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SENIOR MULTICURRENCY TERM AND REVOLVING FACILITIES AGREEMENT
FOR LEVERAGED ACQUISITION FINANCE TRANSACTIONS
(SENIOR/MEZZANINE) INCORPORATING BACKWARD-LOOKING
COMPOUNDED RATES AND FORWARD-LOOKING TERM RATES WITH RATE
SWITCH PROVISIONS (WITH OPTION FOR LOOKBACK WITHOUT OR WITH
OBSERVATION SHIFT)



[amount in numbers]

SENIOR FACILITIES AGREEMENT

dated []

for

[NAME OF PRINCIPAL COMPANY]

arranged by

[NAME[S] OF MANDATED LEAD ARRANGER[S]]
as Mandated Lead Arranger[s]

with

[NAME OF AGENT]
acting as Agent

[NAME OF ISSUING BANK]
acting as Issuing Bank

and

[NAME OF SECURITY AGENT]
acting as Security Agent

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SECTION 6 ADDITIONAL PAYMENT OBLIGATIONS

19. TAX GROSS-UP AND INDEMNITIES¹⁴³

19.1 Definitions

In this Agreement:

"Borrower DTTP Filing" means an HM Revenue & Customs' Form DTTP2 duly completed and filed by the relevant Borrower, which:

- (a) where it relates to a Treaty Lender that is an Original Lender, contains the scheme reference number and jurisdiction of tax residence stated opposite that Lender's name in Part II of Schedule 1 (*The Original Parties*), and
 - (i) where the Borrower is an Original Borrower, is filed with HM Revenue & Customs within 30 days of the date of this Agreement; or
 - (ii) where the Borrower is an Additional Borrower, is filed with HM Revenue & Customs within 30 days of the date on which that Borrower becomes an Additional Borrower; or
- (b) where it relates to a Treaty Lender that is not an Original Lender, contains the scheme reference number and jurisdiction of tax residence stated in respect of that Lender in the documentation which it executes on becoming a Party as a Lender; and
 - (i) where the Borrower is a Borrower as at the date on which that Treaty Lender becomes a Party as a Lender, is filed with HM Revenue & Customs within 30 days of that date; or
 - (ii) where the Borrower is not a Borrower as at the date on which that Treaty Lender becomes a Party as a Lender, is filed with HM Revenue & Customs within 30 days of the date on which that Borrower becomes an Additional Borrower.

"Protected Party" means a Finance Party which is or will be subject to any liability or required to make any payment for or on account of Tax in relation to a sum received or receivable (or any sum deemed for the purposes of Tax to be received or receivable) under a Finance Document.

¹⁴³ This Clause 19 (*Tax gross-up and indemnities*) is drafted on the assumption that payments made by the Obligor(s) may be subject to withholding tax (if any) under United Kingdom law and not under the law of any other jurisdiction. If this is not the case and the Obligor(s) is/are to gross-up payments, Clause 19 (*Tax gross-up and indemnities*) will need to be modified, in particular paragraphs (d), (g), (h), (i), (j), (k) and (l) of Clause 19.2 (*Tax Gross-up*) and the related definitions. If the "Treaty Lender" concept is used, always check the wording of relevant Treaties.

Clause 19 (*Tax gross-up and indemnities*) and in particular the definition of "Qualifying Lender", should always be considered on a case-by-case basis. Consideration should also be given as to whether the representation in Clause 25.10 (*Deduction of Tax*) requires amendment.

"Qualifying Lender" means:¹⁴⁴

- (a) a Lender which is beneficially entitled to interest payable to that Lender in respect of an advance under a Finance Document and is:
 - (i) a Lender:
 - (A) which is a bank (as defined for the purpose of section 879 of the ITA) making an advance under a Finance Document and is within the charge to United Kingdom corporation tax as respects any payments of interest made in respect of that advance or would be within such charge as respects such payments apart from section 18A of the CTA; or
 - (B) in respect of an advance made under a Finance Document by a person that was a bank (as defined for the purpose of section 879 of the ITA) at the time that that advance was made and within the charge to United Kingdom corporation tax as respects any payments of interest made in respect of that advance; or
 - (ii) [a Lender which is:
 - (A) a company resident in the United Kingdom for United Kingdom tax purposes;
 - (B) a partnership each member of which is:
 - (1) a company so resident in the United Kingdom; or
 - (2) a company not so resident in the United Kingdom which carries on a trade in the United Kingdom through a permanent establishment and which brings into account in computing its chargeable profits (within the meaning of section 19 of the CTA) the whole of any share of interest payable in respect of that advance that falls to it by reason of Part 17 of the CTA;
 - (C) a company not so resident in the United Kingdom which carries on a trade in the United Kingdom through a permanent establishment and which brings into account interest payable in respect of that advance in computing the chargeable profits

¹⁴⁴ Users should consider expanding this definition if inclusion of pension funds among the lending syndicate is envisaged. Users should refer to the tax-gross up provisions in the recommended form of LMA Term Facility Agreement for use in Pan-European Private Placements for suitable language. Amendments will need to be made to: (a) the definitions of "**Qualifying Lender**" and "**Tax Confirmation**"; (b) paragraphs (d)(ii) and (d)(iii) of Clause 19.2 (*Tax gross-up*); (c) paragraph (a)(ii) of Clause 25.10 (*Deduction of Tax*); and (d) the forms of Tax Confirmation set out in Schedule 4 (*Form of Transfer Certificate*), Schedule 5 (*Form of Assignment Agreement*), Schedule 14 (*Form of Increase Confirmation*) and Schedule 17 (*Form of Incremental Facility Lender Certificate*).

