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UPSTREAM SECURITY IN EUROPE

A concise overview of the issues arising in connection with the granting and taking of Upstream Security in Europe

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INTRODUCTION

1. Increase in Cross-Border Financing

Financing transactions cross borders more and more often due to the increasing internationalization of lenders and borrowers. In recent decades, companies have increased their international operations. Thus, subsidiaries in various jurisdictions can be involved in financing transactions as borrowers, guarantors or security providers. For lenders the key benefit of cross-border financing is diversification. By spreading their activities over different countries, lenders are less exposed to individual domestic or foreign risks. This may in turn reduce the volatility of lending.

2. Security as Common Feature in Cross-Border Financing

Irrespective of jurisdiction, the first questions in financing are what type of security is available and what is the value of the security. Any loan is associated with some risk of default. Granting security is one method that has been used since the fourth century B.C. to reduce the risk borne by the lender in making a loan. The main purpose of the security is to give the lender some recourse if the borrower fails to meet the terms of the loan. However, the security can also be useful for borrowers. Borrowers who are perceived by lenders to be less credit-worthy are better able to access credit when they grant a security. Without a security, these borrowers would generally find their access to credits restricted. Secured loans usually offer lower rates, higher borrowing limits and longer repayment terms than unsecured loans.

3. Legal Issues in Connection with Upstream Security

Cross-border financing can present many traps for both borrowers and lenders. An array of legal issues is involved in structuring and negotiating cross-border financing transactions. One of these legal issues arises in connection with the granting and taking of upstream security. In many jurisdictions upstream security can be problematical. Often the risk of granting upstream security must be balanced with the actual or potential rewards. Sometimes the value has to be limited to the net asset value of the company providing upstream security. Additionally, there are prohibitions on the granting of financial assistance by a company in connection with the acquisition of its shares, or those of its holding company. The circumstances in which an upstream security may be granted vary greatly in different jurisdictions.

4. Aim of the Brochure

This brochure is designed to offer a concise and practical overview of the issues in connection with the granting and taking of upstream security in Europe. It is intended to give the reader an initial grasp of the different requirements and risks of granting upstream security, thus allowing the right questions to be asked of local counsel and proving an understanding of the responses and its implications. Accordingly, this brochure does not attempt to provide a detailed discussion of granting upstream security in each jurisdiction. The information in this brochure is not considered legal advice and should not be treated as such. The respective authors have developed the editorial content presented. Therefore, the sole responsibility for the content of this brochure lies with the respective author and P+P Pöllath + Partners does not does not assume any responsibility for the content of this brochure.

GLOSSARY OF TERMS USED IN THIS BROCHURE

This glossary lists and defines some of the terms used in this brochure. It shall serve to create a uniform understanding of these terms throughout the brochure.

TERM	DEFINITION
Upstream security	The granting of guarantees and asset security by a company to support loans incurred by a holding company or sister company of the relevant guarantor or security provider, respectively.
Corporate benefit	The directors of a company, which provides an upstream security, have a duty to act in what they consider to be the best interests of said company. They must ask themselves whether they can justify the company's securing another company's obligations.
Financial assistance	All kinds of financial support that expose a company to a risk which did not previously exist and thereby enable or support another person in acquiring shares issued by that company or those of its holding company.
Capital maintenance rules	All rules designed to ensure that a company obtains the capital that it has purported to raise and maintains said capital, subject to the exigencies of the business, for the benefit and protection of the company's creditors and the discharge of its liabilities.

CONTACT

Should you have any specific queries regarding this brochure or taking upstream security in Germany, please do not hesitate to contact us.

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COUNTRY OVERVIEW

1. Austria

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Graf & Pitkowitz Rechtsanwälte GmbH (GPP) is a leading independent Austrian full service law firm with offices in Vienna and Graz. Founded in 1994, GPP's team of dedicated experts has quickly grown and now belongs to the best known practices in Austria. GPP provides legal advice and representation to clients in all sectors of industry and is inherently strong in cross-border and domestic work, with the emphasis on global transactions.

GPP's Banking & Finance team advises across all areas of bank finance from regulatory issues and restructurings to high end (re-)financing transactions with cross-border elements. The team is now highly active on the institutional investor side, particularly in banking disputes and in advising on complex aspects of current Austrian legislation on the recovery and resolution of credit institutions. In addition to banking and finance work, GPP's Banking & Finance team also works with leading alternative capital providers as well as businesses active in the field of virtual currencies. The team's high quality requirements, its innovative strengths and commitment to unbureaucratic solutions are held in high esteem by GPP's clients. Team members are recognized by leading Global and European publications relying on client recommendations and independent peer reviews and are regularly ranked amongst the leading Austrian banking & finance lawyers.

QUESTION 1: Is granting upstream security in principle possible in your jurisdiction?

☒ Yes

☐ No

QUESTION 2: Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?

☐ Corporate benefit

☐ Company benefit required
☐ Group benefit sufficient

☒ Financial assistance

☒ Capital maintenance

QUESTION 3: What are the possible legal consequences of violating such rules in your jurisdiction?

☒ Invalidity of security

☒ Civil liability of

☒ Director of company
☐ Director of shareholder
☒ Shareholder
☒ Lender

☒ Criminal Liability of

☒ Director of company
☐ Director of shareholder
☒ Shareholder
☒ Lender

QUESTION 4: Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?

☒ Yes

Legal consequences: Legal and economic consequence of the standard Austrian limitation language is that the permitted amount of any obligations arising from an upstream security is basically limited to the amount available for lawful distribution to the shareholders; i.e. the amount may be zero or close to zero.

☐ No

QUESTION 5: **Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?**

☒ Yes ☐ No

QUESTION 6: **Are there any exemptions or whitewash procedures in your jurisdiction?**

☐ Yes ☒ No

QUESTION 7: **Are there any differences depending on the legal entity of the security provider in your jurisdiction?**

☒ Yes ☐ No

QUESTION 8: **Comments/Specifics**

(1) Austrian capital maintenance rules (Sections 82 et seq. of the Austrian act on companies with limited liability (GmbHG) and/or Sections 52 and 65 et seq. of the Austrian stock corporation act (AktG)), as applied by Austrian courts, protect the entire assets of an Austrian company on behalf of its respective creditors and cover the entire set of corporate assets, even those exceeding the stated capital. Under Austrian capital maintenance rules, contributions to a shareholder of an Austrian company may only be made in accordance with explicitly specified statutory exceptions. The most important of these circumstances provides that shareholders have the right to receive dividend payments, provided that these dividend payments are restricted to the amount of net profits shown in the approved annual financial statements and are not prohibited by law or the respective subsidiary's articles of association and further provided the shareholder(s) resolved on the disbursement of such dividend payment.

(2) Whilst also members of the supervisory board may face personal liabilities arising from violations of Austrian capital maintenance rules, third parties, including lenders, may only be held liable in exceptional cases.

(3) Transactions aimed to fund and/or grant security for the acquisition of its own shares or the shares of its holding entity are, in general, void.

2. Belgium

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Eubelius is Belgium's largest independent law firm. Our 22 partners, and close to 100 associates offer unique expertise and experience in all areas of business law.

We offer counselling and representation on Belgian and European Union law. We have privileged working relationships with outstanding independent law firms in many foreign jurisdictions. Our practice has a distinctly international focus. We serve a very diverse client base, ranging from Fortune 500 multinationals to local entrepreneurs, a large number of companies with public law status, and numerous Belgian companies which are part of large international groups.

We represent all Belgian language communities and handle matters in English, Dutch, French and German.

We have offices in Brussels, Kortrijk and Antwerp. With approximately 50 support staff, a proprietary knowledge management system, a well-equipped legal library and a state-of-the-art ICT platform, we combine the advantages of a flexible organization with a size that allows us to deliver services of the highest quality.

QUESTION 1: **Is granting upstream security in principle possible in your jurisdiction?**

☒ Yes

☐ No

QUESTION 2: **Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?**

☒ Corporate benefit
- ☒ Company benefit required
- ☐ Group benefit sufficient

☒ Financial assistance

☐ Capital maintenance

QUESTION 3: **What are the possible legal consequences of violating such rules in your jurisdiction?**

☒ Invalidity of security

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- ☒ Director of company
- ☐ Director of shareholder
- ☐ Shareholder
- ☒ Lender

☒ Criminal Liability of
- ☒ Director of company
- ☐ Director of shareholder
- ☐ Shareholder
- ☒ Lender

QUESTION 4: **Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?**

☒ Yes

Legal consequences: It is market practice in Belgium that upstream security is limited in amount, taking into account the corporate benefit of the security grantor. There are however no legal provisions that clearly set what the limits of such upstream security should be. Although numerous variations are possible, enforcement of the security is customarily limited to the higher of:

(a) any amounts directly drawn by the security grantor (and its subsidiaries) under the credit facility and any amounts on-lent to a Belgian security grantor (or its subsidiaries) that are drawn by affiliates under the credit facility; or

(b) a percentage (high, often >80%) of that Belgian security grantor's net assets (as defined in the Belgian companies code), either at the time the security was granted or at the time of enforcement of the security (whichever amount is the highest).

☐ No

QUESTION 5: **Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?**

☐ Yes ☒ No

QUESTION 6: **Are there any exemptions or whitewash procedures in your jurisdiction?**

☒ Yes ☐ No

QUESTION 7: **Are there any differences depending on the legal entity of the security provider in your jurisdiction?**

☒ Yes ☐ No

QUESTION 8: **Comments/Specifics**

(1) Upstream security must comply with general principles of Belgian company and insolvency law, such as (without limitation):
(a) corporate purpose: any (upstream) security in violation of the corporate purposes (as stated in the relevant entity's articles of association), could lead to unenforceability and director's liability; and
(b) corporate interest: each Belgian subsidiary must derive a benefit from the transaction for which it is granting an upstream security; while the interest of the group as a whole may be taken into account, any security must nevertheless be proportionate to the financial means of the subsidiary and to the benefit it derives (over time) from the transaction; a violation thereof could lead to nullity or unenforceability.

(2) Further, an upstream security could also be challenged on the basis of general principles of law such as failure to perform in good faith, abuse of majority, abuse of power/rights, breach of authority, etc.

(3) In certain circumstances, there is a possibility of criminal liability (that could apply both to the subsidiary and to the lenders), such as in case of financial assistance that does not comply with the provisions of the Belgian companies code (in particular that does not comply with the whitewash procedures as set out in Directive 2006/68/EC). Furthermore, there is an additional risk of criminal liability on the basis of provisions concerning the ‚abuse of company goods', if the ultimate economic beneficiary of the subsidiary also has an actual leadership position at the subsidiary level (e.g. by being a director or a shadow director).

3. Bulgaria

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Established in 1990, Boyanov & Co has earned wide international and local recognition as the preferred law firm for many businesses expanding their portfolios in South East Europe. The firm has advised on most of Bulgaria's landmark transactions in the last two and a half decades. Its client portfolio includes local and international companies, governments and institutions.

Since its establishment, the firm has always been ranked as a market leader for the excellence of its services, drawing on years of experience, in-depth knowledge of local and international law, and the brilliance of its professionals.

The firm provides a broad range of services with particular strength in M&A, banking and finance, energy and natural resources, TMT, intellectual property, competition, real estate, restructuring, and dispute resolution.
The firm provides services in Bulgarian, English, German, French, Spanish and Russian.

Boyanov & Co is a founding member of The South East Europe Legal Group (SEE Legal), a unique integrated organisation of the leading national law firms across 12 countries in South-East Europe, providing a one-stop-shop for the best legal advice in the region. Because of its large client base and long track record of advising in major transactions in Bulgaria, the firm has been indicated as the local leader by many international legal directories such as the Chambers Global, European Legal 500, IFLR 1000, Global Counsel 3000, etc. The firm has more than 30 lawyers some of whom work as scholars in leading universities, and contribute regularly to Bulgarian and international publications in all areas of local, European and international law.

