or any other equivalent committee) before the investment fund can enter into the relevant financing arrangements.

Unitised investment funds

The SA, a SARL, SCA and Coop-SA issue shares. SCS and SCSp may issue securities/units, but can also implement partnership interests represented by partners' capital accounts (*comptes d'associés*). The capital accounts reflect the investor's contributions to the SCS or SCSp and are adjusted over time to reflect the participation in profits and losses. In this respect, while it is more common to structure liquid funds in the form of an SA or an SCA, managers of closed-end funds have a preference for the SCS or SCSp.

In case of unitised funds with investors' capital commitments structured as obligations of the investors to subscribe for units, securities or shares, it may be helpful to include in the fund documentation a specific undertaking of the investors to fund their commitments without any defence, particularly to any situation in which it is impossible for the investment fund to issue such units, securities or shares (notably in the case of insolvency). Such undertaking is also important in case of suspension of the net asset value (NAV) calculation of the fund, which may result in an inability to issue units, securities or shares in certain cases.

Investors' debt commitments

While most of the Luxembourg investment funds are funded with equity contributions, the investors' commitments of certain Luxembourg investment funds are sometimes structured as debt commitments (i.e. commitments to make loans to the fund or to subscribe for debts instruments/notes issued by the fund). Given the uncertainty as to the possibility for Luxembourg entities to incur indebtedness after the opening of insolvency proceedings, it may be helpful if possible to include in the fund documentation a conversion mechanism pursuant to which the investors' debt commitments may be converted into equity commitments in an insolvency scenario, so that the investors will be required to make equity contributions after the opening of insolvency proceedings.

Another potential mitigant for this issue is to request a specific waiver from the investors (to be included in the fund documentation or in a separate investor's letter) whereby they explicitly agree to advance their debt commitments without any defences relating to the inability of the investment fund to incur indebtedness, including as a result of the opening of any insolvency proceedings. If the investment fund is financed by its investors with loans

and debt instruments, particular attention will need to be paid to ensure that there are subordination provisions pursuant to which the investors agree that their claims against the fund will rank junior to the claims of the lenders.

Powers of attorney

Concerning the ability for subscription line lenders to call capital from the investors on the basis of a power of attorney, it has to be noted that under Luxembourg law, each power of attorney, mandate or appointment of agent, whether or not stipulated irrevocable (i) may terminate by virtue of law without notice upon the occurrence of insolvency proceedings (relating to the investment fund and/or its general partner), and (ii) may be revoked despite being expressed to be irrevocable. Given the risk of revocability of the power of attorney, it is customary for lenders to take pledges over the investors' commitments. If such pledges are taken, the right to make capital calls and enforce the obligations of the investors to contribute capital should be considered as an ancillary right to the pledged claim (*droit lié à la créance gagée*), and, as a result, the security taker may elect to exercise that right in accordance with the provisions of the pledge agreement (without the need to rely on any power of attorney).

LEGAL DOCUMENTATION: THE FACILITY AGREEMENTS

In most of the Luxembourg fund finance transactions originating in Europe, the facility agreements are governed by English law (noting that a number of US originated fund finance transactions will instead be governed by New York law). There are some Luxembourg-specific provisions to be included in the facility agreements in respect of representations and warranties, undertakings, events of default and conditions precedents. The representations as to status and the applicable regime will need to be carefully prepared on a case-by-case basis for the particular investment fund and its applicable regime. It is common to include representations confirming, inter alia, that:

- the relevant investment fund, its general partner and its AIFM comply with the AIFM Law and the Product Laws (if applicable);
- the AIFM and the depositary of the relevant investment fund have been validly appointed; and
- the central administration (*administration centrale*) and the centre of main interests (COMI) (to the extent applicable) of the relevant investment fund and its GP are in Luxembourg.

The provisions in relation to the fund documentation and the constitutional documents need to be carefully considered to ensure that they correctly reference the relevant documents for the fund, which may vary on an entity-by-entity basis (such as articles of associations for SA, SCA and SARL, partnership agreements for the SCS and SCSp, management regulations for the FCP, offering documents for the RAIF and SIF, prospectus for the SICAR, etc.).

Umbrella investment funds/compartments

If the borrower/guarantor entity is an umbrella fund acting in relation to a compartment, care needs to be taken with respect to the name of the relevant compartment(s). The finance documents have to contain the exact description of the relevant borrower/

guarantor entity (i.e. the investment fund acting in respect of the relevant compartment, as opposed to just the compartment), and the signature blocks have to be prepared accordingly.