(within the meaning of section 19 of the CTA) of that company;
or]

- (iii) a Treaty Lender[; or
- (b) a Lender which is a building society (as defined for the purposes of section 880 of the ITA) making an advance under a Finance Document].

[**"Tax Confirmation"** means a confirmation by a Lender that the person beneficially entitled to interest payable to that Lender in respect of an advance under a Finance Document is either:

- (a) a company resident in the United Kingdom for United Kingdom tax purposes;
- (b) a partnership each member of which is:
 - (i) a company so resident in the United Kingdom; or
 - (ii) a company not so resident in the United Kingdom which carries on a trade in the United Kingdom through a permanent establishment and which brings into account in computing its chargeable profits (within the meaning of section 19 of the CTA) the whole of any share of interest payable in respect of that advance that falls to it by reason of Part 17 of the CTA; or
- (c) a company not so resident in the United Kingdom which carries on a trade in the United Kingdom through a permanent establishment and which brings into account interest payable in respect of that advance in computing the chargeable profits (within the meaning of section 19 of the CTA) of that company.]

"Tax Credit" means a credit against, relief or remission for, or repayment of, any Tax.

"Tax Deduction" means a deduction or withholding for or on account of Tax from a payment under a Finance Document, other than a FATCA Deduction.

"Tax Payment" means either the increase in a payment made by an Obligor to a Finance Party under Clause 19.2 (*Tax gross-up*) or a payment under Clause 19.3 (*Tax indemnity*).

"Treaty Lender" means a Lender which:

- (a) is treated as a resident of a Treaty State for the purposes of the Treaty;
- (b) does not carry on a business in the United Kingdom through a permanent establishment with which that Lender's participation in the Loan is effectively connected; [and
- (c)].¹⁴⁵

¹⁴⁵ This is a complex area and in each case relevant treaties should be reviewed and, if appropriate, additional wording inserted to apportion risk as agreed by the Parties.

"Treaty State" means a jurisdiction having a double taxation agreement (a "**Treaty**") with the United Kingdom which makes provision for full exemption from tax imposed by the United Kingdom on interest.

["UK Non-Bank Lender"] means:

- (a) an Original Lender listed in Part III of Schedule 1 (*The Original Parties*); and¹⁴⁶
- (b) a Lender which is not an Original Lender and which gives a Tax Confirmation in the documentation which it executes on becoming a Party as a Lender.]

Unless a contrary indication appears, in this Clause 19 a reference to "**determines**" or "**determined**" means a determination made in the absolute discretion of the person making the determination.

19.2 **Tax gross-up**

- (a) Each Obligor shall make all payments to be made by it without any Tax Deduction, unless a Tax Deduction is required by law.
- (b) The Parent shall promptly upon becoming aware that an Obligor must make a Tax Deduction (or that there is any change in the rate or the basis of a Tax Deduction) notify the Agent accordingly. Similarly, a Lender or Issuing Bank shall notify the Agent on becoming so aware in respect of a payment payable to that Lender or Issuing Bank. If the Agent receives such notification from a Lender or Issuing Bank it shall notify the Parent and that Obligor.
- (c) If a Tax Deduction is required by law to be made by an Obligor, the amount of the payment due from that Obligor shall be increased to an amount which (after making any Tax Deduction) leaves an amount equal to the payment which would have been due if no Tax Deduction had been required.
- (d) A payment shall not be increased under paragraph (c) above by reason of a Tax Deduction on account of Tax imposed by the United Kingdom, if on the date on which the payment falls due:
 - (i) the payment could have been made to the relevant Lender without a Tax Deduction if the Lender had been a Qualifying Lender, but on that date that Lender is not or has ceased to be a Qualifying Lender other than as a result of any change after the date it became a Lender under this Agreement in (or in the interpretation, administration, or application of)

¹⁴⁶ If UK Non-Bank Lenders are to be envisaged and this definition is, therefore, included but no Original Lender is a UK Non-Bank Lender:

- (a) delete this paragraph (a);
- (b) delete Part III of Schedule 1 (*The Original Parties*); and
- (c) delete the words "other than UK Non-Bank Lenders" from the heading of Part II of Schedule 1 (*The Original Parties*).