The firm's unwavering support for business has made it a valued member of organizations such as Confederation of Employers and Industrialists in Bulgaria, the American Chamber of Commerce, the German-Bulgarian Chamber of Commerce, the British Bulgarian Business Association, the Bulgarian Chamber of Commerce and Industry, etc. Its partners are active in the International Bar Association, American Bar Association, INTA, Lord Slynn European Law Foundation and others.

QUESTION 1: **Is granting upstream security in principle possible in your jurisdiction?**

☒ Yes

☐ No

QUESTION 2: **Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?**

☐ Corporate benefit

☐ Company benefit required
☐ Group benefit sufficient

☒ Financial assistance

☒ Capital maintenance

QUESTION 3: **What are the possible legal consequences of violating such rules in your jurisdiction?**

☒ Invalidity of security

☒ Civil liability of

☒ Director of company
☐ Director of shareholder
☐ Shareholder
☐ Lender

☐ Criminal Liability of

☐ Director of company
☐ Director of shareholder
☐ Shareholder
☐ Lender

QUESTION 4: **Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?**

☒ Yes

Legal consequences: The enforcement of the security is limited to the amount of any free reserves and distributable profits of the security grantor.

☐ No

QUESTION 5: **Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?**

☒ Yes ☐ No

QUESTION 6: **Are there any exemptions or whitewash procedures in your jurisdiction?**

☒ Yes ☐ No

QUESTION 7: **Are there any differences depending on the legal entity of the security provider in your jurisdiction?**

☒ Yes ☐ No

QUESTION 8: **Comments/Specifics**

(1) Bulgarian law only provides explicit rules regarding financial assistance for joint-stock companies (акционерни дружества or AD), whereas no explicit rules exist for limited liability companies (дружества с ограничена отговорност or OOD).

(2) Security granted by an AD for the purpose of acquisition of its own shares or the shares of its holding company is void. There are minor exceptions in favour of credit institutions/financial services institutions, employees and corporate groups contractually formed under the respective provisions of the Bulgarian commerce act.

(3) The directors and managers of a Bulgarian company are subject to a general obligation to act in the interest of that company in relation to all their actions on behalf of the company, including when granting security for the benefit of third parties.

(4) For certain transactions of ADs, including guarantee and security transactions (other than in case of prohibited financial assistance), of a value exceeding half of the balance sheet value of assets, there is a requirement for prior authorization by the general meeting of the shareholders (in a one-tier management system) or the supervisory board (in a two-tier management system).

(5) In case the authorization competence of the general meeting of the shareholders is delegated in the statutes of the company to the board of directors (in a one-tier management system), then the resolution is made by it.

(6) The absence of authorization however does not render the transaction itself invalid but involves the liability of the person who exceeded its powers to the company.

(7) Finally, in case of publicly traded ADs, there are requirements for corporate authorization by the general meeting of shareholders in case of interested parties' transactions exceeding certain (quite low) thresholds. The shareholders interested in such transactions are prohibited from voting at the general meeting authorizing the transactions. Transactions concluded without such a prior authorization (if required) are null and void.

4. Croatia

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Žurić i Partneri was founded in 1992 with the aim of creating a law practice with a genuine international profile to provide legal support in Croatia to both foreign and domestic clients by upholding the highest standards of legal profession.

We are devoted to values which we trust are essential for a modern law practice. Competence, ethics, dedication to solutions, understanding clients' commercial circumstances as well as reliability and efficiency are the fundamental principles of our conduct within the legal profession.

The firm has gained a reputation particularly in the field of business and commercial law. Consequently, most of our clients are domestic and foreign companies, banks, financial institutions and public agencies. For many years our firm as well as some of the firm's partners and attorneys have been ranked by the most prominent international legal directories among the leading Croatian law firms and attorneys. Žurić i Partneri is the exclusive Croatian member of the Energy Law Group, a European association of independent law firms with expertise in the energy and natural resources sectors.

The long-time practical experience in a number of legal issues and cases from all areas of law enables us to devote equal attention to both the most sophisticated legal transactions and to regular day-to-day legal support to our clients. All our lawyers have an excellent command of the English language which is used daily and we also frequently communicate in other languages, such as German, Italian, Slovenian and French.

Žurić i Partneri regularly cooperates with some of the most prominent international law firms. At the same time we also recognise our clients' needs for regional presence and to this end we have developed an efficient network of correspondent law firms throughout the countries of the region.

QUESTION 1: **Is granting upstream security in principle possible in your jurisdiction?**

☒ Yes

☐ No

QUESTION 2: **Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?**

☒ Corporate benefit

☒ Company benefit required
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☒ Capital maintenance

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☐ Shareholder
☐ Lender

QUESTION 4: **Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?**

☐ Yes

Legal consequences: N/a

☒ No

QUESTION 5: **Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?**

☒ Yes

☐ No

QUESTION 6: Are there any exemptions or whitewash procedures in your jurisdiction?

☐ Yes

☒ No

QUESTION 7: Are there any differences depending on the legal entity of the security provider in your jurisdiction?

☒ Yes

☐ No

QUESTION 8: Comments/Specifics

None.

5. Cyprus

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Keane Vgenopoulou & Associates LLC is a newly established firm (2012) and provides comprehensive legal services of the highest quality combined with keen understanding of the modern business environment. The firm applies a cross-disciplinary approach combining, legal, regulatory as well as tax considerations.

We are a full service law firm but have particular experience and expertise in the areas of financial services, banking, capital markets, corporate, M&A, EU law, antitrust (EU and Cyprus), corporate finance, asset and project finance, intellectual property, energy, taxation and public procurement. The firm has extensive experience in finance transactions of all types, asset finance, project finance and acquisition finance.

With over thirty years of collective experience the firm stands for technical excellence, quality of service and integrity.

QUESTION 1: Is granting upstream security in principle possible in your jurisdiction?

☒ Yes

☐ No

QUESTION 2: Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?

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- ☐ Company benefit required
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QUESTION 3: What are the possible legal consequences of violating such rules in your jurisdiction?

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- ☐ Shareholder
- ☐ Lender

☐ Criminal Liability of
- ☐ Director of company
- ☐ Director of shareholder
- ☐ Shareholder
- ☐ Lender

QUESTION 4: Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?

☒ Yes

Legal consequences: In circumstances where use is made of the limitation language the effect is to limit the amount recoverable upon enforcement of security to a particular monetary value. If the asset charged is liquidated for a value higher than the limit then the balance must be accounted for to the security provider.

☐ No

QUESTION 5: Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?

☐ Yes ☒ No

QUESTION 6: Are there any exemptions or whitewash procedures in your jurisdiction?

☒ Yes ☐ No

QUESTION 7: Are there any differences depending on the legal entity of the security provider in your jurisdiction?

☐ Yes ☒ No

QUESTION 8: Comments/Specifics

In the context of upstream security under Cyprus law, the main issues to be considered are:

(1) Financial Assistance: The basic prohibition on the giving of financial assistance (e.g. guarantee, loan, security etc.) remains in place under Cyprus law, however in the case of private companies this can be whitewashed through a resolution of the shareholders. As regards public companies, the prohibition is absolute.

(2) Corporate Benefit: The directors of a Cyprus company are under a duty to act in the best interests of the company and are thus bound to consider if the granting of upstream security is justified. Usually as this nature of security is to give benefit to a group company, this is sufficient to amount to corporate benefit.

(3) Fraudulent Preference: Section 301 of the Cyprian companies law (cap.113) provides that a transaction entered into to give a preference (i.e. being put in a better position than other creditors) is void. To constitute a preference the transaction (with respect to any of the assets of the company) must have been entered into within six months prior to the company going into liquidation with the dominant intention of preferring one creditor over another at a time when the company is insolvent. The central element is the dominant intention to prefer.

6. Czech Republic

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Havel, Holásek & Partners with offices in Prague, Brno, Ostrava, and Bratislava, has a team of more than 180 lawyers, several dozen law faculty students and more than 500 employees, including 130 employees from the affiliated collection agency Cash Collectors and is the largest law firm in the Czech Republic and Slovakia.

During its 14 years on the market, Havel, Holásek & Partners has also become the largest independent law firm in central Europe. Most of our partners and many of our senior lawyers have gained experience in top international law firms, such as Linklaters, Freshfields, Allen & Overy, Clifford Chance, Hogan Lovells, Norton Rose Fulbright, Dentons (Salans), DLA Piper, Weil, White & Case, Baker & McKenzie, Squire Patton Boggs, Gleiss Lutz, Noerr, Schöenherr, Wolf Theiss, Gide Loyrette Nouel, or leading Czech and Slovak law firms as well as in top public sector positions such as government ministries, the competition office and the central bank.

QUESTION 1: **Is granting upstream security in principle possible in your jurisdiction?**

☒ Yes

☐ No

QUESTION 2: **Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?**

☒ Corporate benefit

☐ Company benefit required
☒ Group benefit sufficient

☒ Financial assistance

☒ Capital maintenance

QUESTION 3: **What are the possible legal consequences of violating such rules in your jurisdiction?**

☐ Invalidity of security

☒ Civil liability of

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☒ Shareholder
☒ Lender

☒ Criminal Liability of

☒ Director of company
☐ Director of shareholder
☐ Shareholder
☐ Lender

QUESTION 4: **Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?**

☒ Yes

Legal consequences: Limitation language, preferably limiting upstream security to an amount equal (or less) the amount of net assets of the security provider, avoids the possibility of the security being disputed due to (a) causing the security provider to be insolvent (ii) critical omission/ criminal act on the part of the director(s).

☐ No

QUESTION 5: **Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?**

☒ Yes ☐ No

QUESTION 6: **Are there any exemptions or whitewash procedures in your jurisdiction?**

☒ Yes ☐ No

QUESTION 7: **Are there any differences depending on the legal entity of the security provider in your jurisdiction?**

☒ Yes ☐ No

QUESTION 8: **Comments/Specifics**

(1) Other measures relating to provision of upstream security (question 5): Depending upon the corporate documents of the security provider, corporate approvals by the shareholder/general meeting of the company and by the decision of the board of directors of the company are generally recommended.

(2) Exceptions to whitewash procedures (question 6): Whitewash procedure is not required or is limited if (a) the financial assistance is provided by financial institutions within the usual limits of their main activity, and (b) is provided for the purpose of acquisition of shares by employees of the company providing the financial assistance or employees of a company controlled by such company.

(3) Differences in the procedure depending on the type of legal entity providing security (question Whitewash procedure in case of a limited liability company requires (a) a written report prepared by the executive director justifying the requirement for the provision of the financial assistance, specifying benefits and risks resulting from such provision for the company and the conditions under which the financial assistance will be provided, and reasoning why the financial assistance is not in conflict with the company's interests, and (b) an approval by the general meeting.

In case of a joint stock company, provision of financial assistance is subject to (a) explicit permission under the company's articles of association, (b) approval by the board of directors and provision of the report as with the limited liability company, and (c) approval by the general meeting.

The provision of financial assistance cannot result in substantial reduction of the company's assets; the company needs to establish a reserve fund in the amount of the provided financial assistance. In certain cases the report by the board of directors needs to be independently audited. Financial assistance always needs to be provided on arm's length terms. Other requirements may be set in the company's articles of association.

