



**TYPICAL CONDITIONS
PRECEDENT/SUBSEQUENT FOR
FINANCING INVOLVING A LUXEMBOURG
ENTITY**

by the LPEA Financings in PE Working Group

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Introduction

The Luxembourg Private Equity and Venture Capital Association (“**LPEA**”) aims at promoting and defending the interests of investors and professionals principally active in the field of Private Equity (“PE”) and Venture Capital (“VC”).

The Association is the trusted and relevant representative body of PE and VC practitioners with a presence in Luxembourg.

Created in 2010 by a leading group of PE and VC players, with more than 590 members, LPEA plays a leading role locally, actively promoting PE and VC in Luxembourg.

LPEA provides a dynamic and interactive platform, which helps investors and advisors to navigate through latest trends in the industry. International by nature, the association allows members to network, exchange experience, expand their knowledge and grow professionally attending workshops and trainings held on a regular basis.

About the document

The work presented herein has been drafted by members of the LPEA Financings in PE Working Group (the "**Working Group**"), who are professionals active in the field of Funds Financing. This document gathers members' expertise, knowledge and experience in relation to typical Conditions Precedent/Subsequent for financing involving a Luxembourg entity and provides their pragmatic highlights in this regard. The Association maintains a neutral stance regarding the insights shared within this context. The LPEA does not provide specific advice or endorse any particular company, product, or service over another. While the members of the Working Group are part of Luxembourg law firms and financial institutions, this document does not represent the official position of their respective firms and institutions or of the LPEA as an organisation. Therefore, it cannot be used as a strict or binding precedent in any specific transaction against any of the firms and institutions which are represented in the Working Group.

Interpretation Notes

1. General

This document has been drafted by the members of the Working Group as a recommendation for financing transactions involving a Luxembourg entity ("**Luxco**") in various capacities (borrower, obligor, security provider), regardless of the governing law of the financing documentation.

The purpose of this document is to streamline the negotiation and delivery of condition precedent documentation ("**CPs**") for transactions which involve Luxcos and avoid lengthy discussions on standard Luxembourg points. The list can also be used as guidance for other types of transactions with Luxembourg parties, to the extent they are required to deliver to their counterparties documentation relating to their corporate status (existence and registration in Luxembourg, absence of insolvency proceedings, name of managers/directors, etc).

The following members of the Working Group have contributed to the drafting of this document: Constantin Iscru and Delphine Gomes (Ogier), François Guillaume de Liedekerke (A&O Shearman), Ana Bramao (Elvinger Hoss), Tiago Ventura Mendes (Linklaters), Dominik Pauly and Iulia Gay (Arendt), Nicolas Widung (BSP), Margaux Félix (Clifford Chance), Audrey Jarreton (Loyens & Loeff), Thomas Tomasic (Dechert) and Audrey Mucciante (DLA Piper).

2. Intended scope of application

The document has been drafted to address primarily a "standard" Luxembourg financing scenario which involves the following:

- Luxcos which are incorporated in the form of a SARL (*société à responsabilité limitée*) or SA (*société anonyme*) (excluding, for the avoidance of doubt, Luxembourg partnerships) and which are not operational companies and are holding companies, special purpose vehicles and do not exercise a regulated activity in Luxembourg (whether requiring a licence or not, such as alternative investment funds);
- Luxembourg solvent entities, i.e. which are not subject to bankruptcy (*faillite*), judicial reorganisation (*réorganisation judiciaire*) or any other Luxembourg or foreign insolvency proceedings or which have specific financial difficulties. In such circumstances, the list of CPs contained in this document could still be used as a guidance, but additional documentation would be required; and
- a typical Luxembourg law governed security package, involving pledges over the shares of the Luxco, its Luxembourg accounts and Luxembourg law governed intra-group claims owed by it or to it.

The list only relates to Luxembourg law aspects but additional CPs may be required as a matter of foreign law, to the extent relevant.

The document is drafted on the assumption that there is a timing gap between the date of the signing of the main finance documents and the Luxembourg security documents and the date of the satisfaction of the CPs (such as the Utilisation Date) of at least 1 (one) Business Day. The approach to be taken on back-to-back refinancings was not considered, as the members were of the opinion that it varies from one specific transaction to another.