Specific representations and undertakings are required by lenders to ensure segregation between the compartments and separate accounting and administrative treatment of the compartments and their respective assets and liabilities.

FCP

If the borrower/guarantor entity is an FCP, the finance documents must contain the exact description of the relevant borrower/guarantor entity (i.e. the Management Company acting in respect of the relevant FCP), and the signature blocks must be prepared accordingly.

Specific representations and undertakings are required by lenders to ensure (i) proper performance of the Management Company in the interest of the FCP and its investors, and (ii) a segregation between the respective assets and liabilities of the Management Company and the FCP.

AIFMD leverage considerations

The AIFMD imposes certain rules as to the use of leverage by AIFs (defined as any method by which the AIFM increases the exposure of an AIF it manages, whether through borrowing of cash or securities, leverage embedded in derivative positions, or by any other means).

Each financing transaction has to be analysed on a case-by-case basis to determine whether it constitutes leverage for the purpose of the AIFMD. In case of a financing transaction constituting such leverage, the fund documentation has to be diligenced, with a particular focus on (i) the possibility for the fund to use leverage and grant security interests, and (ii) the applicable borrowing/leverage limitations.

In case of subscription/capital call facilities, borrowings would not be considered as leverage for AIFMD purposes if they: (i) are temporary in nature (the industry consensus being for no more than 12 months); and (ii) relate to and are fully covered by investors' capital commitments.

Depending on how they are structured, NAV financings may constitute leverage within the meaning of the AIFMD.

In relation to financing arrangements constituting leverage, obtaining the AIFM's consent must be considered, and such arrangements shall be taken into account by the AIFM for leverage calculations and disclosure purposes.

LEGAL DOCUMENTATION: THE SECURITY AGREEMENTS

Luxembourg law typically governs the security interests granted by Luxembourg investment funds, notably security interests over investors' commitments (in case of subscription/capital call facilities), security interests over Luxembourg bank accounts (in case of subscription/capital call facilities and NAV facilities), and security interests over equity interests in Luxembourg entities (mainly for NAV facilities and GP facilities). The relevant

security interest is in the form of a financial collateral arrangement governed by the Law of 5 August 2005 on financial collateral arrangements, as amended (Collateral Law).

Subscription/capital call facilities: pledge over investors' commitments

It is common for Luxembourg investment funds to grant security interests over their investors' commitments and the claims against the investors in relation to such commitments. The relevant security interest is in the form of a financial collateral arrangement governed by the Collateral Law. Security interests over claims against the investors may be created by way of pledges or assignments for security purposes, pledges being the most common Luxembourg law security interests over investors' commitments.

The security interest agreement must be evidenced in writing, and it must be executed by the investment fund (as security grantor), the fund's general partner and the security taker. If the AIFM (or another managing entity) is empowered to make capital calls and/or enter into security interest arrangements on behalf of the fund, it must be added as a party to the security interest agreement.

Under Luxembourg law, pledges over investors' commitments that are not notified to, or accepted by, the investors are fully recognised and enforceable. However, the debtor of a pledged claim may be validly discharged from its obligation vis-à-vis the security provider if it had no knowledge of the pledge in favour of the security taker. It is therefore standard for Luxembourg pledges over commitments to be notified to the investors in order to ensure that the investors will act in accordance with the security taker's instructions and pay their undrawn commitments into the pledged account (or as otherwise instructed by the security taker) if the security interest is enforced.

Notices of pledges over commitments may be served to the investors by different means – letters, emails, electronic communications, etc. Alternatively, notices may be included in the reports (distributed to the investors) or published on an investor portal.

Given that some of the investors in Luxembourg investment funds may be located outside of Luxembourg, the following Luxembourg private international law rules must be taken into account when structuring a pledge over investors' commitments and the claims against the investors:

- concerning security interests over claims, the relationship between the security provider and the security taker will be governed by the chosen law of, or the law otherwise applicable to, the agreement between the security provider and the security taker;
- the law governing the claims subject to the security interest determines (i) the question as to whether or not that claim can be made subject to a security interest, (ii) the relationship between the security taker and the debtor, (iii) the conditions under which the granting of a security interest over that claim can be enforced against the debtor, and (iv) the question whether the debtor's obligations under that claim have been paid and discharged in full; and
- since article 14 of the Rome I Regulation does not provide explicitly for any conflict of law rules in relation to the enforceability and invocability of a security interest over claims against third parties, a security interest over claims will become invocable towards third parties (other than the debtor) if the legal formalities applicable in the jurisdiction of the debtor are duly complied with.