Other comments/considerations: Any security agreement may become voidable under Czech civil law if it deliberately and fraudulently impairs satisfaction of an enforceable claim of the company's creditor. Any security may be voidable under Czech insolvency law under certain specific conditions if the company subsequently becomes insolvent. Directors of a company may be potentially held criminally liable e.g. for breach of trust in asset management (Porušení povinností při správě cizího majetku), taking actions leading into bankruptcy (způsobení úpadku) or unjust preference of creditors (zvýhodnění věřitele). For these particular crimes legal entities are not criminally liable. Members of statutory bodies of a company are obliged to compensate damages under breach of duty of care, to inform the general meeting of the company when the member, related person or a legal entity influenced or controlled by such member intend to enter into a substantial agreement with the company.

7. Denmark

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Rønne & Lundgren is one of Denmark's leading law firms. We employ approximately 110 people, of which 65 are attorneys.

We aim to meet the market's demand for accessibility, speed and business understanding that characterises a modern law firm.

Rønne & Lundgren assists Danish and foreign companies, organisations and public institutions within our Practice Areas.

It is important to us that our advisory is focused on solutions. The law and our understanding of the client's situation are our tools to reach the right solution on the issues we are working with.

We work according to a key account principle. It means that the client is linked up to one partner who is responsible that the client's assignments are solved by the attorney(s) that have the right competences.

QUESTION 1: Is granting upstream security in principle possible in your jurisdiction?

☒ Yes

☐ No

QUESTION 2: Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?

☒ Corporate benefit

☒ Company benefit required
☐ Group benefit sufficient

☒ Financial assistance

☐ Capital maintenance

QUESTION 3: What are the possible legal consequences of violating such rules in your jurisdiction?

☒ Invalidity of security

☒ Civil liability of

☒ Director of company
☐ Director of shareholder
☒ Shareholder
☐ Lender

☒ Criminal Liability of

☒ Director of company
☐ Director of shareholder
☐ Shareholder
☐ Lender

QUESTION 4: Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?

☒ Yes

Legal consequences: The purpose of including limitation language is (a) to protect the directors against liability, and (b) to limit upstream security provided (to usually the subsidiary's equity).

☐ No

QUESTION 5: **Are there any other measures required in your jurisdiction to avoid/minimize risks related with up-stream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?**

☐ Yes ☒ No

QUESTION 6: **Are there any exemptions or whitewash procedures in your jurisdiction?**

☒ Yes ☐ No

QUESTION 7: **Are there any differences depending on the legal entity of the security provider in your jurisdiction?**

☒ Yes ☐ No

QUESTION 8: **Comments/Specifics**

The Danish Companies Act includes provisions whereby financial assistance under certain conditions may be legal and valid.

8. Estonia

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SORAINEN is a leading regional business law firm with fully integrated offices in Estonia, Latvia, Lithuania and Belarus. Since its establishment in 1995, SORAINEN has been advising international and local organisations on all business law and tax issues involving the Baltic States and Belarus.

Uniquely, the firm boasts integrated regional teams covering all practice areas, a unified practice and quality management system and shared know-how base. Full integration and combining the resources of all four offices enables SORAINEN to provide seamless service to clients in local and cross-border assignments. For these reasons, SORAINEN is usually the first choice not only for complex domestic transactions, but especially for regional projects and for clients with operations in several Baltic States or Belarus.

QUESTION 1: **Is granting upstream security in principle possible in your jurisdiction?**

☒ Yes

☐ No

QUESTION 2: **Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?**

☒ Corporate benefit

☐ Company benefit required
☒ Group benefit sufficient

☒ Financial assistance

☒ Capital maintenance

QUESTION 3: **What are the possible legal consequences of violating such rules in your jurisdiction?**

☐ Invalidity of security

☒ Civil liability of

☒ Director of company
☐ Director of shareholder
☒ Shareholder
☐ Lender

☒ Criminal Liability of

☒ Director of company
☐ Director of shareholder
☐ Shareholder
☐ Lender

QUESTION 4: **Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?**

☐ Yes

Legal consequences: N/a.

☒ No

QUESTION 5: **Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?**

☒ Yes

☐ No

QUESTION 6: Are there any exemptions or whitewash procedures in your jurisdiction?

☐ Yes ☒ No

QUESTION 7: Are there any differences depending on the legal entity of the security provider in your jurisdiction?

☐ Yes ☒ No

QUESTION 8: Comments/Specifics

N/a.

9. Finland

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Krogerus is one of the largest corporate law firms in Finland. Their practice covers a broad spectrum of transactional, dispute resolution and regulatory matters. The firm has a particularly strong focus in the energy, finance, food and beverage, healthcare, real estate, technology and telecommunications sectors. Clients include leading public and private companies, multinationals, banks and other financial institutions as well as private equity investors. They also advise governments, governmental authorities and international organizations. Krogerus is regularly retained in some of the most challenging and high-profile assignments in the Finnish market.

QUESTION 1: Is granting upstream security in principle possible in your jurisdiction?

☒ Yes

☐ No

QUESTION 2: Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?

☒ Corporate benefit
- ☒ Company benefit required
- ☐ Group benefit sufficient

☒ Financial assistance

☐ Capital maintenance

QUESTION 3: What are the possible legal consequences of violating such rules in your jurisdiction?

☒ Invalidity of security

☒ Civil liability of
- ☒ Director of company
- ☐ Director of shareholder
- ☐ Shareholder
- ☐ Lender

☒ Criminal Liability of
- ☒ Director of company
- ☐ Director of shareholder
- ☐ Shareholder
- ☐ Lender

QUESTION 4: Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?

☒ Yes

Legal consequences: The enforcement of security is limited to the extent the company receives corporate benefit from the arrangement or to the extent it does not breach the financial assistance prohibition, as applicable.

☐ No

QUESTION 5: Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?

☒ Yes ☐ No

QUESTION 6: Are there any exemptions or whitewash procedures in your jurisdiction?

☐ Yes ☒ No

QUESTION 7: Are there any differences depending on the legal entity of the security provider in your jurisdiction?

☒ Yes ☐ No

QUESTION 8: Comments/Specifics

(1) Finnish law only provides explicit rules regarding financial assistance and corporate benefit for limited liability companies (osakeyhtiö, Oy).

(2) Security or guarantees granted by a limited liability company for the purpose of financing the acquisition of its own shares or the shares of its parent company are void.

(3) Lender liability will only apply in exceptional cases.

(4) Shareholder resolutions are often obtained to minimize potential risk as granting upstream security is not customarily within the line of business of a limited liability company.

10. France

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Acknowledged among the leading business law firms in France, De Pardieu Brocas Maffei numbers over 120 lawyers, including 31 partners; its practice covers banking, finance & capital markets, mergers & acquisitions/private equity, restructuring & insolvency, litigation, real estate & real estate finance, competition law, tax law, public law and employment law.

De Pardieu Brocas Maffei, established in 1993, is widely recognized for its strong international practice, founded on the skills of its teams and their expertise in cross-border transactions.

QUESTION 1: Is granting upstream security in principle possible in your jurisdiction?

☒ Yes

☐ No

QUESTION 2: Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?

☒ Corporate benefit
- ☒ Company benefit required
- ☐ Group benefit sufficient

☒ Financial assistance

☒ Capital maintenance

QUESTION 3: What are the possible legal consequences of violating such rules in your jurisdiction?

☒ Invalidity of security

☒ Civil liability of
- ☒ Director of company
- ☐ Director of shareholder
- ☒ Shareholder
- ☒ Lender

☒ Criminal Liability of
- ☒ Director of company
- ☐ Director of shareholder
- ☐ Shareholder
- ☒ Lender

QUESTION 4: Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?

☒ Yes

Legal consequences: In essence (a) the security is limited to an amount equal to the amount which is on-lent by the parent company and (b) financial assistance is prohibited.

☐ No

QUESTION 5: **Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?**

☒ Yes ☐ No

QUESTION 6: **Are there any exemptions or whitewash procedures in your jurisdiction?**

☐ Yes ☒ No

QUESTION 7: **Are there any differences depending on the legal entity of the security provider in your jurisdiction?**

☒ Yes ☐ No

QUESTION 8: **Comments/Specifics**

(1) Under French law (civil and commercial rules), financial assistance rules are only applicable to share companies (sociétés par actions), i.e. sociétés anonymes, sociétés par actions simplifiées and sociétés en commandite par actions.

(2) The application of the above rules is always influenced by the factual circumstances of each transaction and French courts have been delivering judgments in such respect on a case by case basis.

11. Germany

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P+P Pöllath + Partners is an internationally operating German law firm, with more than 100 lawyers and tax advisors in Berlin, Frankfurt and Munich. The firm provides informed expertise and innovative solutions, as well as impartial legal and tax advice in the following practice groups: mergers & acquisitions, private equity, distressed M&A and restructuring, corporate and capital market law, real estate transactions, venture capital, private funds, supervisory law, tax law, sucession and estates, process management and arbitration, anti-trust law.

P+P professionals concentrate on very few areas and are therefore at the top of their fields of expertise. Many are ranked among the top lawyers and tax advisors in professional listings of national and international surveys (Rankings). P+P advises its clients and also renders second opinions and advice to other lawyers and tax advisors. P+P professionals publish and teach extensively for business, professional and academic audiences (Publications and Conferences).

P+P provides services only in specialized areas of expertise, but here we provide full service. This includes 24 hours/ 7 days a week office support, assistance in organizing a family office, providing book- or record-keeping services, running a “beauty contest” for a client, finding or out-placing executives, etc. According to clients' preferences, we also function as a one-stop shop for any transaction on which we advise by organizing (and in-sourcing) any state-of-the-art professional advice that we can not offer ourselves in any relevant jurisdiction.

QUESTION 1: **Is granting upstream security in principle possible in your jurisdiction?**

☒ Yes

☐ No

QUESTION 2: **Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?**

☐ Corporate benefit

☐ Company benefit required
☐ Group benefit sufficient

☒ Financial assistance

☒ Capital maintenance

QUESTION 3: **What are the possible legal consequences of violating such rules in your jurisdiction?**

☐ Invalidity of security

☒ Civil liability of

☒ Director of company
☒ Director of shareholder
☒ Shareholder
☒ Lender

☒ Criminal Liability of

☒ Director of company
☒ Director of shareholder
☒ Shareholder
☒ Lender

QUESTION 4: **Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?**

☒ Yes

Legal consequences: The enforcement of the security is limited to the amount of any distributable reserves of the security provider.

☐ No

QUESTION 5: **Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?**

☐ Yes

☒ No

QUESTION 6: Are there any exemptions or whitewash procedures in your jurisdiction?

☒ Yes ☐ No

QUESTION 7: Are there any differences depending on the legal entity of the security provider in your jurisdiction?

☒ Yes ☐ No

QUESTION 8: Comments/Specifics

(1) It is controversial whether limitation language is required if a domination agreement or a profit and loss transfer agreement is in place between the security grantor and the shareholder for whose benefit the upstream security is given.

(2) It is also controversial whether the statutory rules dealing with the duties of the directors to maintain the liquidity of the company require limitation language which restricts the enforcement of the upstream security beyond the distributable reserves.

(3) German law only provides explicit rules regarding financial assistance for stock corporations (Aktiengesellschaften or AG), whereas no explicit rules exist for limited liability companies (Gesellschaften mit beschränkter Haftung or GmbH). A stock corporation may only provide upstream security if there is a domination or a profit and loss transfer agreement with the shareholder for whose benefit the security is given in place and the enforcement is not permitted if the enforcement would cause an annual deficit of the stock corporation and the shareholder is not able to compensate that deficit in full.

(4) It is unclear whether the statutory limitation on asset stripping (Section 292 of the German Capital Investment Act (Kapitalanlagegesetzbuch or KAGB)), if applicable to the AIFM in question, requires further limitation language which restricts the enforcement of the upstream security in accordance with the asset stripping limitation.

(5) A liability of the lender will only apply in exceptional cases.

