Baker McKenzie.

Guide to Private Credit in Europe

TRANSACTIONAL POWERHOUSE

Austria | Belgium | France | Germany | Italy | Luxembourg | Netherlands | Russia | Spain | Sweden | Switzerland | Turkey | UK | Ukraine

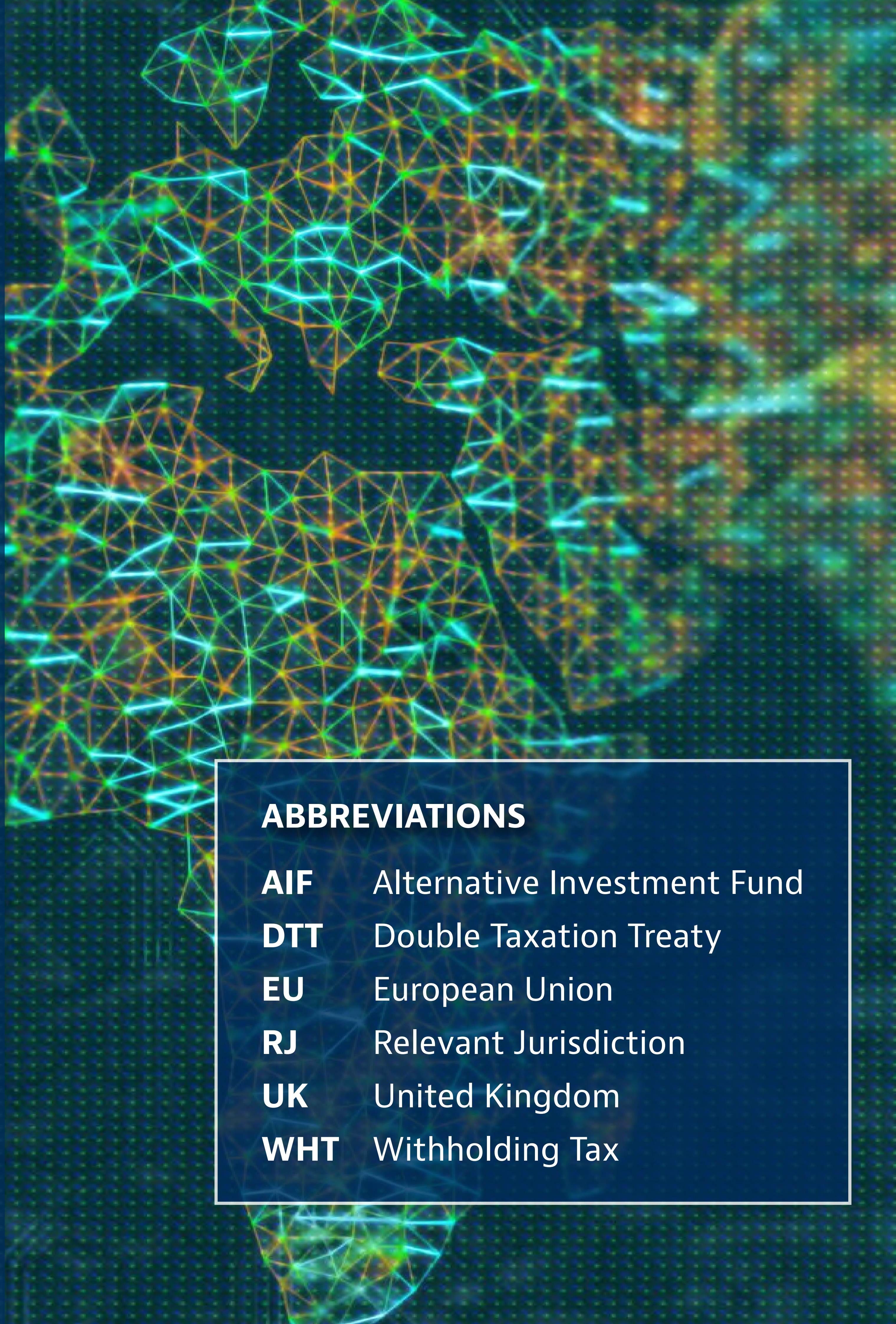
Welcome to the second edition of our Guide to Private Credit in Europe.

The European market for sub-investment grade corporate credit continues to evolve at pace. This is driven in large part by the ongoing shift towards direct lenders as a growing source of debt financing. This shift is supported by recent changes in the economic landscape (including as a result of the global pandemic) as well as legislative changes in domestic insolvency processes / deregulation, encouraging corporates to recapitalise or restructure without using traditional funding sources. With direct lenders raising ever larger funds and having the flexibility to deploy across the credit spectrum, they now are putting pressure on the capital markets by presenting issuers with a stable source of day 1 and future capital when other lenders may be looking to retrench.

At a pan-European level, the recast European insolvency regulation overlay continues to seek to regulate forum shopping and to rebalance the interests of creditors and debtors in securing certainty of outcome when things go wrong. All the while, political pressure demands reduced flexibility to mitigate tax liabilities and increased regulatory transparency from counterparties across the capital structure.

This Guide to Private Credit in Europe includes key issues for consideration in private credit transactions across 14 jurisdictions, providing both a high-level overview and a more detailed jurisdiction-by-jurisdiction analysis.

We hope that this guide provides you with a useful point of reference for European private credit transactions. If you would like to discuss any of the points raised in more detail, please reach out to any of the contacts listed on the last pages of this guide.



ABBREVIATIONS

AIF	Alternative Investment Fund
DTT	Double Taxation Treaty
EU	European Union
RJ	Relevant Jurisdiction
UK	United Kingdom
WHT	Withholding Tax

Private Credit overview

Level of materiality

● High ● Medium ● Low

Issue / Question	Austria	Belgium	France	Germany	Italy	Luxembourg	Netherlands	Russia	Spain	Sweden	Switzerland	Turkey	UK	Ukraine
Can a fund make a new loan to a borrower incorporated in this jurisdiction without a banking license?	● High No (with limited exceptions)	● Low Yes	● Medium Yes (in certain circumstances)	● High No (with possible exceptions)	● Medium Only certain harmonised funds and under certain conditions	● Low Yes (subject to limitations)	● Low Yes	● Medium Yes (subject to conditions)	● Low Yes	● Medium Generally yes (however exceptions may be applied)	● Low Yes	● Medium Yes (with exceptions)	● Low Yes	● Medium Yes (in certain circumstances)
Do taxes or other charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in the RJ?	● Medium No (with possible exceptions)	● Medium No (with possible exceptions)	● Medium No (with possible exceptions)	● Low No (with possible exceptions)	● High In some cases	● Low No	● Low No (with possible exceptions)	● Medium No (with possible exceptions)	● Medium No (with possible exceptions)	● Low No	● High Yes	● Medium Yes	● Low No	● High Yes
Could loans from a fund that owns the borrower of that loan incorporated in this jurisdiction be equitably subordinated?	● High Yes	● Low No	● Low No	● Medium Yes (subject to exceptions)	● High Yes	● Low No	● Low No	● Medium Yes (with possible exceptions)	● High Yes	● Low No	● High Yes	● Medium Yes (with exceptions)	● Low No	● High Yes
Can interest, fees and remuneration be agreed freely between a lender and a borrower in this jurisdiction?	● Medium Yes (with limited exceptions)	● Low Yes (except default interest)	● Low Yes (with limited exceptions)	● Low Yes (with limited exceptions)	● Medium No	● Low Yes (except default interest)	● Low Yes (with limited exceptions)	● Low Yes	● Medium Yes (with limited exceptions)	● Low Yes	● Low Yes (with exceptions)	● Low Yes (except compounded interest)	● Low Yes (except default interest)	● Medium Yes (with exceptions)
Can a fund directly hold security granted by a security provider incorporated in this jurisdiction?	● Low Yes	● Low Yes	● Medium Yes (with limited exceptions)	● Low Yes	● Medium Yes (with limited exceptions)	● Low Yes	● Low Yes (with limited exceptions)	● Low Yes	● Medium Yes (with exceptions)	● Low Yes (with limited exceptions)	● Low Yes (with exceptions)	● Low Yes	● Low Yes	● Medium Yes
Can a company incorporated in this jurisdiction provide credit support for the acquisition of its or its holding companies' shares?	● High No (with limited exemptions)	● Medium Yes (with limited exceptions)	● High No (with limited exemptions)	● Low Yes (except stock corporations)	● Medium No (with limited exceptions)	● Low Yes (subject to using a SARL)	● Low Yes (except public companies)	● Low Yes	● High No	● High No	● Medium Yes (with exceptions)	● Medium Yes (with exceptions)	● Low Yes (except public companies)	● Medium Yes
How strong in relative terms is credit support given by a company in this jurisdiction likely to be?	● High Weak to medium	● Low Strong	● High Weak	● Medium Medium	● High Weak to medium	● Low Strong	● Low Strong	● Low Strong	● High Weak to medium	● Medium Relatively weak	● Medium High in the case of direct security, low in the case of upstream or cross-stream security	● Low Strong	● Low Strong	● Medium Medium
Is the enforcement regime in this jurisdiction relatively lender friendly?	● Medium In most respects	● Low Yes (except for security on real estate)	● High No	● Medium In most respects	● High No	● Low Yes	● Low Yes	● Medium No	● High No	● Low Yes (with some exceptions)	● Medium Medium	● High No	● Low Yes	● Medium Yes

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Austria

Can a fund make a new loan to a borrower incorporated in Austria without a banking licence?

No. The granting of a loan on a commercial basis to a borrower incorporated in Austria requires either an Austrian banking licence or an EU passport. Non-licensed funds, therefore, frequently consider: (i) acquiring fully funded term loans provided by a licensed entity; (ii) entering into a sub-participation; or (iii) using a licensed fronting bank. However, a non-licensed fund may provide a loan to a borrower incorporated in Austria if (besides the incorporation of the borrower) no nexus to Austria exists (in particular, negotiations, execution, payments, payment accounts are all outside of Austria, no security interests are created over assets located in Austria and if the business relationship was established by the borrower ("reverse solicitation")). Nevertheless, even in this case there is a risk that the Austrian regulator could deem this as non-licensed lending activity carried out in Austria, which would violate the Austrian licensing requirements and would have certain negative consequences such as significant fines being imposed on the lending entity, loss of entitlement to interest/fees, and credit support being unenforceable. Given these undesirable consequences, lenders tend to adopt the more conservative approach outlined at the beginning of this section.

Do taxes or other charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in Austria?