Do not, however, delete this definition, as a UK Non-Bank Lender may become a Lender after the date of this Agreement.

any law or Treaty or any published practice or published concession of any relevant taxing authority[; or

(ii) the relevant Lender is a Qualifying Lender solely by virtue of paragraph (a)(ii) of the definition of "Qualifying Lender" and:

(A) an officer of H.M. Revenue & Customs has given (and not revoked) a direction (a "**Direction**") under section 931 of the ITA which relates to the payment and that Lender has received from the Obligor making the payment or from the Parent a certified copy of that Direction; and

(B) the payment could have been made to the Lender without any Tax Deduction if that Direction had not been made; or

(iii) the relevant Lender is a Qualifying Lender solely by virtue of paragraph (a)(ii) of the definition of "Qualifying Lender" and:

(A) the relevant Lender has not given a Tax Confirmation to the Parent; and

(B) the payment could have been made to the Lender without any Tax Deduction if the Lender had given a Tax Confirmation to the Parent, on the basis that the Tax Confirmation would have enabled the Parent to have formed a reasonable belief that the payment was an "excepted payment" for the purpose of section 930 of the ITA]; or

(iv) the relevant Lender is a Treaty Lender and the Obligor making the payment is able to demonstrate that the payment could have been made to the Lender without the Tax Deduction had that Lender complied with its obligations under paragraph (g) or (h) (as applicable) below.

(e) If an Obligor is required to make a Tax Deduction, that Obligor shall make that Tax Deduction and any payment required in connection with that Tax Deduction within the time allowed and in the minimum amount required by law.

(f) Within thirty days of making either a Tax Deduction or any payment required in connection with that Tax Deduction, the Obligor making that Tax Deduction shall deliver to the Agent for the Finance Party entitled to the payment a statement under section 975 of the ITA or other evidence reasonably satisfactory to that Finance Party that the Tax Deduction has been made or (as applicable) any appropriate payment paid to the relevant taxing authority.

(g)

(i) Subject to paragraph (ii) below, a Treaty Lender and each Obligor which makes a payment to which that Treaty Lender is entitled shall co-operate in completing any procedural formalities necessary for that Obligor to obtain authorisation to make that payment without a Tax Deduction.

(ii)

- (A) A Treaty Lender which is an Original Lender and that holds a passport under the HMRC DT Treaty Passport scheme, and which wishes that scheme to apply to this Agreement, shall confirm its scheme reference number and its jurisdiction of tax residence opposite its name in Part II of Schedule 1 (*The Original Parties*); and
- (B) a Treaty Lender which is not an Original Lender and that holds a passport under the HMRC DT Treaty Passport scheme, and which wishes that scheme to apply to this Agreement, shall confirm its scheme reference number and its jurisdiction of tax residence in the documentation which it executes on becoming a Party as a Lender,

and, having done so, that Lender shall be under no obligation pursuant to paragraph (i) above.

(h) If a Lender has confirmed its scheme reference number and its jurisdiction of tax residence in accordance with paragraph (g)(ii) above and:

- (i) a Borrower making a payment to that Lender has not made a Borrower DTTP Filing in respect of that Lender; or
- (ii) a Borrower making a payment to that Lender has made a Borrower DTTP Filing in respect of that Lender but:
 - (A) that Borrower DTTP Filing has been rejected by HM Revenue & Customs;
 - (B) HM Revenue & Customs has not given the Borrower authority to make payments to that Lender without a Tax Deduction within [60] days of the date of the Borrower DTTP Filing; or
 - (C) HM Revenue & Customs has given the Borrower authority to make payments to that Lender without a Tax Deduction but such authority has subsequently been revoked or expired,

and in each case, the Borrower has notified that Lender in writing, that Lender and the Borrower shall co-operate in completing any additional procedural formalities necessary for that Borrower to obtain authorisation to make that payment without a Tax Deduction.

- (i) If a Lender has not confirmed its scheme reference number and jurisdiction of tax residence in accordance with paragraph (g)(ii) above, no Obligor shall make a Borrower DTTP Filing or file any other form relating to the HMRC DT Treaty Passport scheme in respect of that Lender's Commitment(s) or its participation in any Utilisation unless the Lender otherwise agrees.
- (j) A Borrower shall, promptly on making a Borrower DTTP Filing, deliver a copy of that Borrower DTTP Filing to the Agent for delivery to the relevant Lender.

- (k) [A UK Non-Bank Lender which is an Original Lender gives a Tax Confirmation to the Parent by entering into this Agreement.]
- (l) A UK Non-Bank Lender shall promptly notify the Parent and the Agent if there is any change in the position from that set out in the Tax Confirmation.]

19.3 Tax indemnity

- (a) The Parent shall (within three Business Days of demand by the Agent) pay to a Protected Party an amount equal to the loss, liability or cost which that Protected Party determines will be or has been (directly or indirectly) suffered for or on account of Tax by that Protected Party in respect of a Finance Document.
- (b) Paragraph (a) above shall not apply:
 - (i) with respect to any Tax assessed on a Finance Party:
 - (A) under the law of the jurisdiction in which that Finance Party is incorporated or, if different, the jurisdiction (or jurisdictions) in which that Finance Party is treated as resident for tax purposes; or
 - (B) under the law of the jurisdiction in which that Finance Party's Facility Office is located in respect of amounts received or receivable in that jurisdiction,

if that Tax is imposed on or calculated by reference to the net income received or receivable (but not any sum deemed to be received or receivable) by that Finance Party; or
 - (ii) to the extent a loss, liability or cost:
 - (A) is compensated for by an increased payment under Clause 19.2 (*Tax gross-up*); or
 - (B) would have been compensated for by an increased payment under Clause 19.2 (*Tax gross-up*) but was not so compensated solely because one of the exclusions in paragraph (d) of Clause 19.2 (*Tax gross-up*) applied; or
 - (C) relates to a FATCA Deduction required to be made by a Party.
- (c) A Protected Party making, or intending to make a claim under paragraph (a) above shall promptly notify the Agent of the event which will give, or has given, rise to the claim, following which the Agent shall notify the Parent.
- (d) A Protected Party shall, on receiving a payment from an Obligor under this Clause 19.3, notify the Agent.

