

# High-Yield Debt 2021

Contributing editors

Arthur D Robinson, David Azarkh and Mark Brod



**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 February and March 2021. Be advised that this is a developing area.

© Law Business Research Ltd 2021

No photocopying without a CLA licence.

First published 2016

Sixth edition

ISBN 978-1-83862-671-6

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



---

# High-Yield Debt 2021

## Contributing editors

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

---

Lexology Getting The Deal Through is delighted to publish the sixth 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 Luxembourg.

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, David Azarkh and Mark Brod, of Simpson Thatcher & Bartlett LLP, for their continued assistance with this volume.



London

March 2021

---

Reproduced with permission from Law Business Research Ltd

This article was first published in April 2021

For further information please contact [editorial@gettingthedealthrough.com](mailto:editorial@gettingthedealthrough.com)

# Contents

<b>Global overview</b>	<b>3</b>	<b>Portugal</b>	<b>27</b>
Arthur D Robinson, David Azarkh and Mark Brod Simpson Thacher & Bartlett LLP		Maria João Ricou and Manuel Requicha Ferreira Cuatrecasas	
<b>High-yield debt in China</b>	<b>4</b>	<b>Spain</b>	<b>34</b>
Christine Chen, David Liao and Annie Shen Fangda Partners		Jaime de la Torre Viscasillas, Miguel Cruz Roperro and Tania Esteban Logroño Cuatrecasas SLP	
<b>Finland</b>	<b>9</b>	<b>Switzerland</b>	<b>42</b>
Juha Koponen and Niina Nuottimäki Borenus Attorneys Ltd		Jürg Frick and Stefan Oesterhelt Homburger	
<b>France</b>	<b>14</b>	<b>United Kingdom</b>	<b>49</b>
Colin Chang, Cyril Boussion, Kathryn Merryfield and Luis Roth Linklaters LLP		Nicholas J Shaw and Shahpur K Kabraji Simpson Thacher & Bartlett LLP	
<b>Luxembourg</b>	<b>20</b>	<b>United States</b>	<b>56</b>
Basile Fémelat, Arnaud Barchman Wuytiers van Vliet and Delphine Gomes AKD		Arthur D Robinson, David Azarkh and Mark Brod 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 those of 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 plays only an ancillary role.

The same is true for bank loans, which are only rarely governed by Luxembourg laws (which 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 that limit the burden for issuers, notably with the launch of the Securities Official List, which offers a straightforward and cost-efficient listing-only alternative, falling outside 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 customer requirements at European level, which apply to high-yield debt securities issuances and 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 activities in the United States and other jurisdictions in Europe.

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 witnessed a substantial slowdown in March 2020, as a result of the covid-19 pandemic, with many transactions being postponed or cancelled when lockdown measures started to kick in across the world. That said, transactions have been picking up substantially 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.

Almost always, investment banks, servicers, rating agencies and trustees operate from jurisdictions outside 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 public limited liability companies (*société anonymes*) or 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 the 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. The 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 overall extremely efficient. The 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 with 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, while 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 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 affect 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 premium. Such premium arrangements will be adjusted to the financial health of the issuer and the market environment. That said, high-yield documentation almost 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, 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?**

This is typically the case. As a rule, a change of control requires the issuer to offer to prepay the debt securities at 101 per cent, 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 asset sales are permitted, provided that the proceeds of the sale are used in a certain manner. Failing this, the issuer will then typically be required to prepay the debt securities at an 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 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 covenant packages in nature, with weaker restrictions binding on the issuer, such as loser 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 an offering document is not much different from fully 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, as such a 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 order 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 of the 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 almost 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 that 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:
  - the guarantee must be granted with a view to promoting a common economic, social and financial group interest; and
  - the amount of the guarantee must not be disproportionate to the guarantor's financial resources and 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 the guarantee to around 95 per cent of the aggregate of the net assets and the subordinated debts of the 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, as 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 the case that 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 is typically required 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 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 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 any specific subordination arrangements, these will rank *pari passu* with any other senior secured debt (such as bank debt). In such a case, the proceeds from enforcement of the shared security package are 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 30 per cent of the taxpayer's net revenues before interest, tax, depreciation and amortisation, or €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  
2163 Luxembourg  
Luxembourg  
Tel: +352 26 75 82  
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 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 while offering a robust instrument for the beneficiaries.

### Coronavirus

31 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Several initiatives have been taken at various levels to adapt the Luxembourg legal and regulatory environment further to the outbreak of the pandemic. Two are of particular relevance in the framework of high-yield transactions. The first is the possibility for Luxembourg companies to pass resolutions in writing or by (video) conference calls at both shareholders' level and board level, despite such options not

being foreseen in the articles of association of such companies. As a result, physical meetings are no longer required (until 30 June 2021, unless further extended) to pass shareholders' and board resolutions. The second relates to the suspension of the obligation for a Luxembourg company to file for bankruptcy in case of cessation of payments (which was previously of one month from the date of cessation of payments).

## 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)