

# High-Yield Debt 2020

Contributing editors

Arthur D Robinson, Mark Brod and David Azarkh



**Publisher**

Tom Barnes  
tom.barnes@lbresearch.com

**Subscriptions**

Claire Bagnall  
claire.bagnall@lbresearch.com

**Senior business development manager**

Adam Sargent  
adam.sargent@gettingthedealthrough.com

**Published by**

Law Business Research Ltd  
Meridian House, 34-35 Farringdon Street  
London, EC4A 4HL, UK

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between March and April 2020. Be advised that this is a developing area.

© Law Business Research Ltd 2020  
No photocopying without a CLA licence.  
First published 2016  
Fifth edition  
ISBN 978-1-83862-349-4

Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



---

# High-Yield Debt 2020

**Contributing editors**

**Arthur D Robinson, Mark Brod and David Azarkh**  
Simpson Thatcher & Bartlett LLP

---

Lexology Getting The Deal Through is delighted to publish the fifth edition of *High-Yield Debt*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Singapore.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Arthur D Robinson, Mark Brod and David Azarkh, of Simpson Thatcher & Bartlett LLP, for their continued assistance with this volume.



London  
April 2020

---

Reproduced with permission from Law Business Research Ltd  
This article was first published in May 2020  
For further information please contact [editorial@gettingthedealthrough.com](mailto:editorial@gettingthedealthrough.com)

# Contents

<b>Global overview</b>	<b>3</b>	<b>Portugal</b>	<b>37</b>
Arthur D Robinson, Mark Brod and David Azarkh Simpson Thacher & Bartlett LLP		Maria João Ricou and Manuel Requicha Ferreira Cuatrecasas	
<b>High-yield debt in China</b>	<b>4</b>	<b>Russia</b>	<b>44</b>
Christine Chen, David Liao and Annie Shen Fangda Partners		Oleg Ignatyev LECAP	
<b>Brazil</b>	<b>9</b>	<b>Singapore</b>	<b>49</b>
Ricardo S Russo Pinheiro Neto Advogados		Naomi Ishikawa, Giles Kennedy and James McFarlane Milbank LLP	
<b>Finland</b>	<b>14</b>	<b>Spain</b>	<b>55</b>
Juha Koponen, Mikko Heinonen and Niina Nuottimäki Borenus Attorneys Ltd		Jaime de la Torre Viscasillas and Miguel Cruz Ropero Cuatrecasas	
<b>France</b>	<b>19</b>	<b>Switzerland</b>	<b>62</b>
Colin Chang, Luis Roth, Kathryn Merryfield and Cyril Boussion Linklaters LLP		Jürg Frick and Stefan Oesterhelt Homburger	
<b>Greece</b>	<b>24</b>	<b>United Kingdom</b>	<b>68</b>
Apostolos Gkoutzinis, Dimos Papanikolaou and Iakovos Anagnostopoulos Milbank LLP		Nicholas J Shaw and Shahpur K Kabraji Simpson Thacher & Bartlett LLP	
<b>Luxembourg</b>	<b>31</b>	<b>United States</b>	<b>74</b>
Basile Fémelat, Arnaud Barchman Wuytiers van Vliet and Delphine Gomes AKD		Arthur D Robinson, Mark Brod and David Azarkh Simpson Thacher & Bartlett LLP	

# Luxembourg

Basile Fémelat, Arnaud Barchman Wuytiers van Vliet and Delphine Gomes

AKD

## MARKET OVERVIEW

### High-yield debt securities versus bank loans

- 1 | Discuss the major differences between high-yield debt securities and bank loans in your jurisdiction. What are some of the critical advantages and disadvantages?

Luxembourg is a very active jurisdiction for high yield debt securities transactions but does not have its own market. Rather, it is typically a go-to jurisdiction for foreign groups to structure their financing special purpose entities. Luxembourg's business friendly environment makes it one of the most successful jurisdictions and financial centres in the EU and the world. That is also true for high yield debt securities issuances.

The Luxembourg Stock Exchange is the leading venue in Europe for the listing of high yield debt securities and very often high yield debt securities issued by Luxembourg and foreign issuers will be listed on the Luxembourg Stock Exchange and admitted to trading on one of its markets.