19.4 Tax Credit

If an Obligor makes a Tax Payment and the relevant Finance Party determines that:

- (a) a Tax Credit is attributable to an increased payment of which that Tax Payment forms part, to that Tax Payment or to a Tax Deduction in consequence of which that Tax Payment was required; and
- (b) that Finance Party has obtained and utilised that Tax Credit,

the Finance Party shall pay an amount to the Obligor which that Finance Party determines will leave it (after that payment) in the same after-Tax position as it would have been in had the Tax Payment not been required to be made by the Obligor.

19.5 Lender status confirmation

Each Lender which is not an Original Lender shall indicate, in the documentation which it executes on becoming a Party as a Lender, and for the benefit of the Agent and without liability to any Obligor, which of the following categories it falls in:

- (a) not a Qualifying Lender;
- (b) a Qualifying Lender (other than a Treaty Lender); or
- (c) a Treaty Lender.

If such a Lender fails to indicate its status in accordance with this Clause 19.5 then that Lender shall be treated for the purposes of this Agreement (including by each Obligor) as if it is not a Qualifying Lender until such time as it notifies the Agent which category applies (and the Agent, upon receipt of such notification, shall inform the Parent). For the avoidance of doubt, the documentation which a Lender executes on becoming a Party as a Lender shall not be invalidated by any failure of a Lender to comply with this Clause 19.5.

19.6 Stamp taxes

The Parent shall pay and, within three Business Days of demand, indemnify each Secured Party against any cost, loss or liability that Secured Party incurs in relation to all stamp duty, registration and other similar Taxes payable in respect of any Finance Document.

19.7 VAT

- (a) All amounts expressed to be payable under a Finance Document by any Party to a Finance Party which (in whole or in part) constitute the consideration for any supply for VAT purposes are deemed to be exclusive of any VAT which is chargeable on that supply, and accordingly, subject to paragraph (b) below, if VAT is or becomes chargeable on any supply made by any Finance Party to any Party under a Finance Document and such Finance Party is required to account to the relevant tax authority for the VAT, that Party must pay to such Finance Party (in addition to and at the same time as paying any other consideration for

such supply) an amount equal to the amount of the VAT (and such Finance Party must promptly provide an appropriate VAT invoice to that Party).

- (b) If VAT is or becomes chargeable on any supply made by any Finance Party (the "**Supplier**") to any other Finance Party (the "**Recipient**") under a Finance Document, and any Party other than the Recipient (the "**Relevant Party**") is required by the terms of any Finance Document to pay an amount equal to the consideration for that supply to the Supplier (rather than being required to reimburse or indemnify the Recipient in respect of that consideration):
 - (i) (where the Supplier is the person required to account to the relevant tax authority for the VAT) the Relevant Party must also pay to the Supplier (at the same time as paying that amount) an additional amount equal to the amount of the VAT. The Recipient must (where this paragraph (i) applies) promptly pay to the Relevant Party an amount equal to any credit or repayment the Recipient receives from the relevant tax authority which the Recipient reasonably determines relates to the VAT chargeable on that supply; and
 - (ii) (where the Recipient is the person required to account to the relevant tax authority for the VAT) the Relevant Party must promptly, following demand from the Recipient, pay to the Recipient an amount equal to the VAT chargeable on that supply but only to the extent that the Recipient reasonably determines that it is not entitled to credit or repayment from the relevant tax authority in respect of that VAT.
- (c) Where a Finance Document requires any Party to reimburse or indemnify a Finance Party for any cost or expense, that Party shall reimburse or indemnify (as the case may be) such Finance Party for the full amount of such cost or expense, including such part thereof as represents VAT, save to the extent that such Finance Party reasonably determines that it is entitled to credit or repayment in respect of such VAT from the relevant tax authority.
- (d) Any reference in this Clause 19.7 to any Party shall, at any time when such Party is treated as a member of a group for VAT purposes, include (where appropriate and unless the context otherwise requires) a reference to the representative member of such group at such time (the term "representative member" to have the same meaning as in the Value Added Tax Act 1994)¹⁴⁷.
- (e) In relation to any supply made by a Finance Party to any Party under a Finance Document, if reasonably requested by such Finance Party, that Party must promptly provide such Finance Party with details of that Party's VAT registration and such other information as is reasonably requested in connection with such Finance Party's VAT reporting requirements in relation to such supply.¹⁴⁸

¹⁴⁷ This provision does not operate in an international context, so where there is an international context, this wording should be reviewed and updated accordingly.