12. Greece

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Zepos & Yannopoulos is an independent Greek law firm with a unique international orientation. The vast majority of the clients of the firm are foreign based. Zepos & Yannopoulos is the Greek member of numerous non-exclusive associations of leading law firms. For example, Zepos & Yannopoulos is the exclusive member in Greece for Lex Mundi – the world's leading network of independent law firms with in-depth experience in 100+ countries worldwide. Zepos & Yannopoulos is the Greek member firm for Taxand.

QUESTION 1: **Is granting upstream security in principle possible in your jurisdiction?**

☒ Yes

☐ No

QUESTION 2: **Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?**

☐ Corporate benefit

☐ Company benefit required
☐ Group benefit sufficient

☒ Financial assistance

☒ Capital maintenance

QUESTION 3: **What are the possible legal consequences of violating such rules in your jurisdiction?**

☒ Invalidity of security

☒ Civil liability of

☒ Director of company
☐ Director of shareholder
☐ Shareholder
☐ Lender

☒ Criminal Liability of

☒ Director of company
☒ Director of shareholder
☒ Shareholder
☒ Lender

QUESTION 4: **Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?**

☐ Yes

☒ No

Legal consequences: N/a.

QUESTION 5: **Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?**

☒ Yes

☐ No

QUESTION 6: Are there any exemptions or whitewash procedures in your jurisdiction?

☒ Yes ☐ No

QUESTION 7: Are there any differences depending on the legal entity of the security provider in your jurisdiction?

☒ Yes ☐ No

QUESTION 8: Comments/Specifics

(1) According to Art. 23a of Law 2190/1920 (financial assistance rules) as currently in force, a Greek corporation is prohibited from granting loans or concluding any form of agreement accommodating the provision of credit to certain persons, including, but not limited to, its controlling shareholders or other legal entities which are controlled by such shareholder(s) (e.g. sister companies). Same prohibition is applicable for guarantees, except if certain restrictive conditions apply.

(2) A legal entity is considered as exercising "control" on another entity in case it falls under one of the items of Art. 32 of Law 4308/2014 (amending Art 42e para. 5 of Law 2190/1920), which describes which entities are "affiliated". Furthermore, two legal entities may be considered as "affiliated" in case they are subsidiaries or subsidiaries of subsidiaries of the same controlling entity, even if one subsidiary does not participate directly in the share capital of the other subsidiary.

(3) This means that upstream loans or guarantees (i.e. from a Greek subsidiary to its parent) as well as loans or guarantees between "affiliated" entities (i.e. from a Greek subsidiary to another subsidiary of the group) are prohibited (as explained above guarantees may be allowed only under very restrictive conditions). It has been accepted by major Greek scholars that such restriction aims to prohibit the ultimate controlling shareholder from serving its own interests by transferring money from one subsidiary to another, and thus constituting one of its subsidiaries as a simple "shell", to the detriment of minority shareholders and creditors.

(4) Should the movement of cash be actually a loan or guarantee between sister companies or between the Greek entity and its parent, it will be against Greek financial assistance rules.

(5) On a separate note, the prohibition of Art. 23a on loans and guarantees means that any such loan or guarantee is considered null and void. Such invalidity may be invoked by the company itself, its shareholders, its creditors, as well as any third party having a lawful interest. Also, the violation of the prohibitions of Art. 23a may result in criminal sanctions against the violating persons as well as the persons who dealt with it (e.g. members of the board of directors).

13. Hungary

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Chambers and Partners and European Legal Experts.

Forgó, Damjanovic & Partners is one of the leading independent commercial law firms in Hungary. The firm and its lawyers are highly rated by such independent international legal directories and publications as The European Legal 500, Chambers and Partners and European Legal Experts.

All lawyers of Forgó, Damjanovic are proficient in English.

Whilst Forgó, Damjanovic provides its business clients with all the benefits of a full service law firm, it has an especially strong track record in the fields of M&A and Private Equity transactions, Banking and Financing, Employment Law and Dispute Resolution.

The clients of Forgó, Damjanovic includes foreign corporations, the Hungarian businesses of multinational companies and medium to large Hungarian businesses. Forgó, Damjanovic is typically instructed in complex transactions and legal disputes, cases of a cross-border nature, those demanding high quality English language documentation and/or involving clients who require an international level of service.

Forgó, Damjanovic offers specialist expertise for banking and capital markets services.

Forgó, Damjanovic & Partners has represented numerous banks and corporate clients in banking and capital markets transactions, and provided financial enterprises and investment funds with legal advice on licensing and regulatory matters. The firm has also conducted legal due diligence on financial enterprises and acted in banking litigation cases. Forgó, Damjanovic regularly acts as local counsel, in conjunction with foreign legal advisors, in cross-border transactions and on transactions referred by international law firms.

QUESTION 1: **Is granting upstream security in principle possible in your jurisdiction?**

☒ Yes

☐ No

QUESTION 2: **Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?**

☒ Corporate benefit

☒ Company benefit required
☐ Group benefit sufficient

☒ Financial assistance

☒ Capital maintenance

QUESTION 3: **What are the possible legal consequences of violating such rules in your jurisdiction?**

☐ Invalidity of security

☒ Civil liability of

☒ Director of company
☒ Director of shareholder
☐ Shareholder
☒ Lender

☒ Criminal Liability of

☒ Director of company
☒ Director of shareholder
☐ Shareholder
☒ Lender

QUESTION 4: **Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?**

☐ Yes

Legal consequences: N/a.

☒ No

QUESTION 5: **Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?**

☒ Yes

☐ No

QUESTION 6: Are there any exemptions or whitewash procedures in your jurisdiction?

☒ Yes ☐ No

QUESTION 7: Are there any differences depending on the legal entity of the security provider in your jurisdiction?

☒ Yes ☐ No

QUESTION 8: Comments/Specifics

(1) Hungarian law only provides explicit rules regarding financial assistance for open stock corporations (nyílvánosan működő részvénytársaság, Nyrt), whereas no explicit rules exist for closed stock corporations (zártkörűen működő részvénytársaság, Zrt), limited liability companies (korlátolt felelősségű társaság, Kft), and other legal persons.

(2) Open stock corporations shall be allowed to provide financial assistance to third parties for the acquisition of shares issued by the open stock corporation only under market conditions, from the assets available for the payment of dividends, provided that the general meeting approved such decision by at least a three-quarters majority upon recommendation by the management board. The recommendation shall contain the reasons for the financial assistance, the risks involved, the conditions, the price of the shares and the advantages the company is likely to gain by providing such financial assistance. The management board shall submit the recommendation to the court of registry.

(3) The executive officers of a Hungarian company are subject to a general obligation to act in the interest of that company in relation to all their actions on behalf of the company, including when granting security for the benefit of third parties.

(4) The lenders may not accept as collateral its own shares or the shares issued by its subsidiary or holding company. The lender may not take any risk for the acquisition of its own shares or the shares of its subsidiary or holding company.

14. Ireland

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Leading law firm William Fry has over 310 legal and tax professionals and over 430 staff. Our client-focused service combines technical excellence with commercial awareness and a practical, constructive approach to business issues. We advise leading domestic and international corporations, financial institutions and government organisations. We regularly act on complex, multi-jurisdictional transactions and commercial disputes. Strong client relationships and high quality advice are the hallmarks of our business.

We are ranked by international directories, clients and market commentators alike as being a leader in our main areas of work: Corporate & M&A, Banking & Finance, Litigation & Dispute Resolution, Asset Management & Investment Funds, Real Estate, Insurance, Tax, Projects & Construction, Employment & Benefits and Technology.

Our head office is in Dublin. We have offices in London, New York and Silicon Valley and a global law firm network to service our clients at home and abroad. Our capability is enhanced by our alliance with Tughans, Northern Ireland's largest law firm, through which we provide an all island solution.

The Firm's priorities are focused on the need to achieve results for clients. Continued investment in people, technology and research maintain the Firm's ability to provide practical and prompt solutions, while devoting exacting attention to detail.

QUESTION 1: **Is granting upstream security in principle possible in your jurisdiction?**

☒ Yes

☐ No

QUESTION 2: **Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?**

☒ Corporate benefit

☐ Company benefit required
☒ Group benefit sufficient

☒ Financial assistance

☒ Capital maintenance

QUESTION 3: **What are the possible legal consequences of violating such rules in your jurisdiction?**

☒ Invalidity of security

☒ Civil liability of

☒ Director of company
☐ Director of shareholder
☐ Shareholder
☐ Lender

☒ Criminal Liability of

☒ Director of company
☐ Director of shareholder
☐ Shareholder
☐ Lender

QUESTION 4: **Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?**

☒ Yes

Legal consequences: The upstream security is expressed not to be given in any respect that would contravene Irish financial assistance rules. The purpose is to prevent the upstream security from being void in all respects.

☐ No

QUESTION 5: **Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?**

☐ Yes ☒ No

QUESTION 6: **Are there any exemptions or whitewash procedures in your jurisdiction?**

☒ Yes ☐ No

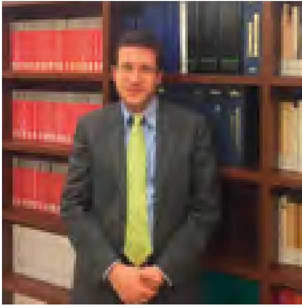
QUESTION 7: **Are there any differences depending on the legal entity of the security provider in your jurisdiction?**

☒ Yes ☐ No

QUESTION 8: **Comments/Specifics**

Subject to certain exemptions, there is a general prohibition on Irish companies providing upstream security for the purpose of the subscription or acquisition of the shares in their direct or indirect parent companies. A whitewash procedure is available to Irish companies (other than public limited companies) providing upstream security for the subscription or acquisition of shares in a direct or indirect parent company (other than an acquisition of shares in a parent public limited company).

15. Italy



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NCTM is one of the leading law firms in Italy. Our strengths are more than 250 professionals including the 59 active and dynamic equity partners who drive the firm, offices in Milan, Rome, Verona, London, Brussels and Shanghai, a vocation for innovation and independence and a great client base.

We deliver integrated legal services to enterprises and financial institutions through multidisciplinary teams reflecting client needs. We believe the growth in the number and needs of our clients is testimony to the success of our strengths and our culture.

QUESTION 1: **Is granting upstream security in principle possible in your jurisdiction?**

☒ Yes

☐ No

QUESTION 2: **Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?**

☒ Corporate benefit
- ☒ Company benefit required
- ☐ Group benefit sufficient

☒ Financial assistance

☒ Capital maintenance

QUESTION 3: **What are the possible legal consequences of violating such rules in your jurisdiction?**

☒ Invalidity of security

☒ Civil liability of
- ☒ Director of company
- ☒ Director of shareholder
- ☒ Shareholder
- ☒ Lender

☒ Criminal Liability of
- ☒ Director of company
- ☐ Director of shareholder
- ☐ Shareholder
- ☐ Lender

QUESTION 4: **Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?**

☒ Yes

Legal consequences: Limitation language provisions, within a specific asset security, aim to fix the maximum amount secured in such a way that permits to the security provider to preserve its share capital if the security is enforced. Therefore, security is granted also on the basis of a prior evaluation of the admittable level of maximum secured amount and the possible adverse consequences in respect of the capital maintenance rules.

☐ No

QUESTION 5: **Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?**

☒ Yes ☐ No

QUESTION 6: **Are there any exemptions or whitewash procedures in your jurisdiction?**

☒ Yes ☐ No

QUESTION 7: **Are there any differences depending on the legal entity of the security provider in your jurisdiction?**

☒ Yes ☐ No

QUESTION 8: **Comments/Specifics**

(1) With specific regard to corporate benefit, financial assistance and capital maintenance, it is worth noting that such matters have been fully developed among time by corporate law and also by case law.