Subscription/capital call facilities: cascading security structures

If an investor-facing vehicle (typically a feeder fund) is unable to grant direct pledges for tax or regulatory reasons and/or due to restrictions included in its fund documentation, a cascading security structure may be established. In such case, the feeder fund may grant security interests over its investors' undrawn commitments and its bank account(s) in favour of its master fund to secure its own capital contribution obligations vis-à-vis the master fund. In turn, the master fund grants a security interest over its investors' undrawn commitments – including the undrawn commitments of the feeder fund and any accessory rights (notably the above security interests granted by the feeder fund) – in favour of the subscription line lender (or its security agent) in order to secure its own borrowings under the subscription/capital call facility. In an enforcement scenario, lenders will be able to enforce the pledge granted by the master fund and exercise all accessory rights attached to the pledged claims and commitments, including the pledges granted by the feeder fund in favour of the master fund.

When structuring a cascading pledge, it is important to ensure that the commitments of the feeder fund vis-à-vis the master fund (documented pursuant to a subscription or commitment agreement) will at all times be at least equal to the available investors' commitments at feeder fund level. If necessary, specific undertakings shall be included in the finance documentation.

If blocker vehicles sit in between the feeder fund and the master fund, particular attention will need to be paid to ensure there is no interruption in the cascading chain of commitments. If necessary, the pledge granted by feeder fund in favour of the master fund shall secure both (i) the obligations of the blocker vehicle (as limited partner) toward the master fund, and (ii) the feeder fund's obligations in favour of the master fund, if any.

If cascading pledges shall be put in place, the fund documentation has to be diligenced, with a particular focus on the ability of the feeder fund to pledge its assets in favour of the master fund, and the possibility for the master funds to pledge its investors' commitments (including the commitments of the feeder fund) in favour of the lender. Care should be taken when drafting the waivers of the investors' defences at the level of the feeder fund in order to ensure that the lenders may rely on such waivers.

Subscription/capital call facilities: AIV structures

When the fund structure is composed of alternative investment vehicles (AIVs), subscription line lenders will usually require the investors' commitments of the AIVs to be included in the pledged collateral. Given that the general partner of the main fund will be able to redirect commitments of its investors to a particular AIV, it is important to ensure that the collateral to be pledged by the relevant AIV includes (i) the commitments of the AIV investors, and (ii) the commitments of the main fund, which may be due or payable to or stipulated for the benefit of the AIV.

Subscription/capital call facilities, NAV facilities and GP facilities: pledges over Luxembourg bank accounts

The security interest over Luxembourg bank accounts (notably the accounts into which investors are required to fund their contributions) may be created by way of a pledge in accordance with the Collateral Law. The pledge agreement (governed by the Collateral

Law) must be evidenced in writing and perfected in accordance with Luxembourg law. In practice, as a result of their general terms and conditions or the depositary agreement, Luxembourg banks have first-ranking pledges over the accounts. It is customary for the lenders to require the account banks to waive such pledges, so that the lenders take first-ranking pledges. The account pledge will become valid and enforceable against the account bank and third parties once it has been notified to and accepted by the account bank (usually by way of an acknowledgment letter signed by the account bank containing the necessary acceptance and waiver provisions). It is therefore standard for lenders to require that such acknowledgment letters be obtained prior to the first utilisation of the loan.

Pledges over equity interests – general considerations

If equity interests issued by Luxembourg entities are part of the collateral, it is essential to diligence the constitutional documents, the shareholders' arrangements and the financial arrangements at the level of the pledged entities, and the underlying entities must be considered to assess whether there are any formalities, consent requirements, (transfer) restrictions, preemption rights or change of control provisions.

The pledge agreement over equity interests issued by Luxembourg entities must be evidenced in writing and perfected in accordance with Luxembourg law.

NAV Facilities: Pledges over shares in SARLs

A pledge over the shares in a Luxembourg SARL (which is the most common form of Luxembourg holding entity) will be perfected once notified to or accepted by the company whose shares have been pledged. In addition, the pledge has to be registered in the shareholders' register of the pledged SARL.

If less than 100% of the shares in a SARL are pledged, the enforcement of the pledge and the share transfer resulting from such enforcement require the prior approval of the shareholders of the SARL, and therefore, lenders will seek to obtain the shareholders' resolutions pre-approving the pledgee and any other potential transferee of the pledged shares (as a result of the pledge enforcement) as a condition precedent. Any existing shareholders' agreement relating to a SARL must also be carefully reviewed. Such agreements may include, among others, transfer restrictions, conditions precedent to share transfers (e.g., adherence to the shareholders' agreement by the transferee), and tag-along or drag-along rights. Lenders should thoroughly assess these provisions to ensure they would not adversely affect the pledgee's rights in an enforcement scenario.