Generally, no. There is no withholding tax for interest payments received by the fund, if the fund is either: (i) non-transparent from an Austrian tax perspective (i.e., the fund itself is subject to Austrian income tax); or (ii) transparent (i.e., not the fund itself, but the individuals who have invested in the fund are subject to Austrian income tax), but no individuals have invested in the fund. Further, if the interest is not subject to an effective tax rate of at least 15% at the level of the fund (or its shareholders, if the fund is qualified as transparent), the borrower may be prevented from deducting the interest payments for Austrian tax purposes.

The assignment of a loan from the initial licensed lender to a fund in general triggers Austrian stamp duty of 0.8% of the purchase price for the transferred loan, which may be avoided by structuring the transaction appropriately. As to security interests, registration fees in respect of a mortgage over real estate are payable (1.2% of the registered amount), and *de minimis* notarial fees may apply to certain security interests.

The tax authorities may reclassify debt into equity for tax purposes when they suspect an "abusive" situation, e.g., a level of equity far below the average of the relevant industry, and the debt is concluded on non-arm's length terms.

Could loans from a fund that owns the borrower of that loan incorporated in Austria be equitably subordinated?

Yes. Subject to certain exceptions, loans granted to a company by its shareholder that (i) has a direct or indirect controlling interest in the company, (ii) owns at least 25% of the shares of the company, or (iii) otherwise has a dominant influence on the company, while the company is in a "crisis" (as defined under the Austrian Equity Replacement Act (EKEG)), (a) may not be repaid until the company is reorganised and (b) in case of an insolvency of the company having its centre of main interests in Austria, are subordinated to the repayment claims of any other creditors of the company.

Can interest, fees and remuneration be agreed freely between a fund and a borrower in Austria?

Yes, unless such an amount is excessive and, therefore, violates certain mandatory provisions of Austrian law (*gute Sitten*). Whether this is the case has to be assessed on a case-by-case basis; however, case law suggests that an interest rate of 10% per annum should not violate these principles.

Can a fund directly hold security granted by a security provider incorporated in Austria?

Yes, although security is commonly granted in favour of a security agent or trustee.

Can a company incorporated in Austria provide credit support for the acquisition of its or its holding companies' shares?

Pursuant to Section 66a of the Austrian Stock Corporation Act (AktG), Austrian stock corporations (*Aktiengesellschaften*) are prohibited from granting security for the purpose of the acquisition of their own shares or the shares of their direct or indirect parents by a third party (i.e., a person other than the company or its subsidiaries). Subject to certain limited exceptions, transactions violating this restriction may be invalid vis-à-vis the creditor and could result in the management of the relevant company being liable for any damages arising out of the violation. According to certain Austrian legal scholars, the above-mentioned restrictions also apply with respect to limited liability companies (*Gesellschaft mit beschränkter Haftung*).

Furthermore, the strict Austrian Capital Maintenance Rules (Section 82 et seq. of the Austrian Act on Limited Liability Companies (GmbHG) and Section 52 et seq. of the Austrian Stock Corporation Act (AktG)) prohibit Austrian companies from distributing funds to their shareholders (i.e., reclaim of the paid-up value of share capital), except for (i) the net distributable profits as evidenced in the annual financial statements of the respective company (*Bilanzgewinn*); (ii) consideration in arm's length transactions; or (iii) repayment of equity in the case of a decrease of share capital (formal procedure to be followed).

Consideration paid to shareholders (or an affiliate of a shareholder) must be at arm's length. A transaction is not considered to be at arm's length if: (i) from an objective point of view the value of the consideration is disproportionate to the value received by the company in the transaction; and (ii) this preferred treatment results from the fact the party to the agreement is also a shareholder of the company. These restrictions also apply to loans granted to (direct or indirect) shareholders or security provided in favour of (direct or indirect) shareholders.

Any transaction in violation of the above is considered null and void, might result in liability (including criminal liability) of the managing directors of the company and have negative tax consequences.

How strong in relative terms is credit support given by a company in Austria likely to be?

An Austrian stock corporation or limited liability company may not provide upstream or cross-stream credit support if it does not receive: (i) "adequate consideration" (as compared to what the company would have received on an arm's length basis); or (ii) other general corporate benefit (*betriebliche Rechtfertigung*) by entering into the transaction.

Limitation language should be included, setting out that any intragroup obligation is limited to an amount in line with Austrian capital maintenance rules.

Is the enforcement regime in Austria relatively lender-friendly?

Broadly, yes. Enforcement can usually be achieved by a secured creditor out of court and reasonably expeditiously.

A lender can enforce its security interests once the secured obligations are due and payable and remain unpaid by the relevant debtor once notice has been given. This would, for instance, be the case where an agreed event of default under the loan agreement occurs and the lenders accelerate the loan — subject to certain mandatory grace periods that apply under Austrian law — or once insolvency proceedings are commenced over the assets of a debtor.

The insolvency administrator of an Austrian borrower and/or lender may — subject to certain conditions set forth in the Austrian Insolvency Code (*Insolvenzordnung*) being met — challenge any transfer of rights, assets or any payments made up to 10 years before an application for the commencement of insolvency proceedings has been filed. Although this is rarely an issue in practice, where credit support has been provided at, or shortly after the granting of a new loan to a solvent company, the risks of challenge if the company becomes insolvent or files an application to open insolvency proceedings would have to be assessed on a case-by-case basis.

Belgium

Can a fund make a new loan to a borrower incorporated in Belgium without a banking licence?

Yes, non-consumer or B2B lending is not regulated in Belgium, unless combined with the taking of deposits or other repayable funds from the public, in which case a licence as a credit institution is required.

Certain conduct of business rules and information requirements may apply for lending to small and medium-sized enterprises, as detailed in the act of 21 December 2013 concerning various provisions on financing for small and medium-sized enterprises. No licensing requirements are triggered in that case.

Do taxes or other charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in Belgium?

Belgium levies, in principle, a 30% withholding tax on interest payments, subject to numerous reliefs/exemptions under both Belgian domestic law and Belgian double taxation treaties. A withholding tax exemption applies for interest paid to Belgian companies and credit institutions established in the European Economic Area.

Interest deduction limitation rules (e.g. 30% EBITDA rule) may apply at the level of the Belgian borrower with certain tax provisions specifically targeting payments to tax havens.

Registration duties will be payable for certain types of security. Registration and mortgage duties for a real estate mortgage are set at 1.3% of the secured amount. For this reason, the amount secured by a mortgage will be limited and a significantly higher amount will be covered by a so-called mortgage mandate (which is a power of attorney to create additional mortgages). For a pledge on movable assets, the registration fee can range between EUR 20 and EUR 500 (depending on the secured amount).

Could loans from a fund that owns the borrower of that loan incorporated in Belgium be equitably subordinated?

No.

Can interest, loans and remuneration be agreed freely between a fund and a borrower in Belgium?

Yes, subject to certain limited exceptions, these are: (i) default interest; (ii) capitalisation of interest/payment in kind interest (with exceptions); and (iii) prepayment penalties/break costs (which may, in certain circumstances, be limited to six months' interest).

Can a fund directly hold security granted by a security provider incorporated in Belgium?

Yes.

Although not required, security is usually granted in favour of a security agent holding the security on behalf of all beneficiaries to facilitate future transfers and enforcement. For security on real estate, the security agent will hold the security using a parallel debt structure.

Can a company incorporated in Belgium provide credit support for the acquisition of its or its holding companies' shares?

Credit support for the acquisition of its holding companies' shares is (in principle) possible, but not for the acquisition of its own shares.

Financial assistance rules prohibit a Belgian company to advance funds, make loans or provide security with a view to the acquisition of its shares by a third party. The rules on financial assistance only apply to the target company itself and, in principle, not to that target company's direct or indirect subsidiaries or any other affiliate of the target company. A whitewash procedure is technically possible, but in practice is rarely used.

How strong in relative terms is credit support given by a company in Belgium likely to be?

Strong

Credit support by a Belgian company must pass the corporate interest test. This condition is usually fulfilled for downstream credit support. Upstream and cross-stream credit support may require a more detailed analysis. To help such an analysis, guarantee limitations may have to be included in the documentation.

In addition, the articles of association will need to permit the giving of a guarantee or security and can usually be amended to include this if they do not already do so.

Is the enforcement regime in Belgium relatively lender-friendly?

Yes. The lender generally has the right to enforce the security without prior court authorisation and without a notice period (in case of security over shares or cash) or with a limited notice period of 10 days (reduced to three days in case of assets subject to rapid loss of value). The borrower and the lender may agree that the lender can not only sell but also appropriate (i.e., acquire ownership over) the secured assets subject to an agreed valuation mechanism.

The one exception is enforcing security on real estate, which is a cumbersome and lengthy process.

In certain instances, the rights to enforce security or other rights may be suspended upon the occurrence of a bankruptcy or a judicial reorganisation. After a bankruptcy, the rights to enforce security or other rights may be exercised by the trustee in bankruptcy.

France

Can a fund make a new loan to a borrower incorporated in France without a banking licence?

Yes, under certain conditions in limited cases. If these conditions are not met, an unlicensed fund may seek to utilise a bond financing structure as an alternative.

In principle, due to the French banking monopoly (*monopole bancaire*) regulation, only duly licensed credit institutions and certain other financial entities (including EU-passported institutions) may perform banking transactions in France on a regular basis and for financial gain.

Exceptions to this requirement have been adopted to make this market more accessible to licensed investment funds.

The financial entities now allowed to grant loans include:

- certain existing French alternative investment funds including: (i) professional specialized investment funds (*fonds professionels spécialisés*, FPS); and (ii) retail venture capital funds (*fonds communs de placement dans l'innovation*, FCPI)
- EU alternative investment funds that are authorised to use the ELTIF label pursuant to the ELTIF Regulation (subject to applicable legal and regulatory provisions)
- *Organismes de financement spécialisés* (OFS) that are allowed to grant loans subject to certain conditions further detailed by two implementation decrees dated 19 November 2018

Authorised un-matured professional receivables may also be acquired from French credit institutions and certain financial entities by a similar non-French entity subject to certain criteria being met, as an alternative to direct lending (especially for offshore and unlicensed funds).

Unlicensed investment funds willing to operate in the French loan market outside of a direct lending structure may seek to resort to sub-participation and fronting structures, but such structuring needs to be made in compliance with French banking monopoly requirements.

For unlicensed investment funds making direct loans in France to a French borrower entity, the more common and easiest option is to resort to a bond structure (which is not a regulated activity for French banking monopoly purposes). These bonds may be structured to fully reflect the terms of term leveraged loans provided they bear the fundamental characteristics of debt securities (for example, they must be transferable by delivery).

Do taxes or other charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in France?

No. Withholding tax generally applies to interest payments made by French resident borrowers, unless the payment is made in a Non-cooperative State or Territory (NCST), in which case a 75% withholding tax may apply (subject to double taxation treaty provisions). The list of NCST is updated on an annual basis by the French tax authorities. Since 1 December 2018, the relevant provisions of the French Tax Code also include a reference to the EU "black list" of non-cooperative tax jurisdictions.