(2) In particular, art. 2358 (in respect of "società per azioni" or "S.p.a.") and art. 2474 (in respect of "società a responsabilità limitata" or "S.r.l.") of the Italian civil code, inter alia, expressly prevent a company from providing, directly or indirectly, guarantees or asset securities, i.e. upstream securities, for the acquisition or the subscription of their own shares.

(3) If the upstream security is granted out of the above scope, no express Italian law provision prevents a joint stock company or a limited liability company to grant upstream security, notwithstanding, the general rules below will apply.

(4) Indeed, from one hand, directors shall act – at any time – in their own company's interest ("duty of care"); from the other hand, within intercompany transactions, the board of directors of a subsidiary, of the parent and of other members of the group, may, in taking decisions which affect their company, have also regard to the overall interests of the group of companies to which their company belongs, as in the light of the interpretation and application of group company law provisions (art.s 2497 and ff. of the Italian civil code) as interpreted by Italian courts.

(5) This faculty is not unlimited, because a reasonable and fair balance (offsetting benefits) between the interest of the individual companies within a group and the overall interest of the group shall be undertaken, through a kind of assessment that is mainly a financial and economic, rather than legal, and that involves the liabilities assumed by the management bodies of the company.

(6) If such rules are violated, then, the directors of the companies involved may be held liable towards the company's creditors, minority shareholders and the company itself ("indemnifiable entities"); further, also any other person involved or who benefits of the relevant transaction may, under specific circumstances, be deemed jointly liable vis-à-vis such indemnifiable entities.

(7) Also a criminal liability of the directors of the companies involved may be envisaged, under specific circumstances.

(8) With specific regard to the case of acquisition or subscription of their own shares, the violation of financial assistance rules, as they are considered mandatory law provisions under Italian jurisdiction, could lead to the invalidity of the security granted, according to art. 1418 of the Italian Civil Code.

(9) It is possible for directors to partially reduce some of the above risks by asking for a prior approval by the company's shareholders, thus reducing the possibility for the same shareholders who have agreed with the issue of the security to act against the directors.

(10) In order to encourage the acquisition of shares by the company's or group company's employees, an exception to the general prohibition (under art. 2359 of the Italian Civil code) is provided for loans and guarantees granted in favor of such employees of joint stock companies. Moreover, in such case, even if not a proper "whitewash" is designed, joint stock companies (società per azioni) may lawfully grant loans and upstream security by observing a special procedure under the Italian civil code, which involves the shareholders and the board of directors.

(11) Furthermore, specific procedures (regulated by the Italian banking act and related rules) need to be implemented when upstream securities are to be granted within the context of a group company made by banks or financial institutions, whose core business is also to issue guarantees in favor of third parties.

16. Latvia

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SORAINEN is a leading regional business law firm with fully integrated offices in Estonia, Latvia, Lithuania and Belarus. Since its establishment in 1995, SORAINEN has been advising international and local organisations on all business law and tax issues involving the Baltic States and Belarus.

Uniquely, the firm boasts integrated regional teams covering all practice areas, a unified practice and quality management system and shared know-how base. Full integration and combining the resources of all four offices enables SORAINEN to provide seamless service to clients in local and cross-border assignments. For these reasons, SORAINEN is usually the first choice not only for complex domestic transactions, but especially for regional projects and for clients with operations in several Baltic States or Belarus.

QUESTION 1: **Is granting upstream security in principle possible in your jurisdiction?**

☒ Yes

☐ No

QUESTION 2: **Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?**

☒ Corporate benefit

- ☒ Company benefit required
- ☐ Group benefit sufficient

☒ Financial assistance

☐ Capital maintenance

QUESTION 3: **What are the possible legal consequences of violating such rules in your jurisdiction?**

☒ Invalidity of security

☒ Civil liability of

- ☒ Director of company
- ☐ Director of shareholder
- ☐ Shareholder
- ☐ Lender

☐ Criminal Liability of

- ☐ Director of company
- ☐ Director of shareholder
- ☐ Shareholder
- ☐ Lender

QUESTION 4: **Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?**

☒ Yes

Legal consequences: In respect of the corporate benefit the limitation language varies on case-by-case basis. If the management is concerned regarding its liability, then, for example, it can be stated that the provision of security interests is valid as far as this does not trigger any liability of the management board members of the Latvian company and its parent company. There is no limitation language that could be used to mitigate risks related to the financial assistance.

☐ No

QUESTION 5: **Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?**

☒ Yes ☐ No

QUESTION 6: **Are there any exemptions or whitewash procedures in your jurisdiction?**

☐ Yes ☒ No

QUESTION 7: **Are there any differences depending on the legal entity of the security provider in your jurisdiction?**

☒ Yes ☐ No

QUESTION 8: **Comments/Specifics**

(1) Latvian law only provides explicit rules regarding financial assistance for stock corporations (akciju sabiedrības, AS), whereas no explicit rules exist for limited liability companies (sabiedrības ar ierobežotu atbildību, SIA). AS is precluded to finance acquisition of its own shares and such transactions would be void. The law is silent on whether this prohibition would also apply to acquisition of shares of the parent company or holding company. We believe that such financing is not prohibited.

(2) There have been attempts to apply by analogy financial assistance rules applicable to stock corporations to limited liability companies, but, in our opinion, such approach is not correct.

(3) The directors of a Latvian company (both SIA and AS) are subject to a general obligation to act as prudent and diligent manager, i.e., act in the interests or the company, in relation to all their actions on behalf of the company, including when granting security interests for the benefit of third parties.

(4) Payment of remuneration on an arms' length basis decreases a) the risk of transaction for provision of financing or security interests being challenged as a loss making transaction in case of insolvency, and b) risk of qualifying the provision of security as unfounded payment to the shareholder that should be repaid to the company. The shareholders cannot receive payments from the company, if the net value of the own funds of the company after the disbursement shall become less, than the total amount of the equity capital of the company. This applies to both AS and SIA.

(5) In case there is no group of companies agreement concluded between the company and, for example, its shareholder, a dominant company may not use its influence in order to induce a dependent company to conclude a transaction disadvantageous to it, unless a compensation for losses incurred as a result of such transaction are compensated. Failure to compensate the losses caused to the dependent company or failure to grant it the rights of claim by the end of the reporting year may trigger the liability of the dominant company and also the liability of the legal representatives of the dominant company towards dependent company for the losses caused to the dependent company. The dominant company may avoid liability if it proves that a prudent and careful manager of an independent company would anyways enter into such transaction. Furthermore, in the dependency statement the management board of the company should describe the transactions concluded under the influence of a dominant company or concluded in its or other group companies' interests, specifically pointing at the transactions disadvantageous to the dependent company as well as describing whether the company has received a relevant compensation. The regulation is different if an agreement of group of companies is concluded.

(6) Highly theoretically management of the Latvian company could be exposed to criminal liability for making the company insolvent due to provision of upstream security without receiving adequate compensation, however, in practice there have to exceptional circumstance for commencement of criminal proceedings.

17. Lithuania

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Tark Grunte Sutkiene (TGS) is a full-service law firm with a strong team of highly qualified professionals who advise clients on complicated financial transactions, in resolution of disputes and in performing analysis covering both public and private law in Lithuania, Latvia and Estonia. The strategic partner of TGS in Belarus is law firm Vlasova, Mikhel & Partners.

Our mission is to be an innovative and proactive law firm creating added value and advising our clients how to achieve their goals and make their businesses prosper. We deliver innovative solutions facilitating our clients' success in the global market and, most importantly, we give our clients the confidence they need.

Today, the TGS Vilnius office employs over 80 specialists of law, this figure is above 150 across all the three Baltic States.

The professionals working in the law firm are long-standing markets participants in Lithuania, Latvia and Estonia. Both local and international clients rely on their reputation and experience. All three offices participated in many major transactions that were conducted in the Baltic States since restoration of their independence. Our clients are international and Lithuanian companies, banks and other financial institutions, public organisations, such as European Commission, Directorate-General for Justice and Consumers, the European Investment Bank, the European Bank for Reconstruction and Development, Nordea Bank Group, Swedbank Group, SEB Group, Unicredit Bank Group, If P&C Insurance AS, Seesam Insurance AS, ING Bank N.V, The Royal Bank of Scotland N.V.

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TGS is regular Baltic partner of international law firms such as Clifford Chance LLP, Allen & Overy LLP, Hogan Lovells International LLP, Shearman & Sterling, Mannheimer Swartling and Norton Rose LLP.

QUESTION 1: Is granting upstream security in principle possible in your jurisdiction?

☒ Yes

☐ No

QUESTION 2: Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?

☒ Corporate benefit
- ☒ Company benefit required
- ☐ Group benefit sufficient

☒ Financial assistance

☒ Capital maintenance

QUESTION 3: What are the possible legal consequences of violating such rules in your jurisdiction?

☒ Invalidity of security

☒ Civil liability of
- ☒ Director of company
- ☒ Director of shareholder
- ☒ Shareholder
- ☒ Lender

☒ Criminal Liability of
- ☒ Director of company
- ☒ Director of shareholder
- ☒ Shareholder
- ☐ Lender

QUESTION 4: Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?

☒ Yes

Legal consequences: The enforcement of security is limited to the amount provided for in the security agreement or the agreement from which secured contractual obligations stems.

☐ No

QUESTION 5: **Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?**

☒ Yes ☐ No

QUESTION 6: **Are there any exemptions or whitewash procedures in your jurisdiction?**

☐ Yes ☒ No

QUESTION 7: **Are there any differences depending on the legal entity of the security provider in your jurisdiction?**

☒ Yes ☐ No

QUESTION 8: **Comments/Specifics**

(1) The answers are based on private limited liability companies (uždaroji akcinė bendrovė or LLC) and public limited liability companies (akcinė bendrovė or PLC) as these legal forms are typically preferred by foreign investors.

(2) There are a number of exceptions to the general restriction on financial assistance, including for certain acquisitions of shares by employees, employees of holding companies and subsidiaries as well as for financial assistance granted by financial institutions fulfilling additional requirements.

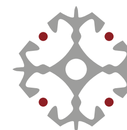
(3) Invalidity of security is one of the possible legal consequences of violating corporate benefit or financial assistance rules while granting such security. If there is a violation of the corporate benefit rules, bad faith of the creditor is required for invalidity. In contrast, the bad faith requirement is not applicable upon a violation of the financial assistance rules. Despite the fact that there is no specific ground for invalidity resulting from an infringement of the capital maintenance rules, general grounds (e.g. infringement of other creditors' rights) may be invoked.

(4) Typically, the general manager and members of managing bodies are liable for damages as they have fiduciary duties. Civil liability of shareholders arises in the event the company cannot fulfil its obligations due to the shareholder performing in bad faith. With regard to the civil liability of the general manager and members of management bodies of the shareholder, the above-mentioned rules of the general civil liability of members of management bodies apply. A lender would become liable only in exceptional cases and only if the lender performs in bad faith.

(5) Violating corporate benefit, financial assistance or capital maintenance rules may result in the criminal liability of the general manager and members of management bodies, in particular if such violation inflicts loss on the company or its creditors (legal grounds of criminal liability vary). The criminal liability of the shareholder and/or its general manager and members of management bodies would arise only in exceptional cases. The criminal liability of the lender acting in bad faith may arise, however we are not aware of any such case.

(6) There are some measures that may possibly be invoked to minimize risks related to upstream security in relation to the corporate benefit rules, such as an adequate fee paid to the company issuing upstream security and limitation of maximum exposure under provided security preventing possible insolvency due to enforcement of such security. Shareholder's approval is often used in order to minimize risks of the general manager and members of management bodies, however its legal consequences are debatable (i.e. it is disputed whether such measure would prevent the occurrence of civil liability of the general manager and members of the management body to their shareholders, nonetheless civil liability to other creditors of the company would occur).