The vast majority of high yield debt securities issued through Luxembourg entities are governed by laws other than Luxembourg, typically New York law and to a lesser extent, English law or even German law. As such, the terms of the supporting documents (terms and conditions of the debt securities, indentures, purchase agreements, etc) are in line with the international market practices, essentially driven by US practices, in which Luxembourg law only plays an ancillary role.

The same is true for bank loans, which are only rarely governed by Luxembourg laws (that would, however, typically be the case for loans granted by the European Investment Bank). Accordingly, bank loans are usually subject to New York law or English law and follow the practices and requirements customary in these legal systems.

From a Luxembourg law perspective, there are no notable differences for a Luxembourg company to structure its debt via the issuance of high yield debt securities or bank loans, and the main differences and benefits will typically be assessed from the perspective of the governing law applicable to the relevant documents of a contemplated transaction or current market circumstances that may impact the economic terms. More generally, a listing of the high yield debt securities in Luxembourg or elsewhere may offer the issuer and its group more visibility on international markets and offer more flexible liability management options (eg, ongoing purchases and tender offers), but will also require the issuer to comply with the applicable disclosure and reporting obligations.

### Regulation

- 2 | Are you seeing increased regulation regarding either high-yield debt securities or bank loans in your jurisdiction?

There is a tendency to regulatory inflation generally within the EU and Luxembourg is no exception to this tendency – although the applicable rules and regulations often derive from European regulations and

directives. This will notably be the case for high yield debt securities admitted to trading on a European market, for which actors allegedly still need to integrate certain effects deriving from the Market Abuse Regulation. Interestingly, the Luxembourg Stock Exchange has proven very creative in offering alternatives limiting the burden for issuers, notably with the launch of the Securities Official List that offers a straightforward and cost efficient listing-only alternative, falling out of the scope of the Market Abuse Regulation.

Although not specific to Luxembourg, investment banks are also no exception to this regulatory inflation, with the recent entry into force of MiFID II and the PRIIPS Regulation and related rules, and the strengthening of anti-money laundering and know your customers' requirements at European level, that apply to high yield debt securities issuances but also to bank loans generally.

### Current market activity

- 3 | Describe the current market activity and trends in your jurisdiction relating to high-yield debt securities financings.

The Luxembourg high yield debt securities environment is heavily dependent on the activities in the US and other jurisdictions in Europe. The first months of 2020 have been quite active, with a favourable business environment for issuers due to the generally low yields.

Most of the transactions are structured as senior secured deals with parent's guarantees or restricted subsidiaries' guarantees, or both, and follow the tendency towards more flexibility for issuers with relatively business friendly covenants. Investors in high yield debt securities issued by Luxembourg issuers are typically sophisticated and institutional investors located in other jurisdictions, in particular the United States.

High yield debt securities issuances have witnessed a substantial slowdown as a result of the covid-19 pandemic in March 2020, with a lot of transactions being postponed or cancelled when lockdown measures started to kick in across the world. That said, transactions have substantially been picking up since June 2020 and, although not back to normal yet, high yield debt securities seem to continue to be an attractive financing option for international groups. Liability management transactions in respect of outstanding debt securities are expected to increase in the next quarters.

### Main participants

- 4 | Identify the main participants in a high-yield debt financing in your jurisdiction and outline their roles and fees.

Virtually always, investment banks, servicers, rating agencies and trustees operate from jurisdictions outside of Luxembourg. Similarly, paying agents do not need to be based in Luxembourg. As a result, the Luxembourg based participants are often limited to issuers or affiliated guarantors and security grantors.

The issuing vehicles are often incorporated as (1) public limited liability companies (*société anonymes*) or (2) private limited liability companies (*sociétés à responsabilité limitée*). The issuing vehicle is frequently incorporated by the parent holding company of the group as its dedicated issuing vehicle, benefiting from guarantees granted by such parent and its restricted subsidiaries to compensate its limited own assets.

The day-to-day administration of the issuing vehicles is often managed with the help of a local corporate services provider. Fees of corporate services providers depend on their role and scope of services but usually comprise a yearly fixed element and variable fees that will depend on the transaction and actions required.

High yield debt securities intended to be listed in Luxembourg will also require the involvement of the Luxembourg Stock Exchange. Such debt securities are usually listed on the alternative market (the widely known Euro MTF) and require a listing prospectus (frequently largely based on the offering memorandum) to be approved by the Luxembourg Stock Exchange. Thanks to the business-friendly and pragmatic approach of the Luxembourg Stock Exchange, the listing process is on the overall extremely efficient. Fees of the Luxembourg Stock Exchange will typically depend on the issuance amount and maturity of the debt securities but are generally seen as very competitive compared to other jurisdictions.