No stamp duty or registration taxes generally apply to lending activities. Certain types of security, in particular over real estate assets (e.g., mortgages), however, may trigger security registration fees and notarial fees.

Various interest limitation rules (thin capitalisation rules, anti-hybrid rules, general interest deduction limitation rules, etc.) may restrict the tax deductibility of the interest payable by French corporate borrowers. Both the anti-hybrid rules and general interest deduction limitation rules were substantially modified by the Finance Act for 2019 and 2020, transposing into French law the EU/2016/1164 and EU/2017/952 directives (known as ATAD 1 and ATAD 2). In certain situations, non-deductible interest at the level of the borrower may be re-qualified as constructive dividends subject to dividend withholding tax at a rate equivalent to the French standard CIT rate (28% for 2020 (75% in the case of an NCST)), subject to double taxation treaty provisions.

Could loans from a fund that owns the borrower of that loan incorporated in France be equitably subordinated?

No.

Can interest, fees and remuneration be agreed freely between a fund and a borrower in France?

Yes, although interest can only be compounded on a yearly basis

Can a fund directly hold security granted by a security provider incorporated in France?

Yes, although certain security interests cannot benefit non-licensed institutions (e.g., *dailly* assignment, pledge over stocks).

Security will typically be granted directly to the lenders, represented by a security agent, and it may be granted to the security agent, since a French law reform dated October 2017.

Can a company incorporated in France provide credit support for the acquisition of its or its holding companies' shares?

No. Neither a *société anonyme* (SA) nor a *société par* actions *simplifiee* (SAS) (being the two most common corporate forms used in leveraged/acquisition finance structures) is able to provide a loan or credit support with a view to financing the acquisition of its own shares. Furthermore, it is generally accepted that this prohibition extends to loans or credit provided with a view to financing the acquisition of the holding companies' shares of the relevant entity .

This prohibition does not apply to a *société a responsabilité limitée* (SARL). However, the granting of a loan for the purpose of the direct or indirect acquisition of its own shares may, in any event, trigger corporate benefit issues, regardless of the form of corporate involved.

How strong in relative terms is credit support given by a company in France likely to be?

Weak. French law generally limits the ability of a company to provide credit support only to the extent that it is able to show a direct financial benefit deriving from such action. This affects upstream credit support, though is also relevant to cross-stream credit support and (to a lesser extent) downstream credit support. Guarantee limitation language is, therefore, frequently included in documentation. This issue is avoided to the extent the loan is made available directly or indirectly through the on-lending of intercompany loans to a French company. In such cases, limitation language should be included in the relevant documentation, setting out that the payments to be made by the relevant company are limited to an amount in line with French capital maintenance rules.

Is the enforcement regime in France relatively lender-friendly?

No. Enforcement can usually be achieved by a secured creditor out of court (other than in the case of enforcement of contractual real estate mortgages (*hypothèques conventionnelles*)) and relatively expeditiously — unless challenged by a debtor, which can make the process considerably longer.

However, a lender can exercise rights of security enforcement only after a payment default. Acceleration of the debt following another contractual default may be used to achieve a payment default, albeit subject to general principles of French law. These include a requirement to act in good faith and to take reasonable steps to attempt to resolve the underlying default through means other than acceleration.

Hardening periods, which are in principle relevant for up to 18 months following a transaction by a company, rarely present an issue in practice if credit support has been provided for a new loan made no later than the time of funding by a solvent company. If granted after funding, any mortgage or pledge will be set aside if granted during the suspect period, which could be as early as 18 months prior to the judgment opening the insolvency proceedings.

Germany

Can a fund make a new loan to a borrower incorporated in Germany without a banking licence?

Under German law, the making of loans on a commercial basis to business entities (and consumers) requires a banking licence under the German Banking Act (*Kreditwesengesetz*; KWG). The licence requirement arises not only when a loan is originated, but also when the term of an existing loan is extended or when the interest rate is changed as part of a loan restructuring.

In relation to non-German funds, the German banking licence requirement applies if the lender addresses itself to the German market via advertisements, internet offerings, personal visits, emails, cold calls or the use of intermediaries. In contrast, "passive services," i.e., where the lender is contacted by the borrower or the borrower's adviser or by an arranger in the course of a loan syndication, do not trigger a licensing requirement. This has enabled non-German loan originating funds to operate at least on a limited basis in Germany.

For German funds, new legislation enacted in 2016 amended the KWG to exempt German alternative investment funds (AIFs) and their German fund managers (AIFMs) from the banking licence requirement. EU AIFMs and EU AIFs are also exempt. However, their counterparts from outside the European Economic Area need to continue relying on the "passive services" exemption. Other alternatives are: (i) acquiring fully funded term loans that have been made available by a licensed person; (ii) using a licensed "fronting bank;" or (iii) using an affiliate of the German borrower established in a jurisdiction that does not require a banking licence as an intermediate borrower.

Do taxes or other charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in Germany?

No. Interest payments on loans are not subject to withholding tax in Germany. As such, making a payment to a foreign lender does not cause particular German tax problems with two main exceptions: (i) if the loan is hybrid (e.g., convertible into equity), profit related or similar, German withholding tax is levied (although double taxation treaties with jurisdictions in which funds are often situated can, for example, after a refund/exemption of withholding tax, reduce the ultimate quantum of withholding tax); or (ii) if the loan is secured by German real estate, a foreign lender becomes subject to limited taxation in Germany in respect of its interest income (albeit subject to the terms of any favourable double taxation treaty).

The granting of security interests on real estate and the pledging of shares in a *Gesellschaft mit beschränkter Haftung* (GmbH) requires payment of certain fees, particularly notarial fees calculated (in part) by reference to the nominal amount of the secured claim or in the case of share pledges, the value of the collateral (if lower).

From a borrower's perspective, if a lender is also a shareholder of the borrower or otherwise affiliated with the shareholder, other restrictions may need to be considered to avoid unfavourable tax treatment on the basis of disguised dividends or the German interest barrier rules.

Could loans from a fund that owns the borrower of that loan incorporated in Germany be equitably subordinated?

Yes. Subject to certain exceptions, loans granted by a shareholder holding more than 10% of the total equity of the borrowing company are subordinated to the repayment claims of any other creditor in the event of formal insolvency of that company. The same applies in the case of indirect shareholdings, provided the lender has control over the direct shareholder of the borrowing company, or where the lender and the direct shareholder are under the control of a common parent. In these cases, security interests granted (up to 10 years prior to the insolvency filing) and principal/interest repaid/paid (up to one year prior to the insolvency filing) can be avoided or clawed back.

Can interest, fees and remuneration be agreed freely between a fund and a borrower in Germany?

Yes, unless such an amount violates usury/immoral lending limitations (which, in practice, very rarely present an issue).

Certain restrictions also apply in relation to: (i) the charging of interest on PIK interest (which can usually be addressed by appropriate drafting); and (ii) call protection provisions (e.g., make-whole premiums) where the underlying loan has a floating interest rate (though this issue is often mitigated by using English or Luxembourg law to govern such provisions).

Can a fund directly hold security granted by a security provider incorporated in Germany?

Yes, although security is commonly granted in favour of a security agent or trustee.

Can a company incorporated in Germany provide credit support for the acquisition of its or its holding companies' shares?

Yes, financial assistance is permitted to be given by a GmbH, save as specified below and subject to satisfying maintenance of capital rules (see below).

A restriction applies in the case of financial assistance (granting loans or collateral) by a German stock corporation (*Aktiengesellschaft*) as neither it nor any of its subsidiaries is permitted to grant such assistance. In practice, this is rarely an issue as stock corporations — compared to GmbH — are not often found in leveraged/acquisition finance structures.

How strong in relative terms is credit support given by a company in Germany likely to be?

Relatively weak. While there are no limitations on downstream credit support, a company must not provide upstream/cross-stream credit support if doing so would cause its registered share capital (*Stammkapital*) to be (further) depleted. Limitation language is, therefore, often included in documentation, limiting the credit support to an amount in line with German capital maintenance rules.

Is the enforcement regime in Germany relatively lender-friendly?

In most respects but not as lender-friendly as, for example, UK or Luxembourg. Enforcement over certain assets can be achieved by a secured creditor without court involvement and reasonably expeditiously. However, the exact enforcement procedure varies according to the security right granted: for example, share pledge enforcements generally require a public auction process.

A lender can, in general, exercise rights of security enforcement only after a payment default. Acceleration of the debt following another contractual default may be used to achieve a payment default.

Hardening periods, though in principle relevant for up to 10 years following a suspect transaction by a company, rarely present an issue where a new loan is provided to a solvent company.

Italy

Can a fund make a new loan to a borrower incorporated in Italy without a banking licence?

Yes, in certain circumstances. Italian and EU alternative investment funds may grant loans to third parties for business purposes in Italy under certain conditions. However, in general, lending remains a reserved activity that can be carried out only by certain entities, including EU licensed banks, Italian (and, if belonging to a banking group, EU) licensed financial intermediaries and, in certain cases, insurance companies, Italian securitisation vehicles, and Italian and EU alternative investment funds.

Where a fund does not qualify, lending may be carried out through investments in bonds (or, where possible, via investments in securitisation notes). Such instruments can be structured largely to reflect the terms of leveraged loans.

Do taxes or other charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in Italy?

Yes. Many funds will generally be subject to withholding tax at the relevant double taxation treaty rate or full withholding rate. However, no withholding tax applies to interest and other proceeds arising from medium to long-term loans (being those having a tenor of over 18 months) granted by EU licensed banks, insurance companies and white-listed institutional investors subject to regulatory supervision. For bonds issued by Italian enterprises, no withholding tax applies where such securities are able to satisfy certain criteria.

Security and notarial taxes may apply. For real estate, these can be significant (2.5% on the secured amount). An optional 0.25% substitute tax can be paid in lieu of individual security taxes; however, this is only available for medium to long-term loans granted by EU licensed credit institutions, collective investment undertakings (established in the EU or in a white-listed EEA country), EU insurance companies and Italian securitisation vehicles. The substitute tax is also available where lending takes place in the form of bonds.

Could loans from a fund that owns the borrower of that loan incorporated in Italy be equitably subordinated?

Yes, if it would be more reasonable for a shareholder to provide equity to the borrower instead of debt or where there is an excessive imbalance between debt and equity. There are no clear guidelines as to what constitutes reasonableness in this context.

However, note that pursuant to Law Decree 23/2020 ("**Decree**") (enacted during the COVID-19 pandemic to introduce measures aimed at supporting Italian companies in terms of access to financing, public aid as well as liquidity issues) the subordination rule would not apply to shareholders' loans granted to an Italian company from the date of entry into force of the Decree until 31 December 2020.