18. Luxembourg



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SJL is considered as a Leading Firm and its partners have been recognised as Leading Lawyers in Their Field and are highly recommended by Chambers and Partners in particular.

QUESTION 1: Is granting upstream security in principle possible in your jurisdiction?

☒ Yes

☐ No

QUESTION 2: Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?

☒ Corporate benefit

☒ Company benefit required
☐ Group benefit sufficient

☒ Financial assistance

☒ Capital maintenance

QUESTION 3: What are the possible legal consequences of violating such rules in your jurisdiction?

☒ Invalidity of security

☒ Civil liability of

☒ Director of company
☐ Director of shareholder
☐ Shareholder
☐ Lender

☒ Criminal Liability of

☒ Director of company
☐ Director of shareholder
☐ Shareholder
☐ Lender

QUESTION 4: Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?

☒ Yes

Legal consequences: Legal consequences: It is generally considered that a Luxembourg company may only grant a guarantee in favor of other group companies if it draws a sufficient corporate benefit from the transaction, as the granting of a guarantee in absence of sufficient corporate benefit may constitute an abuse of corporate assets which would be a criminal offence committed by the directors of the company and which may also have an impact on the validity and the enforceability of the guarantee, as it could be considered by a court as being null and void because having an illicit cause (Article 171-1 of the Law dated 10 August 1915 on Commercial Companies, as amended).

In the absence of any published Luxembourg case law on the applicability of the relevant text to financing transactions, regard may be given to the situation in France, as the Luxembourg provision on abuse of corporate assets is based on the French one. It is however by no means certain that Luxembourg courts would adopt the same position as the French courts in the Rosenblum case (Cass. crim. 4 février 1985).

A limitation to the amount payable under the guarantee has the effect to prevent the guarantor to exceed its financial capabilities.

The inclusion of a limitation language is however not sufficient and the managers/directors of the guarantor will have to assess whether the guarantor has in fact a corporate benefit to grant the guarantee (ex. benefiting from of a cross-collateralization from other group members…) and make specific declarations in this respect in the minutes of the board deciding to enter into the guarantee.

☐ No

QUESTION 5: **Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?**

☒ Yes ☐ No

QUESTION 6: **Are there any exemptions or whitewash procedures in your jurisdiction?**

☐ Yes ☒ No

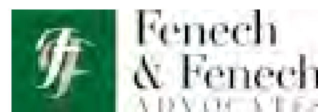
QUESTION 7: **Are there any differences depending on the legal entity of the security provider in your jurisdiction?**

☐ Yes ☒ No

QUESTION 8: **Comments/Specifics**

Currently financial assistance provisions do only apply to SAs (public limited liability companies) and SCAs (partnerships limited by shares). Specific white wash procedures are available in this respect since few years.

19. Malta



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Established in 1891, Fenech & Fenech Advocates is one of the longest established law firms in Malta. Fenech & Fenech is a full service multi-disciplinary law firm with diverse areas of expertise including corporate and commercial law, M&A transactions, financial services, banking, trusts and foundations, intellectual property, shipping and maritime law, employment law and various other areas.

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QUESTION 1: **Is granting upstream security in principle possible in your jurisdiction?**

☒ Yes ☐ No

QUESTION 2: **Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?**

☒ Corporate benefit
☐ Company benefit required
☐ Group benefit sufficient

☒ Financial assistance

☒ Capital maintenance

QUESTION 3: **What are the possible legal consequences of violating such rules in your jurisdiction?**

☒ Invalidity of security

☒ Civil liability of
☒ Director of company
☐ Director of shareholder
☒ Shareholder
☐ Lender

☐ Criminal Liability of
☐ Director of company
☐ Director of shareholder
☐ Shareholder
☐ Lender

QUESTION 4: **Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?**

☐ Yes

☒ No

Legal consequences: N/a.

QUESTION 5: **Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?**

☒ Yes ☐ No

QUESTION 6: Are there any exemptions or whitewash procedures in your jurisdiction?

☒ Yes ☐ No

QUESTION 7: Are there any differences depending on the legal entity of the security provider in your jurisdiction?

☒ Yes ☐ No

QUESTION 8: Comments/Specifics

N/a.

20. The Netherlands

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QUESTION 1: Is granting upstream security in principle possible in your jurisdiction?

☒ Yes

☐ No

QUESTION 2: Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?

☒ Corporate benefit

- ☒ Company benefit required
- ☐ Group benefit sufficient

☒ Financial assistance

☐ Capital maintenance

QUESTION 3: What are the possible legal consequences of violating such rules in your jurisdiction?

☒ Invalidity of security

☒ Civil liability of

- ☒ Director of company
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- ☐ Lender

☐ Criminal Liability of

- ☐ Director of company
- ☐ Director of shareholder
- ☐ Shareholder
- ☐ Lender

QUESTION 4: Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?

☒ Yes

Legal consequences: It is customary for the Facility Agreement to provide that Dutch Obligors have no liability under the guarantee to the extent that, if they were to have such liability, Dutch financial assistance rules would be violated.

☐ No

QUESTION 5: Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?

☒ Yes ☐ No

QUESTION 6: Are there any exemptions or whitewash procedures in your jurisdiction?

☒ Yes ☐ No

QUESTION 7: Are there any differences depending on the legal entity of the security provider in your jurisdiction?

☒ Yes ☒ No

QUESTION 8: Comments/Specifics

(1) Financial assistance restrictions: Since the introduction of the Act on the Simplification and Flexibilisation of the B.V. (the "Wet vereenvoudiging en flexibilisering van het bv-recht", also referred to as the "Flex Act") on 1 October 2012, financial assistance restrictions do no longer apply to Dutch private companies with limited liability (i.e. Dutch B.V.'s). Financial assistance restrictions still apply to Dutch public companies with limited liability (i.e. Dutch N.V.'s).

(2) Corporate benefit: Under relevant Dutch law, a legal transaction entered into by a company can be nullified in the event that the corporate objects of the company as laid down in its articles of association were exceeded by this transaction (ultra vires) and the other party to the transaction knew or should have known this without further investigation. Most authoritative writers take the view that the acts of a company should be in its best interests, in the sense that such acts must be conducive to the realization of the objects of the company as laid down in its articles of association. Only the company itself or a trustee in bankruptcy is entitled to invoke the nullification of the transaction. As for upstream security, the Dutch courts have in a limited number of cases accepted the nullification of granting such security interest on the basis of the ultra vires doctrine. This, however, always occurred in fairly specific circumstances, for example, because the granting of the security interests was not provided for in the corporate objects clause of the company. The opinions in literature differ considerably as to the question of whether and, if so, under what particular circumstances, the granting of an upstream security interest can be nullified. Furthermore, with respect to upstream security or lateral security interests, a distinction can generally be drawn between a group financing pursuant to which all subsidiaries are borrowers under the credit facilities or are entitled to use the credit facility extended to the parent or a group finance company (group financing)., on the one hand, and the financing of one particular borrower for the purpose of its own activities on the other. Although the legal ultra vires test would be no different, group financing gives rise to less risk because all like hood the interests of the companies involved in the financing would be more clearly served, and therefore the issuance of security would be equally in the interest of the companies.

(3) Pauliana: If (i) a Dutch guarantor enters into a guarantee under a facility agreement without an obligation to do so, (ii) one or more of the guarantor's creditors (existing or future) are prejudiced as a result of the guarantee, and (iii) at the time the guarantor entered into the guarantee both it and the finance parties knew or should have known that one or more creditors would be prejudiced, the creditor or creditors concerned (or, in practice the guarantor's trustee in bankruptcy) may nullify the guarantee on the basis of Dutch "Pauliana" rules. A guarantee under a facility agreement will usually be entered into without an obligation to do so. Furthermore, if a guarantee is called, this could result in the guarantor becoming insolvent. In that case, the guarantor's creditors may be prejudiced as a result of the guarantee as (i) creditors must share the assets available for their recourse with the finance parties as beneficiaries under the guarantee, and (ii) the guarantee is unlikely to have produced tangible benefits to the guarantor which also benefit its creditors (but exceptions may apply).

21. Poland

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Thanks to regular cooperation with leading international law firms in the world's major financial centres, we advise clients effectively in international financial transactions involving entire capital groups.

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As a member of the Loan Market Association, we have ongoing access to standard loan documentation and training organised by LMA.

QUESTION 1: **Is granting upstream security in principle possible in your jurisdiction?**

☒ Yes

☐ No

QUESTION 2: **Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?**

☐ Corporate benefit

☐ Company benefit required
☐ Group benefit sufficient

☒ Financial assistance

☒ Capital maintenance

QUESTION 3: **What are the possible legal consequences of violating such rules in your jurisdiction?**

☒ Invalidity of security

☒ Civil liability of

☒ Director of company
☐ Director of shareholder
☒ Shareholder
☐ Lender

☒ Criminal Liability of

☒ Director of company
☐ Director of shareholder
☐ Shareholder
☐ Lender

QUESTION 4: **Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?**

☒ Yes

Legal consequences: The enforcement of the security granted by the Polish security provider is limited up to the then aggregative value of such Polish security provider's assets from time to time, less the aggregate value of such Polish security provider's liabilities, at such time and thus it does not result in insolvency of the relevant Polish security provider in the meaning of the Polish bankruptcy and restructuring law.

☐ No

QUESTION 5: **Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?**

☒ Yes ☐ No

QUESTION 6: **Are there any exemptions or whitewash procedures in your jurisdiction?**

☒ Yes ☐ No

QUESTION 7: **Are there any differences depending on the legal entity of the security provider in your jurisdiction?**

☒ Yes ☐ No

QUESTION 8: **Comments/Specifics**

(1) Financial assistance (question 2): Pursuant to the Polish law the regulations of the financial assistance regard only the joint stock companies. There is no such regulation regarding the limited liability company. In respect of joint stock companies, art. 345 of the Polish commercial companies code stipulates certain conditions for granting financial assistance by a joint stock company for the acquisition of its shares. If these strict conditions are not met, then the financial assistance is unlawful and all the payments are invalid. Moreover, financial assistance is understood very broadly as providing by a company, directly or indirectly, any financing for the purposes of the acquisition of shares issued by that company, inter alia by granting of credit, loan, guarantee or security.

(2) Corporate benefit (question 2): The Polish law does not recognize the doctrine of the corporate benefit, however please note that the management board of the company cannot act to the detriment of the company.

(3) Legal entity (question 7): In general in Poland there are no differences depending on the legal entity of the security provider. However, please note that there is one exception. The financial pledge (in Poland there are three kinds of pledge: registered pledge, civil pledge and financial pledge) cannot be established by a natural person.

22. Portugal

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QUESTION 1: Is granting upstream security in principle possible in your jurisdiction?

☒ Yes

☐ No

QUESTION 2: Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?

☒ Corporate benefit

☐ Company benefit required
☒ Group benefit sufficient

☒ Financial assistance

☒ Capital maintenance

QUESTION 3: What are the possible legal consequences of violating such rules in your jurisdiction?

☒ Invalidity of security

☒ Civil liability of

☒ Director of company
☐ Director of shareholder
☒ Shareholder
☐ Lender

☐ Criminal Liability of

☐ Director of company
☐ Director of shareholder
☐ Shareholder
☐ Lender

QUESTION 4: Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?

☒ Yes

Legal consequences: Security often contain limitation language that the security is only valid to the extent that it does not violate financial assistance rules, which avoids the whole security being void in the case of financial assistance but only the part that is used for the purchase.