For the situation where the signing of all the finance documents (including the Luxembourg security documents) and the utilisation take place concomitantly, all the CPs provided in this document can be maintained, except for the register of shareholders of Luxco(s) whose shares are pledged reflecting the registration of the Luxembourg Share Pledge Agreement ("**Updated Shareholder Register**"), which can be, depending on the circumstances, transferred to the conditions subsequent schedule.

For the situation where the parties wish to provide separate CPs for the signing of the finance documents (i.e. separately from the CPs to utilisation), all the CPs provided in this document can in theory be provided at signing, except for the Updated Shareholder Register. The practice however varies on what exact CPs are to be provided for signing, but board resolutions approving the finance documents are often requested as a minimum requirement.

Part I - Conditions Precedent To The First Utilisation

1. CORPORATE DOCUMENTATION

- 1 (a) A copy of the constitutional documents of each Luxembourg Obligor (including, in respect of a Luxembourg Obligor registered at such time with the Luxembourg Register of Commerce and Companies (*Registre de Commerce et des Sociétés*, Luxembourg) (the "**Luxembourg Register**"): (i) a copy of the up-to-date consolidated articles of association of such Luxembourg Obligor and (ii) an excerpt of the Luxembourg Register pertaining to that Obligor dated the date of this Agreement¹.
- 1 (b) A copy of a resolution of the board of directors/managers of each Luxembourg Obligor:
- approving the terms of, and the transactions contemplated by, the Finance Documents to which it is a party and resolving that it execute the Finance Documents to which it is a party;
 - authorising a specified person or persons to execute the Finance Documents to which it is a party on its behalf; and
 - authorising a specified person or persons, on its behalf, to sign and/or despatch all documents and notices (including, if relevant, any Utilisation Request and Selection Notice) to be signed and/or despatched by it under or in connection with the Finance Documents to which it is a party.
- 1 (c) If applicable, a copy of a resolution signed by all the holders of the issued shares in the Luxembourg Obligor, approving the terms of, and the transactions contemplated by, the Finance Documents to which the Luxembourg Obligor is a party.
- 1 (d) A copy of a negative certificate (*certificat de non-inscription d'une décision judiciaire ou de dissolution administrative sans liquidation*) pertaining to each Luxembourg Obligor registered at such time with the Luxembourg Register issued by the Insolvency Registry (*Registre de l'Insolvabilité*) maintained with the Luxembourg Register, dated the date of this Agreement², stating that on the day immediately prior to the date of issuance of the negative certificate, no judicial decision or procedure of administrative dissolution without liquidation has been registered with the RCS by application of article 13, items 4 to 12, 16 and 17 of the Luxembourg law dated 19 December 2002 relating to the register of commerce and companies of Luxembourg as well as the accounting and the annual accounts of companies, as amended (the "**RCS Law**"), according to which

¹ Under certain circumstances (such as the agreement being signed outside business hours in Luxembourg, pending filings with the Luxembourg Register, unavailability of the website of the Luxembourg Register, etc) a document dated the day prior to the date of this Agreement (or such other date agreed between the Luxembourg counsels on the transaction) can also be acceptable.

² Under certain circumstances (such as the agreement being signed outside business hours in Luxembourg, pending filings with the Luxembourg Register, unavailability of the website of the Luxembourg Register, etc) a document dated the day prior to the date of this Agreement (or such other date agreed between the Luxembourg counsels on the transaction) can also be acceptable.

the Luxembourg Obligor would be subject to one of the proceedings referred to in these provisions of the RCS Law including in particular, bankruptcy (*faillite*), judicial reorganisation (*réorganisation judiciaire*), suspension of payments (*sursis de paiement*), judicial liquidation (*liquidation judiciaire*) or administrative dissolution without liquidation (*dissolution administrative sans liquidation*) proceedings.