Lastly, lawyers and accountants will also typically be involved, with often one set of lawyers assisting the issuer and another set of lawyers assisting the banks involved. Typically, the banks' Luxembourg legal counsel will coordinate the preparation of the relevant security documents whilst the issuer's Luxembourg legal counsel will assist with the relevant corporate deliverables. It is customary that both sets of legal counsel issue legal opinions in relation to the Luxembourg entities involved and any Luxembourg security documents.

## New trends

- 5 | Please describe any new trends as they relate to the covenant package, structure, regulatory review or other aspects of high-yield debt securities.

Trends in the Luxembourg high yield environment are generally aligned with the trends in the international markets, in particular in New York and London. Virtually all markets and industries are present. The general trend is towards a lightening of covenants in favour of the issuers. It remains to be seen how the covid-19 pandemic will have an effect on certain practices, and it cannot be excluded that covenants will start to tighten up as investors may become more prudent. Recent trends suggest that particularly flexible covenants (notably around dividends distributions and assets sales) are being looked at more closely by investors. In any event, it is expected that covenants will be adjusted increasingly to the specific situation of issuers and to reflect uncertainties in terms of economic forecasts.

## DOCUMENTATION TERMS

### Issuance

- 6 | How are high-yield debt securities issued in your jurisdiction? Are there particular precedents or models that companies and investors tend to review prior to issuing the securities?

High yield debt securities are typically issued pursuant to a New York law-governed indenture or an English law trust deed. The securities are usually offered to investors with the help of an offering memorandum or similar offering documents. As high yield debt securities are not designed for retail investors, safe harbours for securities offerings will be relied upon. In Luxembourg, this will typically be the case by

ensuring that the securities have a minimum denomination of €100,000 per unit and restricting the offering (and transferability) to qualified investors in the sense of the Prospectus Regulation, thereby avoiding triggering the requirement to draw up a prospectus in accordance with the Prospectus Regulation.

Recurrent issuers will usually recycle precedents to structure the terms of new issuances. New issuers structure their issuance with the appointed deal team, on the basis of relevant precedents in similar geographical location, industry sectors or practices, hand in hand with the sponsor and appointed banks.

### Maturity and call structure

- 7 | What is the typical maturity and call structure of a high-yield debt security? Are high-yield securities frequently issued with original issue discount? Describe any yield protection provisions typically included in the high-yield debt securities documentation.

The majority of high yield debt securities issued through Luxembourg vehicles have a maturity ranging from five to seven years. Longer maturity securities are unusual, except for certain specific transactions relating to a specific project or acquisition.

Non-call periods are standard, in line with international practices, and will usually depend on the maturity of the debt securities. The minimum non-call period is typically three years and is often adjusted depending on the tenor of the debt securities and the appetite and risk profile of the targeted investors. Once the non-call period has lapsed, the debt securities are usually redeemable at the discretion of the issuer subject to payment of a certain premium. Such premium arrangements will be adjusted to the financial health of the issuer and the market environment. That said, high yield documentation virtually always includes a few exceptions to non-call periods, notably allowing redemption by the issuer of its debt securities on a make-whole basis or as a result of an equity offering materialising in a number of months following the issuance of the debt securities (known as the 'equity clawback option'), generally subject to payment of an agreed premium.

High yield debt securities that are issued with a floating rate often foresee more favourable redemption options for the issuer (eg, shorter non-call period and lower redemption premiums).

It is otherwise not common to see debt securities issued with a discount in high yield transactions involving Luxembourg issuers.

### Offerings

- 8 | How are high-yield debt securities offerings launched, priced and closed? How are coupons determined? Do you typically see fixed or floating rates?

The offering typically starts with the distribution of the 'red', the preliminary offering memorandum or prospectus in which certain features of the debt securities such as the maturity or the yield remain to be specified (ie, pricing details). This triggers the launch of the roadshow period in which the issuer will meet with potential investors. In parallel, the appointed banks will start the book building process and secure commitments from investors. The roadshow typically lasts two weeks, depending on market conditions and the popularity of the issuer. Recurrent high yield issuers with proven track records can reduce this process to just a few days.