Can interest, fees and remuneration be agreed freely between a fund and a borrower in Italy?

No. Usury limits set by the Ministry of Economy and Finance (*Ministero dell'Economia e delle Finanze*) apply depending on the type of financing, which includes all fees and equity kickers, e.g. warrants. The "payment-in-kind" component is also limited, but can be appropriately structured in certain circumstances. However, pursuant to the now prevailing interpretation of CICR (*Comitato Interministeriale per il Credito ed il Risparmio*) resolution of 3 August 2016, published in the Official Gazette on 10 September 2016 No. 212, capitalisation of past due interest is no longer permitted in the context of a loan.

Can a fund directly hold security granted by a security provider incorporated in Italy?

Yes, however the Italian *Privilegio speciale* security interest (akin to a floating charge) is only available to (i) banks making available loans with a tenor of over 18 months, and (ii) bondholders.

More generally, in order to benefit from most forms of security, each creditor must be individually identified as a security holder (which means notarial costs may become payable on syndication/ transfer).

Can a company incorporated in Italy provide credit support for the acquisition of its or its holding companies' shares?

Generally, Italian entities are restricted from providing credit support for acquisition debt. Please note, however, that while an Italian limited liability company (*società a responsabilità limitata — SrL*) is always prohibited from providing credit support for acquisition debt, an Italian public limited company (*società per azioni — SpA*) is allowed to provide credit support for acquisition debt if it complies with certain whitewash procedures.

In order to overcome such a prohibition (or, in relation to Italian SpAs, the need to follow the whitewash procedure), where the target is an Italian entity, a merger between an Italian newco borrower and Italian target is often used. Once completed (typically takes four to eight months) the Italian entity and its Italian subsidiaries can provide credit support (subject to corporate benefit laws — see below).

How strong in relative terms is credit support given by a company in Italy likely to be?

Italian law limits a company's ability to provide credit support to the extent that it is able to show a direct financial benefit deriving from such action. This mainly affects upstream credit support, though may apply to cross-stream credit support and, to a lesser extent, downstream credit support.

Limitation language is often included in documentation to address this. The issue is mitigated to the extent the loan is made available directly, or indirectly by way of on-lending of intercompany loans, to an Italian company.

Is the enforcement regime in Italy relatively lender-friendly?

No. Enforcement usually requires court consent and can take several years (with real estate enforcements taking longer than non-real estate enforcements); the debtor is afforded ample opportunities to challenge the creditor's rights. However, the situation has improved over the last few years due to several reforms.

In principle, a lender can exercise rights of acceleration and security enforcement following the occurrence of any breach, though a judge would most likely recognise acceleration and security enforcement only in case of payment default or breach of a material obligation.

Hardening periods of up to six months or a year apply depending on the characteristics of the transaction and the solvency of the debtor.

Luxembourg

Can a fund make a new loan to a borrower incorporated in Luxembourg without a banking licence?

Yes, assuming that (i) the loan is granted to a limited circle of previously known persons or, (ii) that it is the only loan granted by the fund/special purpose vehicle over its lifetime.

The *Commission de Surveillance du secteur Financier* (CSSF) considers that where loans are granted to a limited circle of previously known persons, they are not granted to the public and, accordingly, the concerned lending activity does not require a banking licence. This is also true where loans are granted through a Luxembourg special purpose vehicle (SPV) to a limited circle of previously known persons by the entity that fully owns the SPV or controls it.

In all other cases, a licence is required.

Do taxes or other charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in Luxembourg?

No.

In principle, interest paid by a company incorporated in Luxembourg is not subject to withholding tax.

Could loans from a fund that owns the borrower of that loan incorporated in Luxembourg be equitably subordinated?

No.

Can interest, fees and remuneration be agreed freely between a fund and a borrower in Luxembourg?

Yes.

However, Luxembourg courts may reduce default interest and other amounts to the extent they could constitute a penalty.

Can a fund directly hold security granted by a security provider incorporated in Luxembourg?

Yes.

Although security is often granted in favour of a security agent or trustee.

Can a company incorporated in Luxembourg provide credit support for the acquisition of its or its holding companies' shares?

Yes, provided that the company is incorporated in the form of a Luxembourg private limited liability company (*société à responsabilité limitée*).

Luxemburg public limited liability companies (*sociétés anonymes*) and other similar types of companies are prohibited from providing financial assistance for the acquisition of their own shares. Please note that in practice this is rarely an issue as public limited liability companies are not often involved in leverage/acquisition finance structures.

How strong in relative terms is credit support given by a company in Luxembourg likely to be?

Strong.

As is the case for every other transaction concluded by a Luxembourg company, the security must pass the corporate interest test. This condition is usually fulfilled for downstream credit support.

Upstream, and to a certain extent cross-stream, credit support require a more detailed analysis. Guarantee limitation language may be included in the documentation to assist with the analysis.

The granting of credit support must also be within the corporate objects of the company, it being understood that such objects be amended to include it if not.

Is the enforcement regime in Luxembourg relatively lender-friendly?

Yes.

The enforcement process is very straightforward. As regards pledges, the pledgee is notably allowed to appropriate the pledged assets without any further formality and without having to wait for the determination of the price of such assets.

Luxembourg pledges can be enforced without the need to appoint any third party, apply to court or satisfy any other formality.

Enforcement measures are difficult to challenge in Luxembourg. Luxembourg and, subject to the EU insolvency regulation, foreign laws relating to reorganisation measures, liquidation proceedings, attachments or other measures or proceedings are not applicable to, and generally do not affect, the enforcement of pledge agreements granted by a Luxembourg company. Furthermore, as a general principle, the enforcement of a Luxembourg law pledge agreement will not be liable to challenge; only actions for liability against the pledgee based on the conditions under which the enforcement occurred (e.g., where the valuation of the pledged assets is disputed) are available.

The Netherlands

Can a fund make a new loan to a borrower incorporated in Netherlands without a banking licence?

Yes, if the fund is funded with equity and the borrowers are not consumers.

Do taxes or other charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in Netherlands?

No, the Netherlands does not levy WHT on interest. Dividend WHT may apply in relation to hybrid loans (generally subordinated profit participating loans with a term of more than 50 years or loans that are (mandatorily) convertible into equity). Please note that the government of the Netherlands has announced its intention to abolish WHT on dividends and to introduce WHT on interest and royalties in light of the present base erosion and profit shifting discussion.

No stamp duties or registration taxes apply (only *de minimis* registration fees for vesting certain types of security (e.g. mortgage)).

From a borrower's perspective, the tax treatment of the loan may be affected if a lender holds an equity interest of more than 5 per cent in the borrower.

Could loans from a fund that owns the borrower of that loan incorporated in Netherlands be equitably subordinated?

No, only in exceptional circumstances.

Can interest, fees and remuneration be agreed freely between a fund and a borrower in Netherlands?

Yes, but not if it is considered to be a usuriously high percentage, unreasonable and unfair.

Can a fund directly hold security granted by a security provider incorporated in Netherlands?

Yes and security may also be held by a security agent using parallel debt mechanics. In addition, please note that the Dutch system of security interests is prescribed and that a fiduciary transfer is only possible in the case of a financial collateral arrangements among professional parties of which one is a licenced financial institution (*bank*).

Can a company incorporated in Netherlands provide credit support for the acquisition of its or its holding companies' shares?

As a matter of statute, there are no restrictions on a Dutch company providing security/guarantees to secure liabilities incurred in respect of the acquisition of its or its holding companies' shares in situations where the target is a limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*). A statutory restriction on granting security and guarantees to secure liabilities incurred in respect of the acquisition of shares in a public company (*naamloze vennootschap*) does apply (also to any subsidiaries of a public company where the shares are acquired in its (indirect) parent). To address this, the public company can be converted into a limited liability company, after which the restrictions will no longer apply.

How strong in relative terms is credit support given by a company in Netherlands likely to be?

Strong. Directors must assess whether granting security and providing a guarantee is in the best corporate interest (*vennootschappelijk belang*) of the company and whether such acts fall within the scope of its objects clause (*doelomschrijving*). However, the granting of security rights and/or guarantees which are determined not to be in the corporate interest of the company, or which conflict with the objects of a company, do not affect the validity of the security rights/guarantees from a lender's perspective per se, but the granting of security transgressing the objects of a company may be avoided by that company if the fund knew or should have known that such transgression had occurred.

Is the enforcement regime in Netherlands relatively lender-friendly?

Yes, lenders can readily enforce their security rights. A security right can only be enforced by means of: (i) a public auction; or (ii) a private sale with the consent of the court. Enforcement by public auction takes between approximately two and six months. For enforcement by way of a private sale, the process requesting leave from the court will take approximately two to six weeks, although preparatory steps for the private sale, such as negotiations with potential bidders and preparing a valuation report, mean the process might take longer.

A lender can, in general, exercise rights of security enforcement only after a payment default. Acceleration of the debt following another contractual default may be used to achieve a payment default provided that, in relation to the other contractual default, the security provider is in *verzuim*.

Hardening periods may apply and voluntary legal acts may be challenged if they are prejudicial to the creditors of the security provider generally. For one year from the granting of initial security rights and guarantees, knowledge of disadvantage is statutorily presumed present in the case of creation of security for claims that are not yet due and certain other circumstances. After that, acts may still be challenged, although the bankruptcy trustee or (prior to bankruptcy) a creditor, must prove that disadvantage was known to the security provider and the security holder.

Please note that for professional parties of which one is a licensed financial institution (*bank*) a financial collateral agreement which is based on a fiduciary transfer is also available and which is not limited by the constraints of the statutorily prescribed security interest.

Russia

Can a fund make a new loan to a borrower incorporated in Russia without a banking licence?

Yes. Generally, lending activity is licensed in Russia. However, a foreign fund can make loans to Russian borrowers without a Russian banking licence, provided the relevant loan agreement is concluded outside of Russia.

At the same time, the regulator may pay attention to the granting of loans if such activity is carried out systematically as the main activity of a fund and targets the Russian territory, including through the internet. Therefore, the fund should refrain from advertising its services in Russia or offering its services to an unidentified group of people.

Do taxes or other charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in Russia?

No. Generally, no, although depending on the jurisdiction of incorporation of the fund, withholding tax may be an issue in Russia when it comes to interest payments. The relevant double taxation treaty rates vary from 0% to 20% and, if none is applicable, the Russian-source withholding tax on interest payments would be withheld by the borrower at the 20% tax rate.

The fund would need to confirm that it is a legal entity and the beneficial owner of the interest, exercises functions and takes risks with respect to the payments on the loan, has a clear business purpose and is not merely a pass-through entity.