¹⁴⁸ This provision does not operate for the benefit of non-Finance Parties and whether this is correct should be considered on a case by case basis.

19.8 FATCA information

- (a) Subject to paragraph (c) below, each Party shall, within [ten] Business Days of a reasonable request by another Party:
 - (i) confirm to that other Party whether it is:
 - (A) a FATCA Exempt Party; or
 - (B) not a FATCA Exempt Party;
 - (ii) supply to that other Party such forms, documentation and other information relating to its status under FATCA as that other Party reasonably requests for the purposes of that other Party's compliance with FATCA; and
 - (iii) supply to that other Party such forms, documentation and other information relating to its status as that other Party reasonably requests for the purposes of that other Party's compliance with any other law, regulation, or exchange of information regime.
- (b) If a Party confirms to another Party pursuant to paragraph (a)(i) above that it is a FATCA Exempt Party and it subsequently becomes aware that it is not or has ceased to be a FATCA Exempt Party, that Party shall notify that other Party reasonably promptly.
- (c) Paragraph (a) above shall not oblige any Finance Party to do anything, and paragraph (a)(iii) above shall not oblige any other Party to do anything, which would or might in its reasonable opinion constitute a breach of:
 - (i) any law or regulation;
 - (ii) any fiduciary duty; or
 - (iii) any duty of confidentiality.
- (d) If a Party fails to confirm whether or not it is a FATCA Exempt Party or to supply forms, documentation or other information requested in accordance with paragraph (a)(i) or (a)(ii) above (including, for the avoidance of doubt, where paragraph (c) above applies), then such Party shall be treated for the purposes of the Finance Documents (and payments under them) as if it is not a FATCA Exempt Party until such time as the Party in question provides the requested confirmation, forms, documentation or other information.
- (e) [If a Borrower is a US Tax Obligor or the Agent reasonably believes that its obligations under FATCA or any other applicable law or regulation require it, each Lender shall, within [ten] Business Days of:
 - (i) where an Original Borrower is a US Tax Obligor and the relevant Lender is an Original Lender, the date of this Agreement;

- (ii) where a Borrower is a US Tax Obligor on a date on which any other Lender becomes a Party as a Lender, that date;
- (iii) the date a new US Tax Obligor accedes as a Borrower; or
- (iv) where a Borrower is not a US Tax Obligor, the date of a request from the Agent,

supply to the Agent:

- (A) a withholding certificate on Form W-8, Form W-9 or any other relevant form; or
- (B) any withholding statement or other document, authorisation or waiver as the Agent may require to certify or establish the status of such Lender under FATCA or that other law or regulation.

- (f) The Agent shall provide any withholding certificate, withholding statement, document, authorisation or waiver it receives from a Lender pursuant to paragraph (e) above to the relevant Borrower.
- (g) If any withholding certificate, withholding statement, document, authorisation or waiver provided to the Agent by a Lender pursuant to paragraph (e) above is or becomes materially inaccurate or incomplete, that Lender shall promptly update it and provide such updated withholding certificate, withholding statement, document, authorisation or waiver to the Agent unless it is unlawful for the Lender to do so (in which case the Lender shall promptly notify the Agent). The Agent shall provide any such updated withholding certificate, withholding statement, document, authorisation or waiver to the relevant Borrower.
- (h) The Agent may rely on any withholding certificate, withholding statement, document, authorisation or waiver it receives from a Lender pursuant to paragraph (e) or (g) above without further verification. The Agent shall not be liable for any action taken by it under or in connection with paragraph (e), (f) or (g) above.]¹⁴⁹

19.9 FATCA Deduction¹⁵⁰

- (a) Each Party may make any FATCA Deduction it is required to make by FATCA, and any payment required in connection with that FATCA Deduction, and no Party shall be required to increase any payment in respect of which it makes such a FATCA Deduction or otherwise compensate the recipient of the payment for that FATCA Deduction.

¹⁴⁹ Paragraphs (e), (f), (g) and (h) of Clause 19.8 (*FATCA information*) may be used for loans entered into with US borrowers (or loans where a US borrower may become an Additional Borrower).

¹⁵⁰ Clause 19.9 (*FATCA Deduction*) may not be appropriate for all circumstances (for instance for some emerging market financings). For further information see the LMA 2014 Summary Note on FATCA (available through the LMA website).

- (b) Each Party shall promptly, upon becoming aware that it must make a FATCA Deduction (or that there is any change in the rate or the basis of such FATCA Deduction), notify the Party to whom it is making the payment and, in addition, shall notify the Parent and the Agent and the Agent shall notify the other Finance Parties.