Once the roadshows have finished, the banks will organise a pricing call with the issuer and agree on the pricing details for the transaction, such as the yield, issue price and maturity. If market conditions are not satisfactory to the issuer, further roadshows can be initiated or the transaction be postponed. Where necessary, the transaction structure can be revisited to tackle concerns from investors, including through

additional security interests or guarantees. When the pricing call is satisfactory, all those elements will be confirmed in the pricing term sheet and will trigger the signature of the purchase agreement with the banks. The preliminary offering memorandum is then completed with the pricing details to form the final offering memorandum. The transaction typically closes in the next three business days (T+3), which is also the date on which the issuer collects the proceeds of the issuance.

High yield debt issuances are often structured around a fixed interest rate determined during the pricing call. The rate of interest will logically depend on the investors' demand, markets conditions, the financial situation and performance of the issuer and its group, sector of activities and geographical location, but also covenants negotiated by the issuer.

## Covenants

- 9 | Describe the main covenants restricting the operation of the debtor's business in a typical high-yield debt securities transaction. Have you been seeing a convergence of covenants between the high-yield and bank markets?

Overall, covenants in high yield debt issuances have for long been relatively more flexible than in bank loans and generally do not include the financial 'maintenance covenants' customary in bank loans. The covenants in Luxembourg high yield issuances are no exception to this tendency and generally follow practices set by US and English deals.

Key covenants are around limitations to incur additional indebtedness, including ratio tests, restrictions on payments such as dividends and distributions, prepayment of subordinated debts, and restrictions on investments. Certain transactions with restricted subsidiaries of the group will often be tailored to the specific needs of an issuer. The use of proceeds from the issuance will also often be relatively strictly regulated. Other covenants might be included depending on the profile of the issuer and its activities. While covenants may appear ab initio relatively restrictive, caveats and exceptions are, in practice, heavily negotiated, to accommodate the situation and specific needs of the issuer and its group. The financial health of the issuer and its group will logically play a key role in the negotiation of the covenants.

As high yield transactions in Luxembourg often feature a security package in favour of the investors, close attention will also be paid to limitations on liens and similar covenants, to ensure optimal protection of the investors and senior ranking of their collateral and claims in insolvency situations.

- 10 | Are you seeing any tightening of covenants or are you seeing investor protections being eroded? Are terms of covenants often changed between the launch and pricing of an offering?

Covenants have been loosening for some time now in Luxembourg high yield deals, following the trend on international capital markets in the US and Europe. Recurrent issuers with proven track records are best placed to tailor covenants more specifically to their needs, providing them with more flexibility. While this does not necessarily prove detrimental to investors, it is a fact that issuers tend to benefit from more and more flexibility to run their business.

With the recent covid-19 pandemic, it cannot be excluded that this tendency will shift back towards somehow stricter covenants in light of market uncertainties and investors looking for safer investment alternatives.

Covenants are typically not amended between the launch and pricing of an offering, but sometimes the structure of the deal can be revisited to grant additional security and guarantees in favour of the holders of the debt securities.

- 11 | Are there particular covenants that are looser or tighter, based on a particular industry sector?

Covenants are negotiated on a case-by-case basis and, absent any local high yield market, it is difficult to link them to a specific industry sector. Covenants will often depend on the financial health of the issuer and its business model. There will be typically more flexibility offered to issuers with a predictable cash-flow model. Capital intensive activities will also similarly offer more flexibility on the use of expenditures by the issuer.

## Change of control

- 12 | Do changes of control, asset sales or similar typically trigger any prepayment requirements?

Yes, that is typically the case. As a rule, a change of control requires the issuer to offer to prepay the debt securities at 101 percent, plus accrued interest. Investors thus have the option to submit their debt securities for redemption but can also decide to keep their securities if they are happy with the change of ownership. Change of control clauses can also be tailored to avoid triggering a redemption if certain criteria are satisfied (such as a certain leverage level).

Asset sales are usually restricted by covenants and do not necessarily lead to prepayment requirements. It may be that assets sales are permitted, provided that the proceeds of the sale are used in a certain manner. Failing so, the issuer will then be typically required to prepay the debt securities at a certain amount agreed in the terms and conditions.

- 13 | Do you see the inclusion of 'double trigger' change of control provisions tied to a ratings downgrade?