In 2020, Russia announced plans to apply 15% withholding tax on interest payments to "transit" jurisdictions such as Cyprus, Luxembourg and Malta, and to renegotiate double taxation treaties with such jurisdictions accordingly.

Could loans from a fund that owns the borrower of that loan incorporated in Russia be equitably subordinated?

Yes. Generally, loans from the "mother" companies are subordinated from the other creditors' claims. However, during insolvency proceedings the court may requalify the loan in contributions to the capital of the borrower, and as a result, the claims of the lender are excluded from the list of creditors' claims. In order to avoid this, the lender should prove that the loan was not made for the purposes of increasing the controlled accounts payable of the borrower, in particular, it may be necessary to give reasonable economic justification for choosing a loan for financing, attracting a loan from an affiliate, providing financing on non-market conditions, etc.

Can interest, fees and remuneration be agreed freely between a fund and a borrower in Russia?

Generally, yes, for loans to corporates. For loans to consumers, the interest rates are limited (the interest should not be higher than double the average market rate for such type of loans).

In addition, where the interest rate significantly exceeds the average market interest rate, the loan agreement may be invalidated if it is proved that the borrower entered into it due to a combination of difficult circumstances, and the other party to the transaction knowingly using those circumstances.

Can a fund directly hold security granted by a security provider incorporated in Russia?

Yes, provided the fund is the lender under the loan agreement. For pledges, the concept of pledge manager (security trustee) exists.

Can a company incorporated in Russia provide credit support for the acquisition of its or its holding companies' shares?

Yes, there are no restrictions for financing by a Russian company of the acquisition of its or its holding companies' shares.

How strong in relative terms is credit support given by a company in Russia likely to be?

Yes. Strong. There are no limitations for upstream, cross-stream or downstream credit support provided by a Russian company.

Credit support may require approval of the board of directors and shareholders of the Russian company as a major transaction (the value of which is at least 25% of the book value of the company assets) and as an interested-party transaction (in case the beneficiary of any credit support is affiliated with the company).

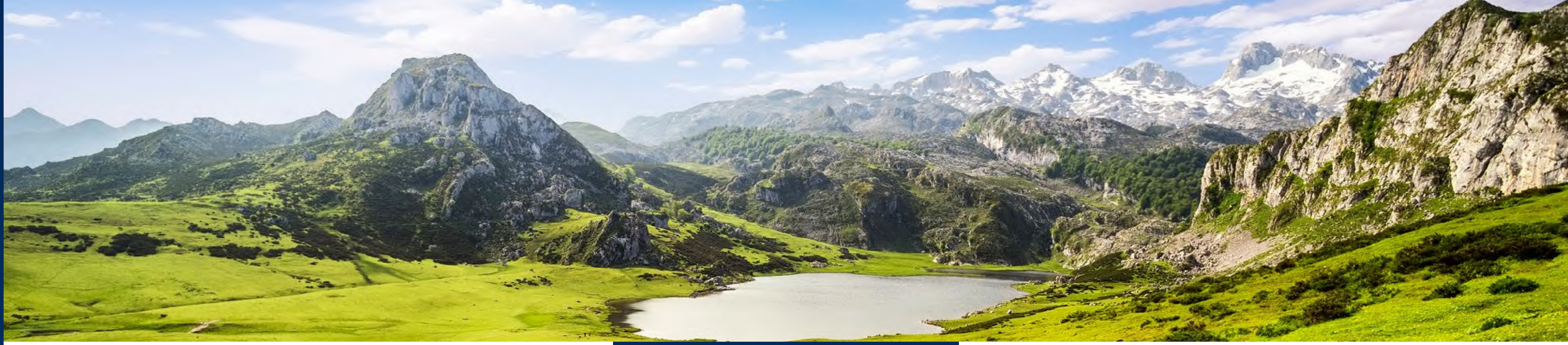
Is the enforcement regime in Russia relatively lender-friendly?

No. Enforcement of security is carried out through a court, unless the parties agreed on an out-of-court enforcement procedure. There are some exceptions when the enforcement of security can be achieved through the court, in particular: (i) after the introduction of the insolvency procedure or the moratorium in respect of the borrower; (ii) if the security ensures the fulfilment of various obligations to several lenders, unless the agreement between all the lenders provides for an out-of-court procedure; and (iii) in case of real estate mortgage of residential property.

The law prohibits enforcement of security if the amount of the unfulfilled secured obligation is less than 5% of the value of the security and the delay period for the performance of the secured obligation is less than three months.

Generally, enforcement is carried out through a public sale. For loans to corporates, the parties may also agree that the lender retains the asset at its market value or the asset is sold to a third party or at auction.

Spain



Can a fund make a new loan to a borrower incorporated in Spain without a banking licence?

Yes (other than in relation to loans to consumers). Under Spanish law, lending activity funded from the taking of deposits or other repayable funds from the public, in each case in the EU requires a banking license. If it is funded from another source, a banking licence is not required.

Do taxes or other charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in Spain?

No, although depending on the jurisdiction of incorporation of the fund, withholding tax may be an issue in Spain when it comes to Spanish-source interest payments. Assuming the fund is tax resident in the EU, no Spanish-source withholding tax on interest payments would apply. However, for funds tax resident outside the EU, relevant double taxation treaty rates should be considered and, if none is applicable, Spanish-source withholding tax on interest payments will be levied by the borrower. With effect from 20 October 2019, new details were published on the proof of EU residence that pension funds and collective investment undertakings should provide in order to claim the above Spanish withholding tax exemption over EU interest payments.

It is worth noting, that in October 2019 the first Spanish court resolution was issued interpreting the so-called "Beneficial Ownership" cases (also known as "the Danish cases"), which were resolved by the Court of Justice of the European Union in February 2019. The Spanish court confirmed that, even if the Spanish withholding tax exemption over interest payments does not contemplate a "beneficial ownership" requirement to apply, a general principle of EU law should apply in cases of fraudulent or abusive conduct (e.g. when their main purpose is to benefit from the Spanish withholding tax exemption).

The creation and transfer of certain security (real estate property mortgages and chattel mortgages) triggers stamp duty. The tax rate is calculated on the maximum secured amount and it currently varies from 0.5% to 1.5%, depending on where in Spain the asset is registered.

Could loans from a fund that owns the borrower of that loan incorporated in Spain be equitably subordinated?

Yes. A fund holding equity in a borrower can grant a loan to that borrower and, in principle, it would be considered as debt. However, in the context of insolvency proceedings of the borrower, the insolvency rules will apply and, therefore, the loan may be considered equity if the fund holding equity qualifies as a "related party". Related parties include: (i) shareholders owning 10% or more of the share capital of the borrower (or 5% if it has securities or debt that trade in a secondary official market); and (ii) companies within the insolvent company's group and their shareholders (if they meet the requirements referred to in (i) above). On insolvency, subordinated creditors may not vote on a settlement agreement and their claims would be satisfied only after settlement of all claims of privileged creditors and ordinary or unsecured creditors.

Royal Decree-Law 16/2020, dated 18 April 2020 , on procedural and organisational measures to address COVID-19 in the area of judicial administration, foresees measures to make insolvency proceedings more flexible. This includes for insolvency proceedings declared pre-14 March 2022, the following will be deemed unsecured credits (*créditos ordinarios*): those involving cash income from loans, credits, or from other businesses of a similar nature that were granted to the debtor after 13 March 2020 by persons especially related to the debtor; or the credits where persons, especially related to the bankrupt party, assumed the bankrupt party's payment obligations.

From a tax perspective, this recharacterisation could only exist when: (i) the loan is structured as a profit participating loan (although a case-by-case analysis would be needed); or (ii) both the fund and the Spanish borrower are considered to be "related parties" under Spanish tax law and it is deemed that the loan does not follow the arm length's principles (in particular, according to Spanish tax law, shareholders and the entity in which they participate are considered to be related parties if the shareholder owns at least 25% of the share capital of the entity).

Can interest, fees and remuneration be agreed freely between a fund and a borrower in Spain?

Yes, subject to certain limitations that include: (i) abusively high interest rates (determined on a case-by-case basis) that may be declared null and void if contrary to usury laws; and (ii) limitations on interest on loans to consumers or individuals.

From a tax perspective, if the fund and the borrower were considered as "related parties" under Spanish tax law, transactions between them should be valued at arm's length.

Can a fund directly hold security granted by a security provider incorporated in Spain?

Yes, however only licensed banking or credit institutions can benefit from floating mortgages over real estate assets (which allow several obligations to be secured by a single mortgage). Security interests over financial collateral may only be granted in favour of eligible counterparties, such as banks, insurance companies, securitisation funds, collective investment schemes, etc. In principle, a non-regulated special purpose vehicle would not be an eligible counterparty for these purposes.

Security can be granted to each lender individually (or collectively to all lenders), but the role of the security agent/security trustee is not recognised under Spanish law. If security must be registered in order to be perfected (such as for real estate mortgages, chattel mortgages and registered pledges), any transfer of the debt must be notarised and registered with the relevant registry.

Entities whose business is to grant loans to consumers, secured by a mortgage over residential property, are required to:

a. be registered with the State Registry (*Registro Estatal*)

b. take out a liability insurance policy or a bank guarantee in order to secure potential liabilities that the entities may incur vis-à-vis consumers for damages arising from its activity

The failure to comply with the obligations referred to above will give rise to sanctions of between EUR 15,025.31 and EUR 601,012.10.

Can a company incorporated in Spain provide credit support for the acquisition of its or its holding companies' shares?

No. A Spanish company cannot provide credit support for the acquisition of its or its holding companies' shares. Moreover, for limited liability companies (*sociedades limitadas*), the prohibition also extends to assistance for the acquisition of shares in other entities belonging to the same corporate group.

How strong in relative terms is credit support given by a company in Spain likely to be?

Weak. It is generally accepted that a Spanish company is allowed to provide credit support, to the extent that it can show that corporate benefit to the company giving credit support results from this action. If, in insolvency proceedings, the creditor cannot show that sufficient corporate benefit accrued to the company, the court may rescind the relevant credit support.

Is the enforcement regime in Spain relatively lender-friendly?

No. Enforcement of security is either through a notary (greater lender risk, though quicker) or the court and can take between six and 18 months, unless challenged by a debtor, in which case the process can be considerably longer. Appropriation is not generally possible (other than under a financial collateral agreement).

A lender can exercise rights of acceleration and security enforcement only after a payment default (in the case of mortgage enforcement proceedings, where the unpaid principal amount is equal to at least three monthly instalments) or material breach of another essential obligation — it is uncertain whether this includes a financial covenant default or cross-default.

Clawback risk applies during the two years preceding to the declaration of insolvency, if the transaction is considered detrimental to the insolvency estate and subject to certain exemptions such as transactions made within the company's ordinary course of business and financial collateral arrangements. For transactions defrauding creditors, the period is four years.