20. INCREASED COSTS

20.1 Increased Costs¹⁵¹

- (a) Subject to Clause 20.3 (*Exceptions*) the Parent shall, within three Business Days of a demand by the Agent, pay for the account of a Finance Party the amount of any Increased Costs incurred by that Finance Party or any of its Affiliates as a result of (i) the introduction of or any change in (or in the interpretation, administration or application of) any law or regulation or (ii) compliance with any law or regulation made after the date of this Agreement.
- (b) In this Agreement "**Increased Costs**" means:
- (i) a reduction in the rate of return from a Facility or on a Finance Party's (or its Affiliate's) overall capital;
 - (ii) an additional or increased cost; or
 - (iii) a reduction of any amount due and payable under any Finance Document, which is incurred or suffered by a Finance Party or any of its Affiliates to the extent that it is attributable to that Finance Party having entered into its Commitment or an Ancillary Commitment or funding or performing its obligations under any Finance Document or Letter of Credit.

20.2 Increased Cost claims

- (a) A Finance Party intending to make a claim pursuant to Clause 20.1 (*Increased Costs*) shall notify the Agent of the event giving rise to the claim, following which the Agent shall promptly notify the Parent.
- (b) Each Finance Party shall, as soon as practicable after a demand by the Agent, provide a certificate confirming the amount of its Increased Costs.

¹⁵¹ The form of increased costs clause in this Agreement is drafted in deliberately wide terms in an attempt to cover all circumstances which could increase a Lender's costs as a result of a change in law or regulation. The European legislation (often referred to as "**CRD IV**") (and a package of subsequent amendments often referred to as "**CRD V**") which implements the Basel Committee on Banking Supervision's proposed new standards for bank capital and liquidity requirements (labelled "**Basel III**") has come into force and potentially involves greater costs than those envisaged by Basel III. Users may wish to consider whether to supplement the clause to address expressly the extent to which both Basel III costs, CRD IV / CRD V costs (and, at the end of the transition period under the EU / UK Withdrawal Agreement, costs under the UK's equivalent regime) are intended to be within, or outside, the scope of the clause.

20.3 Exceptions¹⁵²

- (a) Clause 20.1 (*Increased Costs*) does not apply to the extent any Increased Cost is:
 - (i) attributable to a Tax Deduction required by law to be made by an Obligor;
 - (ii) attributable to a FATCA Deduction required to be made by a Party;
 - (iii) compensated for by Clause 19.3 (*Tax indemnity*) (or would have been compensated for under Clause 19.3 (*Tax indemnity*) but was not so compensated solely because any of the exclusions in paragraph (b) of Clause 19.3 (*Tax indemnity*) applied); or
 - (iv) attributable to the wilful breach by the relevant Finance Party or its Affiliates of any law or regulation.
- (b) In this Clause 20.3 reference to a "**Tax Deduction**" has the same meaning given to the term in Clause 19.1 (*Definitions*).

¹⁵² Basel II was finalised in 2004 and implemented in Europe during 2007 and so it may not be necessary to include a Basel II carve out from the increased costs clause where the syndicate consists of European Lenders. If it is agreed by the parties to exclude Basel II from the increased costs clause, and for example this may be relevant where there are US Lenders in the syndicate as Basel II has not been fully implemented in the US, then users should note that elements of the Basel III papers amend the Basel II paper and so care needs to be taken with the drafting of the carve out. The following provision may be inserted at the end of this paragraph (a) of Clause 20.3 (*Exceptions*) to address this point:

"(v) attributable to the implementation or application of or compliance with the "International Convergence of Capital Measurement and Capital Standards, a Revised Framework" published by the Basel Committee on Banking Supervision in June 2004 in the form existing on the date of this Agreement (but excluding any amendment arising out of Basel III) ("**Basel II**") or any other law or regulation which implements Basel II (whether such implementation, application or compliance is by a government, regulator, Finance Party or any of its Affiliates)."

The following definition should be added to paragraph (b) of Clause 20.1 (*Increased Costs*):

""Basel III" means:

- (A) the agreements on capital requirements, a leverage ratio and liquidity standards contained in "Basel III: A global regulatory framework for more resilient banks and banking systems", "Basel III: International framework for liquidity risk measurement, standards and monitoring" and "Guidance for national authorities operating the countercyclical capital buffer" published by the Basel Committee on Banking Supervision in December 2010, each as amended, supplemented or restated;
- (B) the rules for global systemically important banks contained in "Global systemically important banks: assessment methodology and the additional loss absorbency requirement – Rules text" published by the Basel Committee on Banking Supervision in November 2011, as amended, supplemented or restated; and
- (C) any further guidance or standards published by the Basel Committee on Banking Supervision relating to "Basel III".

Users should note that this definition of Basel III is deliberately wide and includes future Basel III publications. It is, therefore, unlikely to be suitable to describe Basel III in the context of **excluding** Basel III costs from the scope of the increased costs clause generally.

21. OTHER INDEMNITIES

21.1 Currency indemnity

- (a) If any sum due from an Obligor under the Finance Documents (a "Sum"), or any order, judgment or award given or made in relation to a Sum, has to be converted from the currency (the "**First Currency**") in which that Sum is payable into another currency (the "**Second Currency**") for the purpose of:
- (i) making or filing a claim or proof against that Obligor; or
 - (ii) obtaining or enforcing an order, judgment or award in relation to any litigation or arbitration proceedings,

that Obligor shall as an independent obligation, within three Business Days of demand, indemnify each Secured Party to whom that Sum is due against any cost, loss or liability arising out of or as a result of the conversion including any discrepancy between (A) the rate of exchange used to convert that Sum from the First Currency into the Second Currency and (B) the rate or rates of exchange available to that person at the time of its receipt of that Sum.