Provisions that require not only a change of ownership but also a downgrade by one or more rating agencies to trigger the application of change of control clause are not market standard in Luxembourg. Such clauses can be negotiated in practice and will often be relevant depending on the ownership structure of the issuer, notably whether the issuer is held by a family run business or on the contrary by a financial sponsor that may have in mind a forthcoming exit strategy.

## Crossover covenants

- 14 | Is there the concept of a 'crossover' covenant package in your jurisdiction for issuers who are on the verge of being investment grade? And if so, what are some of the key covenant differences?

Although not that frequent, crossover covenant package can be made available for issuers having high-yield and investment grade ratings from different rating agencies or that are on the edge of being investment grade. This will typically be the case for issuers with a strong bargaining power or recurrent issuers that have achieved an improved financial situation. The majority of high yield debt issuances do not, however, include crossover covenant packages.

Key changes will essentially result in the covenants becoming closer to investment grade covenants packages in nature, with weaker restrictions binding on the issuer, such as looser restricted payment tests.

## REGULATION

### Disclosure requirements

- 15 Describe the disclosure requirements applicable to high-yield debt securities financings. Is there a particular regulatory body that reviews or approves such disclosure requirements?

High yield debt securities issued by Luxembourg issuers are traditionally offered exclusively to qualified investors in the European Union (qualified investors being professional clients and eligible counterparties in the sense of MiFID II) or by reliance on other exemptions to the obligation to draw up a prospectus pursuant to the Prospectus Regulation. Consequently, the offering documents do not need to be approved by a competent authority in the European Union and no formal prospectus (nor any key information document) will need to be prepared by the issuer, saving time and costs. Similarly, such debt securities are usually offered in the United States in reliance on the exemptions foreseen by Rule 144A of the Securities Act and in other jurisdictions in reliance on Regulation S of the Securities Act.

In practice, the issuer of high yield debt securities will prepare an offering memorandum or similar offering document together with its advisors (lawyers and accountants) matching with customary market standards. Such offering documents are designed to provide investors with the necessary information to make an investment decision in the offered debt securities. As such, the offering memorandum will notably provide extended information on the issuer and its activities, the group to which it belongs, financial information and recent developments, the relevant risk factors related to the issuer, its activities and all appropriate information on the offered debt securities (in particular, the terms and conditions of the debt securities typically referred to as the 'description of the notes'). It also includes information on the tax treatment for investors holding the debt securities and a summary on insolvency laws applicable to the issuer. In practice, the content of such offering document is not much different from full-fledged prospectuses to be drawn-up pursuant to the Prospectus Regulation, but have more flexibility in terms of presentation, accommodating specific requirements of the issuer and investors, and obviously do not need to be approved by any authority.

If the high yield debt securities are intended to be admitted to trading on the Euro MTF of the Luxembourg Stock Exchange, the listing application will customarily be made on the basis of the offering memorandum, since such document essentially fulfils in practice the requirements of listing prospectuses to be prepared for the purpose of the admission to listing and trading.

Ongoing and periodic disclosure obligations (such as the publication of financial information, regulated information, inside information and reporting of securities events) may be applicable as a result of the admission to trading of the debt securities, deriving from the relevant stock exchange's rules and the potential application of the Market Abuse Regulation.

### Use of proceeds

- 16 Are there any limitations on the use of proceeds from an issuance of high-yield securities by an issuer?

Save for public orders rules and general corporate laws and principles (that would apply to any type of borrowing generally), there are no limitations on the use of proceeds. Evidently, the use of proceeds by the issuer will need to be made in accordance with the terms and covenants set out in the issuance documents and failure to do so could result in the issuer being in default under the terms debt securities.

### Restrictions on investment

- 17 On what grounds, if any, could an investor be precluded from investing in high-yield securities?

The targeted investors are restricted by virtue of the customary selling and transfer restrictions included in the issuance documents. To meet the most favourable public offering regime and avoid triggering retail investors protections and disclosures, high yield debt securities are traditionally exclusively restricted to qualified investors in the European Union and other sophisticated investors abroad, and bear a minimum denomination of €100,000 per unit (or the equivalent in other currencies).

### Closing mechanics

- 18 Are there any particular closing mechanics in your jurisdiction that an issuer of high-yield debt securities should be aware of?

High yield debt securities issued by Luxembourg issuers are virtually always admitted to clearing through Euroclear, Clearstream and DTC.