- 1 (e) A specimen of the signature of each person authorised by the resolutions referred to in paragraph (b) above.
- 1 (f) A certificate of an authorised signatory of each Obligor certifying that each copy document specified in Section 1 of this Schedule is correct, complete and/or in full force and effect (as applicable) as at a date no earlier than the [date of this Agreement/first Utilisation Date].
- 1 (g) A certificate of an authorised signatory of each Luxembourg Obligor certifying that borrowing, guaranteeing and/or securing, as appropriate, the Total Commitments will not cause any borrowing, guaranteeing, securing and/or similar limit binding on that Luxembourg Obligor to be breached.
- 1 (h) A certificate of an authorised signatory of each Luxembourg Obligor certifying that as of the [date of this Agreement/first Utilisation Date], (A) the Company is not in a state of cessation of payments (*cessation de paiements*) and has not lost its creditworthiness (*ébranlement de crédit*), (B) no corporate action, legal proceedings or other procedure or step is taken in relation to bankruptcy (*faillite*), judicial, consensual or conservatory measures under the Luxembourg law dated 7 August 2023 on business preservation and the modernisation of the bankruptcy laws (the "**Business Preservation Law**"), suspension of payments (*sursis de paiement*), voluntary or judicial liquidation (*liquidation volontaire ou judiciaire*) or administrative dissolution without liquidation (*dissolution administrative sans liquidation*) proceedings, (C) no discussion has started with the Minister of Economy (*Ministre ayant l'Économie dans ses attributions*) or the Minister for Small and Medium-Sized Enterprises (*Ministre ayant les Classes moyennes dans ses attributions*) in respect of financial difficulties which could jeopardise all or part of its business under the Business Preservation Law, (D) no application has been made by it or, as far as it is aware, by any other entitled person for the appointment of a *juge-commissaire*, *liquidateur*, *curateur*, *conciliateur d'entreprise*, *mandataire de justice*, *juge délégué*, *administrateur provisoire* or similar officer pursuant to any insolvency, reorganisation or similar proceedings, and (E) to the best of its knowledge, no petition for the opening of such proceedings has been presented by it or by any other person entitled to do so.³
- 1 (i) A certificate of an authorised signatory of each Luxembourg Obligor certifying that it complies with the Domiciliation Act 1999.⁴

³ Note: it is recommended that this certification is not included if already covered in full in the representation sections of the facility agreement.

⁴ Note: it is recommended that this certification is not included if already covered in full in the representation sections of the facility agreement.

2. SECURITY DOCUMENT(S)

2 (a) The following Luxembourg law governed Security Documents (the "**Luxembourg Security Documents**") each duly entered into by the parties to them:

2 (a) (i) the Luxembourg law governed pledge over the shares of the Borrower ("**Luxembourg Share Pledge Agreement**");

2 (a) (ii) the Luxembourg law governed pledge over the cash bank accounts of the Borrower opened with the [Luxembourg Account Bank] ("**Luxembourg Account Pledge Agreement**");

2 (a) (iii) the Luxembourg law governed pledge over the [Luxembourg law governed] intra-group receivables owed to the Borrower ("**Luxembourg Receivables Pledge Agreement**"); and

2 (a) (iv) the Luxembourg law governed pledge over the intra-group receivables owed by the Borrower ("**Luxembourg Receivables Pledge Agreement (Borrower)**").

Note:

The above reflects a typical Luxembourg structure involving a sole Luxco as sole borrower, with its shareholder(s) being solely security provider(s) (i.e. not borrower(s) or guarantor(s)). A Luxembourg account pledge would be required only in respect of accounts of the Borrower which are opened with a Luxembourg institution. Luxembourg receivables pledge agreements are typically required if there are Luxembourg law governed receivables and/or Luxcos as debtor(s).

2 (b) A copy of the following documents required under the Luxembourg Security Document(s):

2 (b) (i) a copy of the register of shareholders of the Borrower reflecting the registration of the Luxembourg Share Pledge Agreement;

2 (b) (ii) a copy of the signed notice of pledge to be sent by the Borrower to the [Luxembourg Account Bank] in relation to the Luxembourg Account Pledge Agreement;

and

2 (b) (iii) if applicable, a copy of the signed notice of pledge to be sent by the Borrower to the debtor(s) of the pledged receivables in relation to the Luxembourg Receivables Pledge Agreement.