- (b) Each Obligor waives any right it may have in any jurisdiction to pay any amount under the Finance Documents in a currency or currency unit other than that in which it is expressed to be payable.

21.2 Other indemnities

- (a) The Parent shall (or shall procure that an Obligor will), within three Business Days of demand, indemnify the Arranger and each other Secured Party against any cost, loss or liability incurred by it as a result of:
- (i) the occurrence of any Event of Default;
 - (ii) a failure by an Obligor to pay any amount due under a Finance Document on its due date, including without limitation, any cost, loss or liability arising as a result of Clause 35 (*Sharing among the Finance Parties*);
 - (iii) funding, or making arrangements to fund, its participation in a Utilisation requested by the Parent or a Borrower in a Utilisation Request but not made by reason of the operation of any one or more of the provisions of this Agreement (other than by reason of default or negligence by that Finance Party alone);
 - (iv) issuing or making arrangements to issue a Letter of Credit requested by the Parent or a Borrower in a Utilisation Request but not issued by reason of the operation of any one or more of the provisions of this Agreement (other than by reason of default or negligence by that Finance Party alone); or
 - (v) a Utilisation (or part of a Utilisation) not being prepaid in accordance with a notice of prepayment given by a Borrower or the Parent.

- (b) The Parent shall promptly indemnify each Finance Party, each Affiliate of a Finance Party and each officer or employee of a Finance Party or its Affiliate, against any cost, loss or liability incurred by that Finance Party or its Affiliate (or officer or employee of that Finance Party or Affiliate) in connection with or arising out of the Acquisition or the funding of the Acquisition (including but not limited to those incurred in connection with any litigation, arbitration or administrative proceedings or regulatory enquiry concerning the Acquisition), unless such loss or liability is caused by the gross negligence or wilful misconduct of that Finance Party or its Affiliate (or employee or officer of that Finance Party or Affiliate). Any Affiliate or any officer or employee of a Finance Party or its Affiliate may rely on this Clause 21.2 [subject to Clause 1.4 (*Third party rights*) and the provisions of the Third Parties Act].

21.3 Indemnity to the Agent

The Parent shall promptly indemnify the Agent against:

- (a) any cost, loss or liability incurred by the Agent (acting reasonably) as a result of:
 - (i) investigating any event which it reasonably believes is a Default;
 - (ii) acting or relying on any notice, request or instruction which it reasonably believes to be genuine, correct and appropriately authorised; or
 - (iii) instructing lawyers, accountants, tax advisers, surveyors or other professional advisers or experts as permitted under this Agreement; and
- (b) any cost, loss or liability [(including, without limitation, for negligence or any other category of liability whatsoever)]¹⁵³ incurred by the Agent (otherwise than by reason of the Agent's gross negligence or wilful misconduct) [(or, in the case of any cost, loss or liability pursuant to Clause 36.11 (*Disruption to payment systems etc.*) notwithstanding the Agent's negligence, gross negligence or any other category of liability whatsoever but not including any claim based on the fraud of the Agent)]¹⁵⁴ in acting as Agent under the Finance Documents.

¹⁵³ Users should consider including this wording if the optional Clause 36.11 (*Disruption to payment systems etc.*) has been included.

¹⁵⁴ Include words in brackets if optional Clause 36.11 (*Disruption to payment systems etc.*) has been included.

21.4 Indemnity to the Security Agent¹⁵⁵

- (a) Each Obligor jointly and severally shall promptly indemnify the Security Agent and every Receiver and Delegate against any cost, loss or liability incurred by any of them as a result of:
 - (i) any failure by the Parent to comply with its obligations under Clause 23 (*Costs and expenses*);
 - (ii) acting or relying on any notice, request or instruction which it reasonably believes to be genuine, correct and appropriately authorised;
 - (iii) the taking, holding, protection or enforcement of the Transaction Security;
 - (iv) the exercise of any of the rights, powers, discretions, authorities and remedies vested in the Security Agent and each Receiver and Delegate by the Finance Documents or by law;
 - (v) any default by any Obligor in the performance of any of the obligations expressed to be assumed by it in the Finance Documents; or
 - (vi) acting as Security Agent, Receiver or Delegate under the Finance Documents or which otherwise relates to any of the Charged Property (otherwise, in each case, than by reason of the relevant Security Agent's, Receiver's or Delegate's gross negligence or wilful misconduct).
- (b) Each Obligor expressly acknowledges and agrees that the continuation of its indemnity obligations under this Clause 21.4 will not be prejudiced by any release or disposal under clause [14] (*Distressed Disposals and Appropriation*) of the Intercreditor Agreement taking into account the operation of that clause.
- (c) The Security Agent and every Receiver and Delegate may, in priority to any payment to the Secured Parties, indemnify itself out of the Charged Property in respect of, and pay and retain, all sums necessary to give effect to the indemnity in this Clause 21.4 and shall have a lien on the Transaction Security and the proceeds of the enforcement of the Transaction Security for all moneys payable to it.