Listing applications with the Luxembourg Stock Exchange are made in parallel with the offering process to ensure effective admission to trading and listing of the debt securities immediately upon closing of the transaction. Unless the high yield debt securities are intended to be admitted to trading on a regulated market, the Luxembourg Stock Exchange will be the only entity involved in Luxembourg in connection with the listing and trading application.

## GUARANTEES AND SECURITY

### Guarantees

- 19 Outline how guarantees among companies in a group typically operate in a high-yield deal in your jurisdiction. Are there limitations on guarantees?

The Luxembourg issuing vehicle is frequently incorporated by the parent holding company of the group as a special purpose vehicle which holds no material assets and generally benefits from a guarantee granted by such parent (and affiliates) to compensate its limited assets. Luxembourg guarantors are generally also holding companies that have no operational activities.

Guarantees by Luxembourg companies are generally subject to the law governing the main issuance documents (ie, New York or English law) but two key elements must be taken into account on the Luxembourg side:

- the granting of a guarantee must fall within the corporate object of the guarantor pursuant to its articles of association; and
- the guarantor must derive a corporate benefit from the granting of the guarantee. Although such benefit may be more easily demonstrated in the event of guarantee provided by a parent company, it is generally held that the following conditions are met in case of an upstream or cross-stream guarantee: (1) the guarantee must be granted with a view to promoting a common economic, social and financial group interest and (2) the amount of the guarantee must not be disproportionate (a) to the guarantor's financial resources and (b) to the commitments of the other group companies. To ensure this condition is met, practitioners customarily include guarantee limitation language in the issuance documentation in respect of any upstream or cross-stream guarantee given by a Luxembourg guarantor, limiting such guarantee to around 95 per cent of the aggregate of the net assets and the subordinated debts of such guarantor.



## Collateral package

### 20 | What is the typical collateral package for high-yield debt securities in your jurisdiction?

The customary Luxembourg security package for secured high-yield debt issuances is rather extensive and usually consists of pledging most of the assets of the Luxembourg companies involved (be it as issuer, guarantors and other security grantors), for example, shares, bank accounts and receivables (mainly arising from intragroup loans). Mortgages or pledges over going concerns are rather uncommon since Luxembourg companies involved are often holding companies with no real estate or operational assets.

The Luxembourg security package will be subject to the creditor-friendly regime introduced by the Luxembourg law of 5 August 2005 on financial collateral arrangements (the Luxembourg Collateral Law). Beyond the wide flexibility left to contractual freedom, this attractive legal framework has the benefit of being bankruptcy-proof (including during the suspect period), resulting in a particularly robust security package for the holders of the debt securities.

As a result of the covid-19 pandemic, there has been a recent tendency to strengthen security (and guarantee) packages, in particular for US issuers. That said, European issuances do not seem to follow this trend and security packages have so far remained close to what they were before the outbreak of the pandemic.

## Limitations

### 21 | Are there any limitations on security that can be granted to secure high-yield securities in your jurisdiction? Are there any limitations on types of assets that can be pledged as collateral? Are there any limitations on which entities can provide security?

Putting aside corporate object and upstream and cross-stream guarantee considerations, there are strictly speaking no limitations on the nature of security that can be granted or assets over which a security can be granted or on the types of entities that can provide security. Nonetheless, some US or English legal concepts (such as floating charges) are not per se recognised by Luxembourg law.

## Collateral structure

### 22 | Describe the typical collateral structure in your jurisdiction. For example, is it common to see crossing lien deals between high-yield debt securities and bank agreements?

Crossing liens are not market practice in Luxembourg, although creation of first lien and second lien security is possible. Rather, the preference is typically to rely on a shared collateral package whose terms and allocation are further extensively described and regulated in an intercreditor agreement in case high-yield debt securities and bank debt co-exist side-by-side.

## Legal expenses

### 23 | Who typically bears the costs of legal expenses related to security interests?

Costs arising from Luxembourg security interests mainly consist of legal counsels' fees as security interests do not require, as a matter of principle, to be registered or filed with the Luxembourg authorities. Costs and expenses provisions provided for in Luxembourg law governed security documents generally stick to agreements made in this respect in the main issuance documents. In practice, the issuer traditionally bears the costs and expenses (including legal fees) incurred by all parties involved in the issuance, including costs relating to the creation of security interests.