Sweden

Can a fund make a new loan to a borrower incorporated in Sweden without a banking licence?

Yes, other than in relation to loans to consumers.

Under Swedish law, lending activity funded from the taking of deposits or other repayable funds from the public is restricted to being performed by regulated entities, which hold a licence in Sweden (either directly from the Swedish Financial Supervisory Authority (FSA) or through EU passporting rules). If it is funded from another source, a licence is not required.

However, if the lending activity is considered to be regular, the entity may be regarded as conducting a permanent financing business in Sweden; in such cases, the FSA must be notified. While the regulatory situation is not entirely clear, more incidental lending to Swedish borrowers does not usually require notification.

Do taxes or other charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in Sweden?

No. Sweden does not levy withholding tax on interest. However, the tax situation for each fund must be assessed on a case-by-case basis.

Could loans from a fund that owns the borrower of that loan incorporated in Sweden be equitably subordinated?

No. There is no concept of equitable subordination for any class of creditor under Swedish bankruptcy law.

Can interest, fees and remuneration be agreed freely between a fund and a borrower in Sweden?

Yes, generally there are no formal limits unless the loans are being offered to consumers. For a commercial loan the outer limits are when the loan interest rate is, in fact, usury (usury rates are criminally punishable in Sweden).

Please note that default interest is payable at a statutory rate if it is not explicitly agreed in the loan agreement.

Can a fund directly hold security granted by a security provider incorporated in Sweden?

Yes. However, it is more common that the security is held by a security agent acting as a representative for the secured party. Please note that the concept of "trust" or "trustee" is not recognised in Sweden.

In order to create a valid, binding and enforceable security interest under Swedish law, certain Swedish bearer instruments, such as share certificates, real property mortgage certificates and business mortgage certificates, will be handed over to the security agent in Sweden and at all times be retained by the security agent in Sweden or in any other jurisdiction where the security interest will be recognised.

Can a company incorporated in Sweden provide credit support for the acquisition of its or its holding companies' shares?

No, the Swedish Companies Act (*aktiebolagslag 2005:551*) prohibits Swedish limited liability companies from providing guarantees, security or other credit support for obligations of any person where such obligations are being incurred for the purpose of acquiring shares in the company itself or in any other superior member of the same Swedish group of companies.

No whitewash procedure is available under Swedish law.

How strong in relative terms is credit support given by a company in Sweden likely to be?

Relatively weak, with certain limitations.

Pursuant to the Swedish Companies Act, a Swedish limited liability company may not provide a guarantee or security for the obligations of a shareholder or a company under the control of a shareholder, unless an exemption applies. The guarantees and security given by the guarantors or security providers incorporated under the laws of Sweden will be limited in accordance with the applicable restrictions relating to prohibited loans, guarantees and security and financial assistance, so that the guarantees and security provided only apply to the extent permitted and not result in a breach of the Swedish Companies Act.

Is the enforcement regime in Sweden relatively lender-friendly?

Yes, generally lender-friendly but not as lender-friendly as the UK.

Market practice in Sweden is that a lender becomes entitled to enforce security and claim under guarantees following an event of default/declared default (upon declaring all outstanding amount due and payable) under the credit documentation. There are no specific requirements under Swedish law that a breach constituting an event of default must be of a certain nature in order to accelerate, although in practice a technical default would rarely be used to accelerate debt or enforce security.

The process for enforcement depends on the type of security being enforced. For example, mortgages in respect of real property, ship, aircraft and business can be enforced only through certain public authorities and, in essence, require an execution order or the commencement of formal insolvency proceedings. Other types of security (e.g. shares, receivables, bank accounts) can generally be enforced by public or private sale, for example, share pledges usually gives the pledgee the right to sell the security assets (e.g. pledged shares) by private or public sale, auction or in any other way, and on such terms as the pledgee in its sole discretion deems fit (including the right for the pledgee to purchase the asset itself, provided the pledgee accounts for any surplus value to the pledgor).

Under Swedish law, a secured creditor or pledgee is considered to have a duty of care in relation to the security and, therefore, may not enforce or realise the pledge or sell the security assets in a way that is unduly adverse to the pledgor. The secured creditor must, as a fiduciary duty, take into consideration and protect the interests of the relevant pledgor in connection with enforcement, including obtaining a fair market price for the security assets. Further, if the sales price exceeds the indebtedness for which the security was granted, any surplus must be distributed to the pledgor following the sale of the assets.

There are special provisions in the case of bankruptcy and company reorganisation proceedings and these provisions override any contractual provisions in Swedish law security documents. In bankruptcy and company reorganisation proceedings, transactions can (in certain circumstances and subject to a time limit) be challenged. In the majority of these situations, a claim for recovery can be made concerning actions that were made during the three or six months preceding the commencement of the relevant insolvency proceedings. In certain situations longer time limits apply and in others there are no time limits, these include, among others, situations where the other party to an agreement or other arrangement is deemed to be a closely related party to the debtor, such as a subsidiary or parent company.

Switzerland

Can a fund make a new loan to a borrower incorporated in Switzerland without a banking licence?

Yes.

Do taxes or other charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in Switzerland?

Yes, because of the Swiss tax law rules commonly referred to as the "Swiss non-bank rules." Under Swiss domestic tax laws, payments by a Swiss borrower under a bilateral or syndicated financing arrangement are generally not subject to Swiss withholding tax, provided that the Swiss non-bank rules are complied with. These rules require that:

- a lending syndicate for a financing arrangement with a Swiss obligor does not consist of more than 10 lenders that are not licensed banks (10 non-bank rule)
- a Swiss obligor does not, in aggregate, have more than 20 non-bank creditors as its lenders (20 non-bank rule)
- a Swiss obligor does not, in aggregate, have more than 100 non-bank creditors under financing arrangements that qualify as deposits within the meaning of the relevant rules.

In the case of direct lending funds, there can be two issues. First, funds typically do not qualify as licensed banks. Therefore, they require (at least) one non-bank lender slot. Second, a fund could be transparent from a Swiss withholding tax perspective, and as a consequence one non-bank lender slot may be required for each of the fund's investors that don't qualify as licensed banks. To have certainty on the Swiss withholding tax treatment of a fund, an advance tax ruling issued by the Swiss Federal Tax Administration would be required.

A violation of the Swiss non-bank rules would trigger 35% Swiss withholding tax on interest payment(s). A Swiss tax resident lender may reclaim the Swiss withholding tax provided the interest payments are duly declared in the profit and loss statement with respect to the Swiss tax return . Non-Swiss resident lenders may claim a full or partial refund based on applicable double taxation treaties, if any, and if the conditions of such a treaty are met.

Could loans from a fund that owns the borrower of that loan incorporated in Switzerland be equitably subordinated?

Yes. Under Swiss case law, a loan made to a corporation by a shareholder may qualify, in the corporation's bankruptcy, as so-called 'hidden equity' if (i) an independent third party would not have made the loan on the same conditions and (ii) only an equity contribution would have eliminated the corporation's over-indebtedness. The consequence of a qualification as hidden equity is not a formal conversion into equity but rather a compulsory subordination of the loan, meaning that the lender may not prove its claim as a general unsecured, unsubordinated creditor.

Can interest, fees and remuneration be agreed freely between a fund and a borrower in Switzerland?

Yes, subject to usury rules.

Can a fund directly hold security granted by a security provider incorporated in Switzerland?

Yes. Exceptions and potentially adverse consequences may apply with respect to Swiss real estate.

Can a company incorporated in Switzerland provide credit support for the acquisition of its or its holding companies' shares?

Swiss corporate law does not have any specific rules on financial assistance and does not provide for any "thin capitalization" or similar rules. However, there are several provisions protecting the nominal capital as well as the reserves of Swiss corporations. A Swiss corporation may not make any payment to its parent company unless such payment is made (i) as a formal dividend, (ii) in the course of a formal reduction of the relevant company's share capital, or (iii) on the basis of an agreement that is made on arm's length terms. The same applies to any payments to sister companies. No restrictions apply to downstream payments to a wholly-owned subsidiary unless the subsidiary is in financial distress.

It is the prevailing view in Switzerland that the granting of a guarantee or security interest to a third party (e.g. a lender under an acquisition facility agreement) for the obligations of a parent or sister company (upstream or cross-stream guarantee or security interest) as well as certain other acts having a similar effect (e.g. an indemnity or the waiving of rights for the benefit of a parent or sister company) are subject to the same limitations as an actual payment. This ultimately has the effect that the value of any upstream or cross-stream credit support is limited to the amount the security provider could freely distribute to its shareholders as a dividend at the time payment is demanded or the security interest is enforced. Payments under any upstream or cross-stream credit support may also have certain tax implications. For example, they may trigger Swiss withholding tax at the current rate of 35% if they do not meet the arm's length test for tax purposes (reclassification as constructive dividend). A Swiss resident recipient may reclaim the Swiss withholding tax, provided the dividend payments are duly declared in the profit and loss statement with respect to the Swiss tax return . Non-Swiss resident recipients may claim a full or partial refund based on applicable double taxation treaties.

Swiss law does not provide for any whitewash or similar measures to avoid the consequences of an upstream or cross-stream guarantee or security. However, in order to mitigate the imperfections of such security interests from a Swiss law perspective lenders will usually require that the corporate purpose clause contained in the articles of association of any Swiss security provider explicitly permit the granting of upstream or cross-stream security. Additionally, it is typically ensured that the credit documents and the relevant upstream or cross-stream transactions are properly approved by the competent corporate bodies, which includes an approval by the shareholders' meeting of the respective security provider. Finally, the credit documents usually contain limitation language that addresses the free equity limitation.

How strong in relative terms is credit support given by a company in Switzerland likely to be?

If it is a direct security (i.e. security for its own obligations), the credit support will likely be strong. If it is an upstream or cross-stream security, the credit support will likely be rather weak.

Is the enforcement regime in Switzerland relatively lender-friendly?

Medium.

Turkey

Can a fund make a new loan to a borrower incorporated in Turkey without a banking licence?

Yes. Under Turkish laws, extending a loan as a business requires a banking licence. Intercompany loans are also allowed without a licence provided they satisfy certain conditions.

Turkish laws are silent on foreign lenders extending loans to Turkish-resident borrowers; the law does not prohibit it per se. In order for a foreign fund not to be subject to licensing in Turkey, it must take no action that creates the impression it is operating in Turkey. It must not engage in any marketing, promotion or solicitation in Turkey or directed at Turkish residents, except on a reverse inquiry basis where the Turkish resident client initiates the contact. Foreign funds must avoid any promotion, distribution, marketing or other solicitation of their services and products in Turkey. There is no exact definition of "marketing, promotion and solicitation of these products" under Turkish laws. However, "marketing, promotion and solicitation of these products" covers all initiatives to market products and services, including passive marketing. For instance, a foreign fund calling or emailing a client resident in Turkey to provide information on its products or services without the client first asking for such information is considered marketing of its services and products in Turkey, and the fund would be subject to licensing in Turkey.