Note:

The complete recording of the Luxembourg Share Pledge Agreement cannot be made in advance but only after the fully signed and dated pledge agreement becomes available (for the avoidance of doubt, with all signatures released). Situations where the signing and funding occur simultaneously are to be discussed for each transaction, noting that as a matter of courtesy a copy of the undated and signed register of shareholders can be provided in advance.

For item 2 (b) (ii), the signed notice of account pledge can always be provided concomitantly with the signed and dated Luxembourg Account Pledge Agreement.

Item 2 (b) (iii) is only required in respect of debtor(s) which are NOT already parties to the Luxembourg Receivables Pledge Agreement(s).

3. LEGAL OPINIONS

The following legal opinions:

- a legal opinion of [], legal advisers to Borrower Luxembourg, relating to capacity matters; and
- a legal opinion of [], legal advisers to the Finance Parties in Luxembourg, relating to the validity of the Luxembourg Security Documents and enforceability in Luxembourg of non-Luxembourg law governed Finance Documents.

each substantially in the form distributed to the Lender/Finance Parties before signing this Agreement, and addressed to the Lender.

Note:

The allocation of legal opinions between Luxembourg counsels is only indicative and can be agreed differently between the parties, depending on (i) the type of transaction, (ii) the Luxembourg legal counsel which drafts the Luxembourg security documents (which is expected to opine on their validity) and (iii) the absence of any Luxembourg law governed finance documents (in which case it may be more efficient for only one Luxembourg counsel to opine on all Luxembourg law matters).

4. OTHER DOCUMENTS AND EVIDENCE

4 (i) A copy of any other Authorisation (as defined in LMA standard documentation) or other document, opinion or assurance which the Lender reasonably considers to be necessary or desirable (if it has notified the Borrower accordingly) in connection with the entry into and performance of the transactions contemplated by any Finance Document or for the validity and enforceability of any Finance Document.

4 (ii) A copy of the [Original] Financial Statements of each [Luxembourg] Obligor.

[4 (iii) Evidence that all fees, costs and expenses then due and payable from the Borrower under this Agreement have been or will be paid by the first Utilisation Date.]

Part II - Conditions Subsequent

	Condition Subsequent	Date on or before which it must be provided
1.	[A copy of the register of shareholders of the Borrower reflecting the registration of the Luxembourg Share Pledge Agreement]	On the date of the Share Pledge Agreement
2.	[A copy of the signed notice of pledge to be sent by the Borrower to the Luxembourg account bank in relation to the Luxembourg Account Pledge Agreement]	On the date of the Account Pledge Agreement
3.	A copy of the signed acknowledgement of the [Luxembourg Account Bank] in relation to the Luxembourg Account Pledge Agreement	Time period to be determined in accordance with the below guidelines
4.	A copy of the signed acknowledgement the relevant intra-group debtors pursuant to the Luxembourg Receivables Pledge Agreement	Time period to be determined in accordance with the below guidelines

Note

This schedule should be adapted to exclude any perfection documents already included as conditions precedent.

For item 1, a longer period can be agreed between the parties if exceptional circumstances justify it.

For item 2, it is difficult to justify a longer period, since the notice of pledge and its sending is completely within the control of the pledgor and its Luxembourg legal counsel.

For item 3, the exact time period for delivering the acknowledgement will depend primarily upon the time required by the [Luxembourg Account Bank] for issuing it, it being noted that the acknowledgement is a key requirement under Luxembourg law for the valid creation and perfection of the pledge and that according to the Luxembourg market practice the [Luxembourg Account Bank] will have pre-approved the forms of notice and acknowledgement prior to the signing of the Luxembourg Account Pledge Agreement.

Item 4 is only required if a separate notice of pledge is required to be sent to debtors pursuant to the Luxembourg Receivables Pledge Agreement(s). The requirement of the delivery of an acknowledgement shall apply only in respect of intra-group debtors and not third party debtors, such as the debtors of insurance claims or trade receivables.



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