## Security interests

### 24 | How are security interests recorded? Is there a public register?

No general public register of security interests exists in Luxembourg save for specific security interests, such as mortgages, which are not customary in high yield debt transactions.

For perfection purposes, Luxembourg law governed share pledges must be recorded in the shareholders' register of the Luxembourg company whose shares are pledged while a pledge over a bank account opened in Luxembourg typically requires to be notified to, and accepted by, the account bank. As per their general terms and conditions, Luxembourg banks frequently benefit from a first ranking pledge over the accounts opened with them; therefore, it is market practice to request the account bank to return a signed acknowledgement of pledge whereby it waives its first ranking pledge in order to preserve the prior ranking of the security interest put in place.

One of the various creditor-friendly features of the Luxembourg Collateral Law is the immediate perfection of a receivables pledge upon the signature of the related agreement by all the parties thereto. No further perfection requirement is thus necessary, although receivable pledges are, in practice, subject to a notification and acknowledgement procedure for information purposes of the debtor.

### 25 | How are security interests typically enforced in the high-yield context?

Enforcement of Luxembourg security interests in the framework of high yield transactions is uncommon, as investors typically favour negotiated alternatives.

The Luxembourg Collateral Law offers a wide range of (cumulative) enforcement options:

- the pledgee (or any person designated thereby) may appropriate the pledged assets at a value to be determined (before or after appropriation) in accordance with the valuation method agreed between the parties or at market price to the extent such assets consist of listed financial instruments;
- the pledged assets may be assigned through an arm's length private sale, auction or stock exchange sale;
- the pledgee may request a court to order the pledged assets to be retained by the pledgee until due and full payment of its claim; or
- in respect of pledged assets consisting of cash or monetary claims, the pledgee may set-off such amounts against any sums owed by the pledgor.

In parallel, soft enforcement methods may also be determined on a contractual basis. Modalities will vary depending on the nature of the security, and will typically foresee that upon the occurrence of an enforcement event, the pledgee will be entitled to:

- in the case of a share pledge, take control of the company whose shares are pledged through the exercise of all voting rights of the pledgor (including with a view to replacing the management in place) and receive any distributions to be paid out by such company to the pledgor; and
- in the case of an account or receivable pledge, request the account bank or the debtor to pay out any amount standing to the credit of the pledged accounts or any amount due by the debtor to the pledgor directly to the pledgee.



## DEBT SENIORITY AND INTERCREDITOR ARRANGEMENTS

### Ranking of high-yield debt

#### 26 | How does high-yield debt rank in relation to other creditor interests?

Ranking of high yield debt securities will depend on whether the securities are secured or not and/or subordinated to any other debt or not. High yield debt securities of Luxembourg issuers are generally issued as senior secured debt instruments and thus rank structurally senior to unsecured debt and any junior or subordinated debt. Absent of any specific subordination arrangements, these will rank *pari passu* with any other senior secured debt (such as bank debt). In such case, proceeds from enforcement of the shared security package is typically dealt with in intercreditor agreements. In practice, intercreditor agreements usually foresee that (part of) the bank debt ranks structurally senior to high yield debt securities. In this field, Luxembourg high yield debt issuances typically follow the market practices set forth by US and English transactions.

### Regulation of voting and control

#### 27 | Describe how intercreditor arrangements entered into by companies in your jurisdiction typically regulate voting and control between holders of high-yield debt securities and bank lenders?

Investors in high yield debt are generally non-Luxembourg entities and intercreditor arrangements follow the typical market practices set out in US and English law governed transactions.

## TAX CONSIDERATIONS

### Offsetting of interest payments

#### 28 | May issuers set off interest payments on their securities against their tax liability? Are there any special considerations for the high-yield market?

Interest payments are generally deductible as normal business expenses subject to certain exceptions and limitations. Interest relating to exempt income is generally not deductible up to the exempt income derived during the same year or may be subject to recapture rules.

Interest deduction limitation rules apply to exceeding borrowing costs, in accordance with the law implementing Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (ATAD 1). Exceeding borrowing costs are defined as the tax deductible borrowing costs that are in excess of the taxable interest revenues and other economically equivalent taxable income of the taxpayer. The exceeding borrowing costs of a taxpayer are deductible in a tax period only up to the higher of (1) 30 per cent of the taxpayer's net revenues before interest, tax, depreciation, and amortisation (EBITDA) or (2) €3 million. Exceeding borrowing costs not deductible in a tax period may be carried forward without time limitation.