☐ No

QUESTION 5: **Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?**

☐ Yes ☒ No

QUESTION 6: **Are there any exemptions or whitewash procedures in your jurisdiction?**

☒ Yes ☐ No

QUESTION 7: **Are there any differences depending on the legal entity of the security provider in your jurisdiction?**

☒ Yes ☒ No

QUESTION 8: **Comments/Specifics**

(1) In order for a company to be able to grant upstream security without corporate interest being required, the borrower and the lender need to be in a "group relationship" or in a "relationship of control". Since only companies limited by quotas (sociedades por quotas), companies limited by shares (sociedades anónimas) and partnerships limited by shares (sociedades em comandita por acções) can be in such a relationship, only those companies can grant or receive upstream security without corporate interest being required.

(2) Two companies are in a "relationship of control" when a company exercises dominant influence over the other. It is assumed that one company has control over the other when the former, directly or through other companies or individuals, is the majority owner of the share capital of the latter company or of the members' voting rights, or has the power to designate the majority of the members of the board of directors or of the supervisory body. A "group relationship" occurs when a company is the unique owner of the share capital of another company or when two companies agree to be governed by the same board of directors (irrespective of whether one of the companies is the owner of a stake of the other's share capital).

(3) Under Portuguese law, a company is not permitted to grant security to a third party as a means of allowing the latter to acquire shares issued by that company (financial assistance prohibition). This prohibition does not apply to transactions concluded by banks or other financial institutions in the normal course of business (this is a very restricted threshold and almost never applicable), nor to transactions with a view to the acquisition of shares by or for the company's employees or the employees of an associate company (sociedade coligada), provided that those transactions do not have the effect of reducing the net assets available for distribution.

(4) As a general rule, security granted against the rules on upstream security is void. It is also possible that the company or the directors or shareholders of the company be held liable for damages resulting from the grant of security against the prohibition of financial assistance. However, the violation of such rules is not in itself liable to amount to criminal liability.

23. Romania

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Nestor Nestor Diculescu Kingston Petersen Legal & Tax ("NNDKP Legal & Tax") is a full-service law firm that distinguishes itself on the Romanian market through a thorough understanding of the industry particulars in a local and international context and unwavering commitment to client satisfaction.

We bring together some of the highest profile lawyers and tax advisors in Romania, their results reflecting an authentic mix of legal and tax insights, courtroom experience and practical business sense needed to prevail in a broad range of cases and transactions.

The NNDKP team specializes in all practice areas specific to business law, including: corporate law, mergers and acquisitions, dispute resolution, banking and finance, real estate, competition, infrastructure and PPP, energy and natural resources, intellectual property, taxation, public procurement, commercial contracts, environment, capital markets, employment law, data protection, IT, electronic communications and media, pharmaceuticals and healthcare, gaming, consumer protection and immigration.

NNDKP was granted "Law Firm of the Year in Romania" three times in the past seven years at the Chambers Europe Gala, a premiere on the Romanian legal market.

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QUESTION 1: **Is granting upstream security in principle possible in your jurisdiction?**

☒ Yes

☐ No

QUESTION 2: **Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?**

☒ Corporate benefit
- ☒ Company benefit required
- ☐ Group benefit sufficient

☒ Financial assistance

☐ Capital maintenance

QUESTION 3: **What are the possible legal consequences of violating such rules in your jurisdiction?**

☒ Invalidity of security

☒ Civil liability of
- ☒ Director of company
- ☐ Director of shareholder
- ☒ Shareholder
- ☐ Lender

☒ Criminal Liability of
- ☒ Director of company
- ☐ Director of shareholder
- ☒ Shareholder
- ☐ Lender

QUESTION 4: **Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?**

☒ Yes

Legal consequences: Although, there is no unitary market practice in this respect, in last years it has become more frequent for borrowers to request the insertion of a limitation language stating that the secured obligations are limited to the maximum amount (a) for which the borrower can justify a corporate benefit and (b) which ensures compliance with the limitations included in art.s 272 and art. 1444 of the Romanian companies law (please see more details below) and art. 106 of the Romanian companies law (regarding financial assistance). The underlying aim of such limitation language is to limit any potential liability that may be incurred by the directors or shareholders of the company from granting the guarantee/security. However, to our knowledge, the effects of such limitation wording have not yet been tested in practice and (unless it

limits the secured obligations to an amount for which corporate benefit can be justified by the company), it is likely that it cannot eliminate the risks deriving from lack of corporate benefit (it can be a mitigation factor, but would not eliminate the risks).

☐ No

QUESTION 5: **Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?**

☒ Yes ☐ No

QUESTION 6: **Are there any exemptions or whitewash procedures in your jurisdiction?**

☐ Yes ☒ No

QUESTION 7: **Are there any differences depending on the legal entity of the security provider in your jurisdiction?**

☒ Yes ☐ No

QUESTION 8: **Comments/Specifics**

(1) Corporate benefit

(a) Romanian legislation and practice lack objective criteria for assessing corporate benefit, leaving this aspect, in case of a challenge, at the discretion of the court. The existence of corporate benefit is a factual aspect, commercial in essence, that should be assessed from a business perspective by the Romanian company and its management and, in case of a challenge, it is to be ultimately determined by a court of law.

(b)To avoid/minimize risks related to upstream security, the safest approach would be to limit the amount of the secured obligations to the actual amount for which a corporate benefit can be sustained and justified by the Romanian company granting the security. Depending on the factual circumstances, other mitigation factors may be considered.

(2) Specific restrictions deriving from the Romanian companies law

When granting upstream security, there are also certain provisions in the Romanian companies law no. 31/1990 (the "Companies Law") that, in certain circumstances, may be of relevance. We note in particular that the Companies Law prohibits as a criminal offence the fact for a director, founder (arguably, any shareholder may be deemed as falling under this category), manager or legal representative of a Romanian company to:

(a) use in bad faith the assets and goodwill of the company, for a purpose which is contrary to the company's interests or for its own interest or for favouring another company in which the respective person is directly or indirectly interested (art. 272 paragraph 1 (b) of the Companies Law); or

(b) make a company managed by them, a company controlled by the latter, or a company which controls the company managed by them grant guarantees for their own debts (art. 272 paragraph 1 (c) of the Companies Law).

Also, art. 1444 of the Companies Law prohibits the granting by a Romanian company of a guarantee, directly or indirectly, in favour of its directors or related parties (spouse, relatives or next-of-kin up to the 4th degree). The prohibition also extends to any guarantee granted (directly or indirectly) by a Romanian company to a company (i) in which the director of the first company (or any of the above mentioned related parties) holds a participation of at least 20% or (ii) which is managed by the respective director or related parties. While we believe that these provisions should be strictly applied in case the director (or a related party) in question has a personal interest in the transaction, we note that there are views on the market that sustain the applicability of art. 1444 to any guarantee given by a Romanian company to a company (i) in which a director of the first company holds a participation of at least 20% or (ii) which has a joint director with the first company, irrespective of whether the director in question has a personal interest in the respective transaction.

As a rule, such legal provisions should be very strictly interpreted. However, they are quite unclear and subject to different interpretations in the legal literature. For example, even if art. 272 paragraph 1 (c) should not normally contemplate shareholders' acts, but directors' acts, a legislative amendment brought to the respective article appears to support the application of this provision to shareholders as well.

To the best of our knowledge, there is no relevant court practice so far in respect of the application of these provisions to granting of upstream security.

(3) Financial assistance

(a) The Romanian companies law only provides the interdiction regarding financial assistance for joint stock companies (S.A.s). There are minor limited exceptions for credit institutions and other financial institutions or for the employees of the company.

(b) Given that no explicit rules exist for limited liability companies (SRLs), it may be argued that the prohibition should not apply to this type of companies. However, in practice, there have been instances where Romanian courts have applied rules specific to joint stock companies to SRLs where they deemed that the underlying purpose protected by the relevant legal provisions justified the application of the same rules for both SRLs and SAs.

(c) A loan or security granted by a SA for the purpose of the acquisition or subscription of its own shares by a third party is void. Moreover, in certain cases, breach of the financial assistance prohibition may trigger criminal liability for the directors or management of the company.

(d) Unlike other jurisdictions, no whitewash procedure has been implemented in Romania.

(4) Other potential grounds for triggering liability of the shareholders or directors of the company

(a) To mitigate risks, the Romanian company should also assess the granting of an upstream security and the consequences of potential payment/enforcement thereof from the perspective of its ability to satisfy its obligations towards its other creditors.

(b) If for example, the granting of the security (and potential enforcement thereof) would trigger the inability of the Romanian company to comply with its obligations towards other creditors, there is a risk that the liability of its shareholders may be triggered based on the provisions of Art. 2371 (4) of the Companies Law (according to which, a shareholder can be held liable if it disposes of the company's assets as if they were its own assets or if it reduces the assets of the company in its own interest or in the interest of a third party, knowingly or being expected to know that this could lead to the inability of the respective company to comply with its obligations).

(c) To the extent that the granting of the security (and potential enforcement thereof) would trigger the insolvency of the company, there is a risk that the liability of its directors, representatives, shareholders and/or other persons involved may be triggered based on the provisions of the Romanian insolvency law, according to which any person who caused the insolvency of a company though certain actions (such as, for example, the use of the company's assets for his/her own interest or in the interest of a third party or through any action wilfully taken which contributed to the insolvency of the company), may be obliged to pay part or all of the debts of the respective company (depending on the prejudice caused by that person's actions).

(d) Also, in the event of the insolvency of the Romanian company, there is a risk of the security falling under the claw-back provisions under the insolvency legislation, including those referring to the annulment of the transactions at an undervalue (in which obligations assumed exceed by far the benefits incurred).

(5) Other aspects

(a) As regards question 3 above, please note that, although the civil and/or criminal liability of a lender or a director of the shareholder may be triggered, this only applies in certain limited exceptional cases.

(b) In terms of corporate approvals, depending on the constitutive act of the company and the amount of the secured obligations by reference to the company's assets, a shareholders' resolution empowering the directors of the company to sign the security, may be necessary.

24. Slovakia

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We have served both lenders and borrowers on all types of finance transactions, from simple and small to large and complex, for over 10 years. We are particularly experienced in representing both financial institutions and trading entities with their swaps and derivatives transactions.

Our attorneys have worked at prestigious European banking institutions and are pursuing advanced business and finance degrees.

QUESTION 1: **Is granting upstream security in principle possible in your jurisdiction?**

☒ Yes

☐ No

QUESTION 2: **Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?**

☐ Corporate benefit

☐ Company benefit required
☐ Group benefit sufficient

☒ Financial assistance

☐ Capital maintenance

QUESTION 3: **What are the possible legal consequences of violating such rules in your jurisdiction?**

☒ Invalidity of security

☒ Civil liability of

☒ Director of company
☐ Director of shareholder
☐ Shareholder
☐ Lender

☒ Criminal Liability of

☒ Director of company
☐ Director of shareholder
☒ Shareholder
☐ Lender

QUESTION 4: **Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?**

☐ Yes

Legal consequences: N/a.

☒ No

QUESTION 5: **Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?**

☐ Yes

☒ No

QUESTION 6: Are there any exemptions or whitewash procedures in your jurisdiction?

☐ Yes ☒ No

QUESTION 7: Are there any differences depending on the legal entity of the security provider in your jurisdiction?

☐ Yes ☒ No

QUESTION 8: Comments/Specifics

(1) Slovak law only provides explicit rules regarding financial assistance for stock corporations (akciová spoločnosť – a.s.), whereas no explicit rules exist for limited liability companies (spoločnosť s ručením obmedzeným – s.r.o.).

(2) Security granted by an a.s. for the purpose of acquisition of its own shares or the shares of its holding company is void. There are minor exceptions for banks acting in ordinary course of business.

(3) Directors of a Slovak companies are subject to a general obligation to act in the interest of that company (due care) in relation to all their actions on behalf of companies, including when granting security for the benefit of third parties.

