

## The Luxembourg Professional Guarantee Draft Bill - a Fund Finance Application

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Luxembourg is already well known as a lenders' friendly legal hub and in particular for its attractive and efficient Luxembourg law on collateral arrangements (the "**Collateral Law**") governing the standard security package, in the context of all type of fund facilities (subscription lines, GP facilities, NAV facilities or hybrids).

The security package traditionally covers pledges over the uncalled capital commitments and the accessory rights and over the bank accounts into which the investors are required to fund their commitments or over the equity and debt interests held by the fund in and towards the underlying SPVs, when focused on the underlying assets.

Yet, no or few guarantees governed by the Luxembourg law are envisaged (when these are envisaged at all in the security package), notably because of the uncertainty of the current regime and the risk of requalification (which has shown hesitations in between the suretyship (*cautionnement*) constituted under the Luxembourg civil code and the independent guarantee (*garantie autonome*), an instrument created by Luxembourg market practice and confirmed by Luxembourg case law).

The Luxembourg legislator is willing now to enrich the panel of tools for the cross-border financing transactions by seeking to introduce a special regime which will create the professional guarantees of payment (*garantie professionnelle de paiement*), a new type of guarantee.

A draft bill on professional guarantees of payment (*garantie professionnelle de paiement*) (the "**Professional Guarantee Draft Bill**") has been submitted to the Luxembourg Parliament on 22 April 2020.

The Professional Guarantee Draft Bill foresees that the professional guarantee will be limited to legal entities (natural persons being excluded) and will be able to secure all kinds of obligations freely determined by the parties, including without limitation any obligations to pay.

The professional guarantee will need to be documented in writing (including by electronic means) and will need to specifically refer to the law (i.e. to the Professional Guarantee Draft Bill once entered into force).

The Professional Guarantee Draft Bill will allow the professional guarantee to be granted over present or future claims provided that they are identified or identifiable at the time of the entry into the professional guarantee agreement.

Likewise the security interests governed by the Collateral Law, the professional guarantee may be issued in favor of a third party, a security agent, and acting for benefit of the finance parties.

Likewise the pledges over capital commitments, the professional guarantee agreement will include typical waiver of defenses, rights of recourse and action given by the grantor.

Likewise the pledges governed by the Collateral Law, which are insolvency "proof", the professional guarantee will follow the same regime. In practice this means that, the insolvency of the fund or the general partner (in the case general partner is a borrower under a GP facility) will not affect the enforcement of the guarantee.

The attractiveness of this new tool will stand from its intrinsic characteristic i.e. being driven by the freedom of contract - which means in practice that, it will both combine terms of the suretyship (*cautionnement*) and independent guarantee (*garantie autonome*) and follow closely the general

terms of the security agreements governed by the Collateral Law and their proven efficiency - and the elimination of any requalification risk.

Once the Professional Guarantee Draft Bill will be entered into force, the credit providers on the fund finance market will be keen, while considering Luxembourg as the governing law of the security agreements, to rapidly adopt the professional guarantee of payment as part of the security package. It will be possible to envisage guarantees given by the general partner and/or the limited partners (notably, in case of SMAs facilities) to secure the obligations of the fund by entering into a guarantee agreement governed by Luxembourg law.

Please feel free to contact us should you like to hear more about this topic.

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