Luxembourg has implemented the anti-hybrid rules contained in Directive (EU) 2017/952 as regards hybrid mismatches with third countries (ATAD 2) into its domestic law. Under these rules, the deduction of an expense (such as interest) is denied when, by virtue of a difference in the legal qualification of a financial instrument or undertaking (ie, hybrid mismatch), an arrangement structured between the Luxembourg taxpayer and a related party, leads to one of the following situations:

- the expense or loss is already deductible in the other EU member state, where the expense or loss is sourced (double deduction cases); or



**Basile Fémelat**

bfemelat@akd.lu

**Arnaud Barchman Wuytiers van Vliet**

abarchman@akd.lu

**Delphine Gomes**

dgomes@akd.lu

40, Avenue Monterey  
L-2163 Luxembourg  
Luxembourg  
Tel: +352 26 75 821  
www.akd.eu

- the expense or loss is sourced in Luxembourg and the corresponding income is not included in the overall net income determined in the other EU member state (deduction without inclusion cases).

### Tax rulings

#### 29 | Is it common for issuers to obtain a tax ruling from the competent authority in your jurisdiction in connection with the issuance of high-yield bonds?

No.

## UPDATE AND TRENDS

### Recent developments

#### 30 | Are there any emerging trends or hot topics regarding high-yield debt in your jurisdiction?

The recent Luxembourg law dated 10 July 2020 relating to professional payment guarantees has introduced a new regime for guarantees that may be relied upon when structuring high yield transactions involving a Luxembourg parent or guarantor. The beneficiary-friendly regime created by this law offers an interesting alternative to foreign-law governed guarantees, that can be tailored to the specific needs of all types of transactions whilst offering a robust instrument for the beneficiaries.

## Other titles available in this series

Acquisition Finance	Distribution & Agency	Investment Treaty Arbitration	Public M&A
Advertising & Marketing	Domains & Domain Names	Islamic Finance & Markets	Public Procurement
Agribusiness	Dominance	Joint Ventures	Public-Private Partnerships
Air Transport	Drone Regulation	Labour & Employment	Rail Transport
Anti-Corruption Regulation	e-Commerce	Legal Privilege & Professional Secrecy	Real Estate
Anti-Money Laundering	Electricity Regulation	Licensing	Real Estate M&A
Appeals	Energy Disputes	Life Sciences	Renewable Energy
Arbitration	Enforcement of Foreign Judgments	Litigation Funding	Restructuring & Insolvency
Art Law	Environment & Climate Regulation	Loans & Secured Financing	Right of Publicity
Asset Recovery	Equity Derivatives	Luxury & Fashion	Risk & Compliance Management
Automotive	Executive Compensation & Employee Benefits	M&A Litigation	Securities Finance
Aviation Finance & Leasing	Financial Services Compliance	Mediation	Securities Litigation
Aviation Liability	Financial Services Litigation	Merger Control	Shareholder Activism & Engagement
Banking Regulation	Fintech	Mining	Ship Finance
Business & Human Rights	Foreign Investment Review	Oil Regulation	Shipbuilding
Cartel Regulation	Franchise	Partnerships	Shipping
Class Actions	Fund Management	Patents	Sovereign Immunity
Cloud Computing	Gaming	Pensions & Retirement Plans	Sports Law
Commercial Contracts	Gas Regulation	Pharma & Medical Device Regulation	State Aid
Competition Compliance	Government Investigations	Pharmaceutical Antitrust	Structured Finance & Securitisation
Complex Commercial Litigation	Government Relations	Ports & Terminals	Tax Controversy
Construction	Healthcare Enforcement & Litigation	Private Antitrust Litigation	Tax on Inbound Investment
Copyright	Healthcare M&A	Private Banking & Wealth Management	Technology M&A
Corporate Governance	High-Yield Debt	Private Client	Telecoms & Media
Corporate Immigration	Initial Public Offerings	Private Equity	Trade & Customs
Corporate Reorganisations	Insurance & Reinsurance	Private M&A	Trademarks
Cybersecurity	Insurance Litigation	Product Liability	Transfer Pricing
Data Protection & Privacy	Intellectual Property & Antitrust	Product Recall	Vertical Agreements
Debt Capital Markets		Project Finance	
Defence & Security			
Procurement			
Dispute Resolution			

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)