Do taxes or other charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in Turkey?

Yes. If a fund directly extends a loan to a Turkish borrower:

- The loan interest payments of a Turkish borrower to a person or entity resident abroad are subject to withholding tax. The withholding tax rate for interest payments related to all types of loans received from foreign states, international institutions, foreign banks, or institutions authorised to grant loans regularly in their country and that grant loans not only to related corporations but to all individuals and legal entities, is determined as 0%. This would apply if the fund is authorised to provide loans in its home country and grants loans not only to related persons but also to third parties. Otherwise, the withholding tax rate is 10%, unless the related double tax treaty provides a reduced rate.
- The loan interest paid is subject to VAT through the reverse charge mechanism. The VAT paid may not be a cost item for the Turkish borrower as it can be offset from other VAT payables.
- A loan agreement signed by a Turkish borrower with a non-financial institution is subject to stamp tax at 0.948% on the highest value stated in the agreement (i.e. facility amount). The stamp tax due on an agreement is limited to TRY 3,239,556.40 for 2020. However, if the fund is an authorised financial institution in its home country, the loan agreement to be signed with a Turkish borrower is exempt from stamp tax.
- The resource utilisation support fund (RUSF) is a type of charge levied on the loans obtained by Turkish borrowers from abroad. The rate and application of RUSF change depending on the maturity, type and currency of the loan. The FX denominated loans is subject to RUSF over the principal loan between the rates of 3% and 0%. If the average maturity of the FX loan is more than three years, 0% RUSF applies. In case of TRY financing RUSF would apply over the interest with a rate of 1%, if the average maturity is less than one year; otherwise 0% RUSF applies. The rate of RUSF is 0% on loans borrowed by Turkish banks and financial institutions from abroad.
- Thin capitalization and transfer pricing regulations need to be considered for the Turkish borrower.

If the Turkish borrower provides loans to a fund abroad:

- Interest must be charged by the Turkish borrower. This interest income will be included in the Turkish borrower's corporate income tax base and its net income (after offsetting any previous year losses) will be subject to corporate income tax.
- The financing service provided by the Turkish borrower can be considered within the scope of export exemption and is not subject to VAT.
- If the financing service is provided by a Turkish bank or financial institution, the interest charged will be subject to banking and insurance transaction tax at a rate of 5%.
- In principle, the agreement signed to provide the loan abroad would be subject to stamp tax. However, if the lender is a Turkish bank or financial institution, it could be argued that the stamp tax exemption applies (this issue requires detailed analysis).

Could loans from a fund that owns the borrower of that loan incorporated in Turkey be equitably subordinated?

Yes. While Turkish law does not specifically recognise contractual subordination, it is valid and enforceable between the parties to the contract where the subordination arises. However, it is not enforceable against third parties, such as execution offices in bankruptcy or enforcement proceedings.

Further, Turkish insolvency rules are directly applicable rules; they apply to the insolvent party's relationship with its creditors even if the agreements are governed by the laws of a jurisdiction other than Turkey. Accordingly, if the Turkish debtor becomes insolvent, the bankruptcy administration will not uphold the subordination arrangements, and the creditors of this debtor will be subject to the rankings provided in the Execution and Bankruptcy Law No. 2004 (EBC). Under Article 206 of the EBC, secured creditors have priority for collecting the proceeds of the sale of the secured assets of the bankrupt company, which, in principle, will be sold by the bankruptcy administration as soon as possible. Unsecured creditors will be paid in the following order:

i. taxes and other government charges accrued in connection with the asset to be sold

ii. employee or labour pension-related claims and alimonies

iii. claims of third parties whose assets are managed by the company under a custody or guardianship

iv. claims prioritised under various laws

v. other unsecured claims

All the creditors in a category must be satisfied before creditors in the following category are paid. If the remaining liquidation proceeds are insufficient to cover the unsecured claims in any specific category, they will be distributed between the relevant creditors pro rata.

If there is any remaining sum from the liquidation of the assets, it is shared, pro rata (unless otherwise set forth under the articles of association) among the shareholders.

Nevertheless, subordination agreements between creditors and the insolvent party will continue to be enforceable between the parties. This means that any creditor that receives more than it should, pursuant to the subordination arrangements, must pay the excess amount to the other parties of the arrangement in accordance with the agreed subordination principles.

Can interest, fees and remuneration be agreed freely between a fund and a borrower in Turkey?

Yes. The general rule is that interest and default interest rates can freely be determined between a fund and Turkish borrower. However, a party should not take unfair advantage of the other party's situation when determining the rates. That said, pursuant to Turkish laws, while interest may be compounded for periods of at least three months in the case of commercial transactions (i.e., loan transactions), default interest cannot be compounded.

Can a fund directly hold security granted by a security provider incorporated in Turkey?

Yes

Turkey *(cont'd)*

Can a company incorporated in Turkey provide credit support for the acquisition of its or its holding companies' shares?

Yes. First, a Turkish company (that is not a bank or another financial institution authorised to lend) cannot provide credit support to a Turkish resident company unless both parties belong to the same group and the credit support is provided and recorded in Turkish lira.

In addition to this rule, whether a company can provide credit support will mainly depend on the type of the credit support provider.

Joint stock companies

Under the Turkish Commercial Code No. 6102 (TCC), a joint stock company (*anonim şirket*), which is the most popular company type in Turkey, must not provide an advance, loan or security to third parties to support the acquisition of its own shares, otherwise that transaction will be null and void. There are two exceptions to the financial assistance prohibition. First, credit and financial institutions (mainly banks) may provide assistance/financing to third parties as part of their ordinary course of business (i.e. extending cash or non-cash loans) for the acquisition of their own shares. Second, a company may provide advances, loans or securities to support the acquisition of its shares by its employees or its subsidiaries' employees as part of their stock options. Nevertheless, these exceptions will be deemed null and void if the transactions reduce the target company's statutory reserves.

If the joint stock company is a public company, it may not grant a security or guarantee in favour of third parties in any circumstances. The only exception wherein a public company can grant a security or guarantee in favour of third parties is if it is in the ordinary course of the target company's , or the relevant third party is consolidated into the financial statements of the target company or a subsidiary of the public company.

Other companies

The prohibition against the provision of financial assistance does not apply to other types of companies in Turkey, such as limited liability companies (*limited şirket*), collective companies (*kollektif şirket*) and commandite companies (*komandit şirket*). Therefore, any company in Turkey that is not a joint stock company can provide financial assistance if it complies with general legal considerations, such as capital maintenance.

In addition to the above, the TCC does not specifically regulate a Turkish company's provision of financial assistance for the acquisition of its holding company's shares. We believe that it is possible.

How strong in relative terms is credit support given by a company in Turkey likely to be?

It is strong to the extent the restrictions specified above are observed.

Is the enforcement regime in Turkey relatively lender-friendly?

No. It is borrower-friendly. Debtors have many procedural grounds to object to enforcement actions taken by creditor and can slow down the process.

UK

Can a fund make a new loan to a borrower incorporated in UK without a banking licence?

Yes, assuming that the loan is not made to a consumer. Caution is needed for debt securities, as certain activities in relation to these instruments may be within the scope of regulation (i.e., dealing, advising or arranging).

Do taxes or other charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in UK?

Generally, no. The UK levies withholding tax on interest, subject to certain reliefs/exemptions. For unlisted debt with a term of more than 12 months, a non-UK non-bank lender will normally need to rely on a double taxation treaty to reduce or eliminate the withholding tax. Most funds will routinely locate their investment vehicle(s) in a favourable double taxation treaty jurisdiction in order to benefit from treaty relief. However, care is needed to ensure that the double taxation treaty claim is not challenged, e.g. due to pass-through arrangements or a lack of substance in the lender's territory.

Stamp duty is normally not relevant but may apply on transfers of loans with certain equity-like features, e.g., conversion rights or excessive interest rates, or on enforcement of security over shares or real property. Only *de minimis* security registration fees apply in relation to the taking of security.

From the borrower's perspective, tax relief may be denied for some or all of the interest on a loan if (broadly) it is from a connected person and the borrower could not have borrowed that debt from a third party at arm's length, or if the loan has certain equity-like features or is stapled to equity in the borrower.

The UK Government is currently reviewing the direct and indirect taxation of UK investment funds, with the aim of ensuring that the UK regime remains an attractive option for investors. The review includes a consideration (launched in March 2020) of the VAT treatment of fund management fees and the tax treatment of asset-holding companies in alternative fund structures.

Could loans from a fund that owns the borrower of that loan incorporated in UK be equitably subordinated?

No. However, equity holdings that would cause a person making a loan to be "connected" to a credit support provider should be taken into account in relation to hardening periods.

Can interest, fees and remuneration be agreed freely between a fund and a borrower in UK?

Yes. However, English law restricts default interest and other amounts to the extent they could constitute a penalty (which would render them unenforceable on the grounds that they do not represent a genuine pre-estimate of the loss of the aggrieved party, or are out of all proportion to the legitimate interests of the innocent party).

Can a fund directly hold security granted by a security provider incorporated in UK?

Yes, although security is commonly granted in favour of a security agent or trustee.

Can a company incorporated in UK provide credit support for the acquisition of its or its holding companies' shares?

Yes, financial assistance is permitted to be given by private companies, except as specified immediately below and subject to satisfying corporate benefit and maintenance of capital rules (see below).

A restriction does apply, subject to certain limited exceptions, in the case of financial assistance by a company for the acquisition either of its own shares, if it is a public company, or of shares in its holding company, if that holding company is a public company. In practice, most companies involved in direct lending will be (or will be able to become) private companies.

How strong in relative terms is credit support given by a company in UK likely to be?

Strong. The company directors will need to satisfy themselves as to the corporate benefit of the transaction and to abide by the maintenance of capital rules. While this requires a case-by-case analysis, in practice solvent English companies with positive net assets often satisfy these requirements and can provide full guarantees and security.

In addition, the articles of association will need to permit the giving of a guarantee/security and can usually be amended to include this if they do not already do so.

Is the enforcement regime in UK relatively lender-friendly?

Yes. Enforcement can usually be achieved by a secured creditor out of court and relatively expeditiously.

In principle, a lender can exercise rights of acceleration and security enforcement after any event of default if the documents provide for this (in practice, a technical default would rarely be used to accelerate debt or enforce security).

Hardening periods, in principle relevant for up to two years after a suspect transaction by a company, rarely present an issue in practice if credit support was provided for a new loan by a solvent company.