25. Slovenia

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QUESTION 1: **Is granting upstream security in principle possible in your jurisdiction?**

☒ Yes

☐ No

QUESTION 2: **Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?**

☒ Corporate benefit

☒ Company benefit required
☐ Group benefit sufficient

☒ Financial assistance

☒ Capital maintenance

QUESTION 3: **What are the possible legal consequences of violating such rules in your jurisdiction?**

☒ Invalidity of security

☒ Civil liability of

☒ Director of company
☐ Director of shareholder
☒ Shareholder
☐ Lender

☒ Criminal Liability of

☒ Director of company
☐ Director of shareholder
☐ Shareholder
☐ Lender

QUESTION 4: **Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?**

☒ Yes

Legal consequences: Limitation of the enforcement of the guarantee or security.

☐ No

QUESTION 5: **Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?**

☐ Yes

☒ No

QUESTION 6: Are there any exemptions or whitewash procedures in your jurisdiction?

☒ Yes ☐ No

QUESTION 7: Are there any differences depending on the legal entity of the security provider in your jurisdiction?

☒ Yes ☐ No

QUESTION 8: Comments/Specifics

(1) Capital maintenance rules applicable to limited liability companies (družba z omejeno odgovornostjo) differ in several aspects from those applicable to stock corporations (delniška družba). For example, capital maintenance rules for limited liability companies only protect share capital and tied-up reserve. Also, shareholders in limited liability companies other than the borrower have an obligation to repay the company in case payment cannot be claimed from the borrower.

(2) Transactions in which a company grants an advance payment or a loan for the purpose of acquiring its own shares and any other transaction having comparable effect (such as granting security) are void. Exemptions are available to financial institutions, employees and affiliated companies.

(3) Within a de facto group of companies or a contractual group of companies capital maintenance rules can, under certain conditions, be overridden by controlling company's instructions, whereby the controlling company is liable for the losses incurred.

(4) When performing their duties, members of the management board must always act in the interest of the company, namely with the diligence of a conscientious and fair businessmen. This duty includes securing corporate benefit.

26. Spain

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QUESTION 1: Is granting upstream security in principle possible in your jurisdiction?

☒ Yes

☐ No

QUESTION 2: Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?

☒ Corporate benefit

- ☒ Company benefit required
- ☐ Group benefit sufficient

☒ Financial assistance

☒ Capital maintenance

QUESTION 3: What are the possible legal consequences of violating such rules in your jurisdiction?

☒ Invalidity of security

☒ Civil liability of

- ☒ Director of company
- ☐ Director of shareholder
- ☐ Shareholder
- ☐ Lender

☐ Criminal Liability of

- ☐ Director of company
- ☐ Director of shareholder
- ☐ Shareholder
- ☐ Lender

QUESTION 4: Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?

☒ Yes

Legal consequences: The secured obligations are deemed to be extended only to such obligations that do not contravene mandatory Spanish law restrictions.

☐ No

QUESTION 5: **Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?**

☒ Yes ☐ No

QUESTION 6: **Are there any exemptions or whitewash procedures in your jurisdiction?**

☒ Yes ☐ No

QUESTION 7: **Are there any differences depending on the legal entity of the security provider in your jurisdiction?**

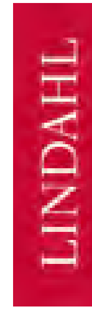
☒ Yes ☐ No

QUESTION 8: **Comments/Specifics**

(1) Spanish corporate legislation includes a general regulation on corporate benefit. This principle states that directors will discharge their duties as loyal representatives in the defense of the corporate interest. Such corporate interest consists of the interest of the company – as opposed to other interests, such as the interest of the shareholders, creditors or group companies. Thus, decisions taken by directors may be contested if they are not (or not as well) for the benefit of the company itself.

(2) However, as of today, there is no Spanish regulation on groups of companies. Thus, such concept as the group interest does not exist under Spanish law. If the action taken by directors of a certain Spanish company (e.g., granting of security or issuing personal guarantees) benefits another group company (e.g., a foreign special purpose vehicle within the corporate structure), but not the Spanish company directly or indirectly, the action of the Spanish company is not analyzed in light of the benefit for the whole group, but on an isolated manner. This may lead to claims against the directors from creditors, shareholders or insolvency receivers in the framework of upstream or downstream guarantees if the Spanish company that grants security or provides guarantees but does not obtain a direct or indirect benefit in the form of monies from the underlying transaction.

27. Sweden



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QUESTION 1: Is granting upstream security in principle possible in your jurisdiction?

☒ Yes

☐ No

QUESTION 2: Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?

☒ Corporate benefit
- ☒ Company benefit required
- ☐ Group benefit sufficient

☒ Financial assistance

☒ Capital maintenance

QUESTION 3: What are the possible legal consequences of violating such rules in your jurisdiction?

☒ Invalidity of security

☒ Civil liability of
- ☒ Director of company
- ☐ Director of shareholder
- ☒ Shareholder
- ☒ Lender

☒ Criminal Liability of
- ☒ Director of company
- ☐ Director of shareholder
- ☐ Shareholder
- ☐ Lender

QUESTION 4: Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?

☒ Yes

Legal consequences: The limitation wording which is standard to include in security agreements and guarantees in the Swedish market is drafted to say that the relevant security/guarantee is only valid up to the amount permitted as a consequence of an application of the relevant provisions of the Swedish Companies Act. The legal consequence is that the value of the security/guarantee is limited in value to an amount which is permitted and works to protect the board members of the security/guarantee provider from civil liability.

☐ No

QUESTION 5: **Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?**

☐ Yes ☒ No

QUESTION 6: **Are there any exemptions or whitewash procedures in your jurisdiction?**

☒ Yes ☐ No

QUESTION 7: **Are there any differences depending on the legal entity of the security provider in your jurisdiction?**

☒ Yes ☐ No

QUESTION 8: **Comments/Specifics**

(1) The answers are based on the rules which apply to Swedish limited companies (Sw.aktiebolag). In relation to loans, security and guarantees provided by other forms of legal entities, there are no specific rules under Swedish law. However, the rules applicable to limited companies may become relevant indirectly, depending on the circumstances at hand.

(2) Please note that although there is a "whitewash procedure" for prohibited loans and security/guarantees this procedure is in practice not relevant, as an exemption from the rule will only be granted if there are particular reasons for the relevant loan/security/guarantee to be permitted. In an acquisition financing context, such particular reasons are generally not at hand.

(3) Please note that the Swedish rules regarding non-permitted loans and security/guarantees have two different applications – one for loans/security/guarantees granted outside of an acquisition financing context, and one which is aimed at the pure financial assistance scenario (i.e. where the purpose of the loan/security/guarantee is to assist in the financing of the purchase of shares of a company in the same group as the provider of the relevant loan/security/guarantee). For loans/security/guarantees that are not granted for the purposes of assisting in the financing of a purchase of shares in a company in the same group as the lender/security provider/guarantor, there is a general exception in the Swedish companies act making such loans/security/guarantees permitted if made to or for the benefit of other members of the same group as the grantor.

28. Switzerland

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QUESTION 1: Is granting upstream security in principle possible in your jurisdiction?

☒ Yes

☐ No

QUESTION 2: Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?

☒ Corporate benefit

- ☒ Company benefit required
- ☐ Group benefit sufficient

☐ Financial assistance

☒ Capital maintenance

QUESTION 3: What are the possible legal consequences of violating such rules in your jurisdiction?

☒ Invalidity of security

☒ Civil liability of

- ☒ Director of company
- ☐ Director of shareholder
- ☒ Shareholder
- ☒ Lender

☒ Criminal Liability of

- ☒ Director of company
- ☐ Director of shareholder
- ☒ Shareholder
- ☒ Lender

QUESTION 4: Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?

☒ Yes

Legal consequences: The enforcement of upstream security is limited to the amount of any freely distributable reserves of the guarantor or security provider at the time of the enforcement. Such amount has to be confirmed by the company's auditors.

☐ No

QUESTION 5: **Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?**

☒ Yes ☐ No

QUESTION 6: **Are there any exemptions or whitewash procedures in your jurisdiction?**

☐ Yes ☒ No

QUESTION 7: **Are there any differences depending on the legal entity of the security provider in your jurisdiction?**

☐ Yes ☒ No

QUESTION 8: **Comments/Specifics**

(1) Corporate benefit: The directors of a Swiss company are subject to a general obligation to act in the best interest of that company in relation to all their action on behalf of the company, including in the case of granting upstream security.

(2) Financial assistance: There are no particular corporate rules on a Swiss company granting security to secure debt used to purchase its own shares or the shares of an affiliate.

(3) No particular restrictions on upstream security apply, if the security is granted at arm's length conditions. Since in practice it is difficult to determine whether the granting of security meets the arm's length test, it is advisable to treat the granting of upstream security as if the company pays a dividend. As a consequence, the board of directors and a general meeting of shareholders have to approve the granting of security and the enforcement of the security has to be limited to the freely distributable reserves. Also, the company's purpose clause should permit the granting of upstream security.

(4) Further, upstream security failing to meet the arm's length test may give rise to tax consequences (in particular, withholding tax at 35%).

(5) Lender liability will only apply in exceptional cases.

29. The United Kingdom

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QUESTION 1: **Is granting upstream security in principle possible in your jurisdiction?**

☒ Yes

☐ No

QUESTION 2: **Are there any corporate benefit, financial assistance and/or capital maintenance rules that need to be observed in your jurisdiction?**

☒ Corporate benefit

- ☒ Company benefit required
- ☐ Group benefit sufficient

☒ Financial assistance

☒ Capital maintenance

QUESTION 3: **What are the possible legal consequences of violating such rules in your jurisdiction?**

☐ Invalidity of security

☒ Civil liability of

- ☒ Director of company
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- ☒ Director of company
- ☐ Director of shareholder
- ☐ Shareholder
- ☐ Lender

QUESTION 4: **Is it market practice in your jurisdiction to include limitation language and if so, what are in essence the legal consequences?**

☒ Yes

Legal consequences: In circumstances where the guarantee or security could contravene financial assistance rules detailed below, limitation language will typically state that the guarantee or security does not apply to any liability to the extent that it would result in the guarantee or security constituting unlawful financial assistance.

☐ No

QUESTION 5: Are there any other measures required in your jurisdiction to avoid/minimize risks related with upstream security besides limitation language (e.g. shareholder approval, adequate fee etc.)?

☒ Yes ☐ No

QUESTION 6: Are there any exemptions or whitewash procedures in your jurisdiction?

☐ Yes ☒ No

QUESTION 7: Are there any differences depending on the legal entity of the security provider in your jurisdiction?

☒ Yes ☐ No

QUESTION 8: Comments/Specifics

(1) Directors of a UK company are under a duty to promote the success of the company for the benefit of its members.

(2) It is more difficult (but normally possible in the majority of non-distressed transactions) to establish that a company obtains a corporate benefit from providing an upstream or cross-stream guarantee or security. Lenders usually require the giving of the guarantee to be authorized by directors' and shareholders' resolution, to avoid the transaction being challenged by a shareholder on the basis that the directors have breached their duties. However, this will not cure a lack of corporate benefit if the company is in the zone of insolvency when the directors' primary duty is deemed to be owed to the company's creditors.

(3) An upstream guarantee may result in an unlawful reduction of capital unless the company has distributable reserves sufficient to cover the amount of the reduction and the statutory requirements for effecting such a reduction are complied with. The effect on net assets should be determined according to normal accounting principles. As a result, lenders may ask to see board minutes that address the issue of net assets. Where the borrower group is in financial distress, lenders may require a net assets letter from the company's auditors.

(4) Financial assistance rules prohibit a UK public company from giving financial assistance for the purpose of the acquisition of its shares or those of a parent company, and a UK private company from giving financial assistance for the purpose of the acquisition of shares of a public parent company.

(5) Liability of a lender will only apply in exceptional cases.

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