NAV facilities and GP facilities: pledges over partnership interests

A pledge over partnership interests issued by a Luxembourg partnership (such as an SCS or SCSp) is perfected when notified to or accepted by the partnership. The pledge has to be registered in the partners' register. The partnership interests may, on pain of nullity, only be transferred or pledged in accordance with the terms and in the manners provided for in the partnership agreement. In the absence of provisions in the partnership agreement, (i) any transfer or pledge of a limited partner's interest requires the approval of the general partner(s), and (ii) any transfer or pledge of a general partner's interest requires the approval of the partners who deliberate in the manner provided for the amendment to the partnership agreement. Furthermore, an enforcement of a pledge over the general partner interests could cause the pledgee or a third party who were to become the owner

of the general partner's interests to be liable jointly, severally and without limitation for the debts of the partnership, by virtue of the general partner being the unlimited partner of the partnership.

LUXEMBOURG RESTRUCTURING LAW

When negotiating the security documentation and structuring the enforcement trigger events, the provisions of the Luxembourg law of 7 August 2023 on business preservation and modernisation of the bankruptcy law (the Restructuring Law) must be considered. The Restructuring Law has introduced reorganisation proceedings and measures in order to provide relief to debtors in financial difficulties.

Investment funds governed by the Product Laws (such as Part II UCIs, SIFs, SICARs and RAIFs) are not covered by the Restructuring Law, but the other investment funds and AIFs fall within the scope of application of the Restructuring Law.

The key takeaway is that the Restructuring Law and the opening of the reorganisation proceedings thereunder do not affect the enforceability of the security interests under the Collateral Law.

That being said, the Restructuring Law contains certain limitations with regard to termination or modification of agreements or enforcement by creditors of their rights thereunder against the debtors during the reorganisation proceedings. According to article 30 of the Restructuring Law, the opening of proceedings for a judicial reorganisation (or a request to this effect) cannot serve as a legal basis for the early termination or otherwise modification of an agreement, notwithstanding any contractual provision to the contrary. In addition, a statutory remedy period of 15 days for a contractual breach by a debtor is applicable. Article 30 of the Restructuring Law also allows the debtor to suspend the performance of its contractual obligations for the duration of the stay, provided that such suspension is imperatively required for the judicial reorganisation.

Although article 30 of the Restructuring Law does not explicitly mention "acceleration", it may be not excluded that acceleration of debt may be restricted by virtue of article 30 of the Restructuring Law.

As already indicated, the enforceability of the security interests under the Collateral Law is not affected by the opening of the reorganisation proceedings under the Restructuring Law. That being said, such security interests can only be enforced upon the occurrence of the contractually agreed trigger event. If the parties have contractually agreed that the pledge enforcement trigger event is the acceleration of the underlying debt and not merely an event of default, the lenders must consider the limitations on acceleration described above. If the acceleration of the underlying debt is impossible due to such limitations, the contractual conditions for the enforcement of the security interest will not have been met, and the enforcement of the security interest may not be possible for the duration of the reorganisation proceedings.

As a result, trigger events in the pledge documentation and the enforcement provisions in the underlying facility documentation need to be assessed on case-by-case basis. In order to provide comfort for the lenders, one of the possibilities is to ensure that the pledge enforcement triggers do not depend on the acceleration of the underlying debt and that the security interest can be enforced already at the occurrence of any event of default (without acceleration of the underlying debt). If such option is not commercially acceptable,

the opening of the reorganisation proceedings under the Restructuring Law and the filing shall therefore be included as additional independent triggers for the pledge enforcement, alongside the acceleration of the underlying debt. The enforcement of the security interests under the Collateral Law at the occurrence of such trigger events should still be possible.

EU SECURITISATION REGULATION

It is important to note that certain financing structures (notably those involving NAV financings of credit funds and/or their investment vehicles) may fall within the scope of Regulation (EU) 2017/2402 of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation (EU Securitisation Regulation), if there is a securitisation involving tranching of credit risk.

Should the EU Securitisation Regulation apply, a number of obligations will be imposed on the involved securitisation special purpose entities, originators, sponsors and investors – notably, in respect of risk retention, due diligence, transparency and disclosure, restrictions on sale to retail investors, etc.

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