Ukraine

Can a fund make a new loan to a borrower incorporated in Ukraine without a banking licence?

Yes. Any Ukrainian company can make a loan without a banking licence, to the extent that such lending activity is not the company's regular business and it is not funded at the expense of borrowed funds (e.g. from other persons or deposits). Only a Ukrainian company, which is a financial institution, can be regularly engaged in the lending activity as its principal or exclusive business and can fund it in any manner permitted by applicable law. Financial institutions are included in the State Register of Financial Institutions and are required to receive a licence for: (i) making loans using borrowed funds; and (ii) the provision of any financial services, which include the direct or indirect attraction of financial assets from individuals. With regard to non-Ukrainian (foreign) lenders, their capacity and authority to lend should be determined in accordance with the laws of their country of establishment and registration.

Do taxes or other charges usually present a material issue to a fund lending directly to, or taking credit support from, a company incorporated in Ukraine?

Yes. A foreign entity that carries on its commercial activities in Ukraine through a permanent establishment (PE) is to be taxed on attributable profit with 18% corporate income tax in line with the Authorised OECD Approach (AOA). The AOA recommends the application of the transfer pricing rules for the purposes of ascertaining the profits "earned" by the PE. Effective from 23 May 2020, the PE would be treated as an independent enterprise rendering/selling the same or similar services/goods on the same or similar terms.

Foreign legal entities are taxed in Ukraine on a "net" basis in respect of the income derived from their commercial activities undertaken in Ukraine through a PE. Income derived by foreign entities from sources in Ukraine, other than through PEs in Ukraine, is taxed in Ukraine on a "gross" basis, being subject to withholding tax (WHT) at the time of remittance of such income to such foreign entities. Such tax is withheld from the sums remitted, except for the income in the form of consideration for goods (works and services), which is generally not subject to WHT.

Under a general rule, WHT applies at the rate of 15% to Ukrainian-sourced income (including interest on the loans) at the time of remittance to a non-resident, unless otherwise provided by an applicable double taxation treaty. Depending on the period when a loan was provided to a resident, a full exemption or a reduced 5% rate under domestic law may apply to interest paid to a foreign lender under a loan financed by the issuance of bonds in the international capital markets (the so-called loan participation notes structures).

Notarial certification of a mortgage agreement or a pledge agreement involves a state duty of 0.01% of the value of the collateral or a notarial fee of at least the same amount. Registration of encumbrances arising from a pledge agreement in the State Register of Encumbrances over Movable Property requires the payment of a state duty of approximately EUR 2.

Could loans from a fund that owns the borrower of that loan incorporated in Ukraine be equitably subordinated?

Outside of the borrower's liquidation or bankruptcy procedures, yes.

Satisfaction of claims during the solvent and insolvent liquidation of a company is subject to prioritisation in the order prescribed by corporate and insolvency law requirements. The legislation does not provide for any appropriate exceptions from this rule. Therefore, agreements on contractual subordination are unlikely to be honoured by a liquidator or a bankruptcy trustee.

In view of prioritising claims of insolvent entities, Ukrainian insolvency law differentiates between secured and unsecured creditors. Secured creditors are those whose claims are secured by a pledge of the borrower's property and have absolute priority over claims of all other possible creditors since such claims are satisfied at the cost of the collateral. The claims of unsecured creditors of a Ukrainian company (other than a bank) are subjected to the following ranking in bankruptcy: 1.a. salary payment claims; b. claims for compensation of damages caused to the State Budget of Ukraine by the enforcement of decisions of the European Court of Human Rights; c. claims arising from insurance agreements; e. costs for bankruptcy proceedings in the commercial court and for the work of liquidation commission; 2. labour claims excluding claims specified in items 1.c. and 5.; 3. tax claims; 4. creditors' claims that are not secured by a pledge; 5. claims related to the repayment of employees' contributions to the share capital; and 6. other claims.

As to the equity holders and related parties of the company, no specific priorities or other benefits connected with their particular status are prescribed by legislation within the liquidation procedure. That said, corporate legislation (including the Law of Ukraine "On Limited Liability and Additional Liability Companies" ("LLC Law") and the Law of Ukraine "On Joint-Stock Companies" ("JSC Law")) provides for the rule pursuant to which the claims of equity holders are satisfied after the claims of all other creditors are satisfied.

Can interest, fees and remuneration be agreed freely between a fund and a borrower in Ukraine?

A lender and a borrower can generally agree freely on interest, remuneration (fees and commissions) and other terms and conditions of a loan agreement.

Certain currency control restrictions exist in relation to loan agreements between non-resident lenders and Ukrainian borrowers. In particular, to carry out transactions under such a loan agreement, the Ukrainian servicing bank of the borrower is required to review whether the value of a loan granted to the Ukrainian borrower by the non-resident company corresponds to market conditions. The following criteria are considered by servicing banks: (i) cost of borrowings in the respective currency at the relevant time; and (ii) comprehensive assessment of the Ukrainian sovereign risk and the risk related to the private borrower.

If Ukrainian law governs the loan agreement, a penalty on the overdue payment would be limited to twice the discount rate of the National Bank of Ukraine (NBU). The discount rate is currently set at 6% per annum.

Can a fund directly hold security granted by a security provider incorporated in Ukraine?

Yes. Security can be granted only to the creditor of the claim purported to be secured. At the same time, joint and several creditor and English law parallel debt arrangements, which purport to create a security agent's/trustee's entitlement to claim all amounts owed to all the creditors, should be recognised in Ukraine. However, there is no established court practice in Ukraine in respect of a parallel debt structure.

Can a company incorporated in Ukraine provide credit support for the acquisition of its or its holding companies' shares?

Financial assistance while acquiring shares in a Ukrainian company

Ukrainian legislation does not contain a general prohibition on the provision of financial assistance by a target company in connection with the acquisition of shares (participatory interests) in that company. Specific restrictions, however, are established by particular laws governing the activity of the most popular legal vehicles, such as joint-stock companies and limited liability companies.

The JSC Law prohibits joint-stock companies from: (i) lending to finance the acquisition of any securities issued by the company; and (ii) issuing a guarantee (suretyship) in respect of a third party's loan that finances the acquisition of shares issued by the company.

The LLC Law provides similar restrictions on extending a loan to finance the payment for a participatory interest in the company or granting suretyship for the obligations under a loan extended by a third party to finance such payment.

Although both restrictions were established with the same purpose and were drafted with the use of similar language, a fair interpretation of the LLC Law would allow the conclusion that only operations on the formation or increase of the limited liability company's charter capital are subject to the restriction. Accordingly, the prohibition to grant suretyship applies only if the third party's loan was extended with the goal to form or increase the limited liability company's charter capital.

No limitations on the provision of financial assistance by a Ukrainian company to finance the acquisition of either shares or participatory interest in its Ukrainian parent company are established in either the JSC Law and the LLC Law or other laws.

Ukraine *(cont'd)*

Financial assistance while acquiring shares in a foreign parent company

Generally, there are no prohibitions in Ukrainian legislation for the provision of financial assistance by Ukrainian companies to finance the acquisition of foreign parent companies. However, the NBU introduced various currency control restrictions affecting the possibility of a Ukrainian company making payments in foreign currency abroad. In particular, investments outside Ukraine or cross-border transfers from Ukraine to the same person's foreign bank account should not exceed the aggregate cumulative annual limit of: (i) EUR 2 million per year for Ukrainian businesses; and (ii) EUR 100,000 per year for individuals.

How strong in relative terms is credit support given by a company in Ukraine likely to be?

In contrast to certain other jurisdictions, Ukrainian law does not provide detailed rules on corporate benefit. However, there are various requirements relating to "fiduciary duties" of company officials. In particular, the Civil Code of Ukraine sets out that an official or a body acting on behalf of the company should act reasonably and in good faith and it should not abuse its authority. Failure to comply this rule could mean the officials of a company are liable for any damages incurred by the company because of their actions (or inactivity). In certain limited cases, the amount of the claimed damages may be reduced because of the application of capped material liability rules established by Ukrainian employment legislation. In these cases, the amount of an official's liability does not exceed their average monthly salary.

Ukrainian corporate law also establishes rules for the execution of material and interested party transactions (including transactions involving the company's officials). The violation of the prescribed procedure for the execution of material and interested party transactions may result in liability for officials of the limited liability company and additional liability companies for the damages incurred by the company. The transactions may also be declared invalid by the court on the same ground.

The Commercial Procedural Code of Ukraine also allows "derivative action" by a shareholder or participant of a legal entity holding at least 10% of the company's share capital or assets to file a claim against the company's officials. The claim is filed in the interest of the company, which formally acts as a claimant in the course of the proceedings and exercises its procedural rights jointly with the shareholder, participant or owner.

Is the enforcement regime in Ukraine relatively lender-friendly?

Generally, yes. The enforcement of security interest outside of court procedures is a statutory right of the secured creditor. Secured creditors may choose at their own discretion whether to use an out-of-court procedure or to apply to the court for enforcement of the security interest. In practice, a debtor's cooperation would often be required to proceed with out-of-court enforcement.

The secured creditor may appropriate the pledged asset upon the debtor's default provided that: (i) the secured creditor has the collateral in its possession; and (ii) there are no objections from the debtor and/or other registered secured creditors to the transfer of the encumbered asset. If these conditions are not met, the secured creditor may either proceed through the sale of the encumbered asset to third parties (provided that the secured creditor has the collateral in its possession) or demand its transfer through court proceedings. The secured creditor may acquire the asset as a full repayment of the debt by the agreement provided that there are no objections from the other registered secured creditors to the transfer or the claims of the objecting secured creditors have been settled.

At the same time, Ukrainian insolvency legislation provides that the particular transactions (agreements) of a company (other than a bank) executed after the commencement of bankruptcy proceedings or during the three years preceding such proceedings may be declared invalid by the court on the grounds that entering into such transaction was not commercially justified. This includes transactions that caused losses to the company or creditors and where the company: (i) performed proprietary obligations before the due date; (ii) assumed obligations as a result of which it became insolvent or its performance of monetary obligations to other creditors in part or in full became impossible; (iii) disposed of its property for a price that was below market price and it did not have sufficient assets to discharge the creditors' claims either at the moment it undertook obligations or as a result of the transaction; (iv) made payment to a creditor on the day when the amount of the creditors' claims exceeded the value of assets (or similar); or (v) undertook security obligations to secure monetary claims.

Private Credit Team

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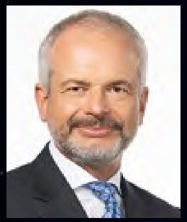

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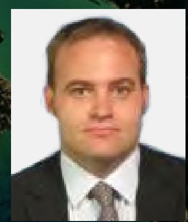

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