22. MITIGATION BY THE LENDERS

22.1 Mitigation

- (a) Each Finance Party shall, in consultation with the Parent, take all reasonable steps to mitigate any circumstances which arise and which would result in any Facility ceasing to be available or any amount becoming payable under or pursuant to, or cancelled pursuant to, any of Clause 12.1 (*Illegality*) (or, in

¹⁵⁵ To the extent that an equivalent indemnity is included in the Intercreditor Agreement the indemnity in this Clause 21.4 (*Indemnity to the Security Agent*) can be removed to avoid unnecessary overlap. (The recommended forms of LMA Intercreditor Agreement for Leveraged Acquisition Finance Transactions (Senior/Mezzanine) contains an equivalent indemnity at clause 24.1 (*Indemnity to the Security Agent*)).



BPP

Nature and purpose of security and quasi-security

This element explains the nature and purpose of security and quasi-security and how it is used in debt finance transactions.

Introduction

- Having considered the loan agreement, attention now turns to the security package the lender may require and drafting the security document.
- A lender can make a loan on an unsecured basis, but that would make the lender an unsecured creditor. If the borrower defaults and becomes insolvent, the lender's claim against the borrower will rank alongside other unsecured creditors. An unsecured creditor only has a personal claim against the debtor and has no direct claim against the debtor's assets.
- Due to the statutory order of payment of creditors on the winding-up or administration of a company's assets, other types of creditors will rank ahead of unsecured creditors, meaning the lender risks losing some or all of their money.
- This is why a lender will want to be a secured creditor by taking security, as they will enhance their chances of getting their money back.
- Essentially, security is where the lender has a proprietary right in an asset of the borrower.
- By contrast, quasi-security broadly provides a lender with a way of recovering their money, but does not create rights over an asset of the borrower.

What is security?

- The aim of security is to protect a lender from the possible insolvency of a borrower. If a lender holds security over the assets of a borrower, then this increases the likelihood of the lender being repaid.
- When a lender holds security over an asset of the borrower, if the borrower defaults, then the lender can step in and take possession of that asset or sell that asset to repay any outstanding amount that is due on its loan to the borrower.
- Depending on the type of security taken, the lender may effectively 'control' the asset in that it cannot be disposed of by the borrower without the involvement of the lender.

What is security?

- Taking security also gives lenders certain rights under insolvency legislation, for example the right for a 'qualifying floating charge' holder to appoint its own choice of administrator using the out-of-court procedure.
- Under insolvency law, the claims of secured creditors rank ahead of those of unsecured creditors and shareholders.
- The right for a lender to enforce its security will be triggered when a borrower defaults under the connected loan agreement.

Which obligations are secured?

- The proceeds of sale of the secured assets can only be applied towards repayment of the secured debt (i.e., the monies owed to the lender). This is typically defined in the security document as the '**Secured Liabilities**'.
- Secured Liabilities is usually defined in one of two ways:
 - all monies; or
 - limited to amounts under a specific loan agreement.
- See slides below for examples.

Secured Liabilities- 'all monies'

- As a simple example, with 'all monies' security the Secured Liabilities may be defined as:
'all present and future liabilities and obligations of the Borrower to the Lender which are, or may become, due owing or payable on any account whatsoever'
- 'All monies' security is used where all the borrower's financing arrangements are to be secured by the security and will cover the initial borrowing as well as future financing obligations (whether known or unknown at the point the security is entered into).

Secured Liabilities- Limited to amounts under specific loan

- The alternative, and more common, formulation is for the Secured Liabilities to be limited to amounts owed under a specific loan agreement. This may (as a simple example) be defined as follows:

'Secured Liabilities means all present and future monies, obligations and liabilities owed by an Obligor to the Lender, whether actual or contingent and whether owed jointly or severally, as principal or surety or in any other capacity, under or in connection with the Finance Documents, together with all interest (including, without limitation, default interest) accruing in respect of those monies or liabilities.'
- 'Obligor' will include the borrower and any other entity providing security and/or guarantees to the lender; and
- 'Finance Documents' will include the loan agreement, any security documents/guarantees and any separate fee letters.

What are the secured assets?

- A lender may take security over just one asset, or over all the assets of a borrower, depending on the deal.
- An important point to note is that it is not uncommon for a lender to take security over assets with a value far in excess of the amount of money lent. One reason for this could be that the lender is concerned that the value of the assets may reduce over time, or it may be driven by the desire of the lender to take security over all or substantially all the assets of the borrower in order that it has a 'qualifying floating charge'.
- A borrower may agree to give full security as it has an “equitable right of redemption” to compel the lender to release the security as soon as the secured debt has been repaid even if the date for repayment has passed.

How is security documented?

- There will be a separate security document which will set out matters such as in whose favour the security is granted, the scope of the security (i.e., the definition of Secured Liabilities), the identity of the secured assets and the type of security taken over that asset and various other undertakings and boilerplate provisions.
- Security will also need to be 'perfected' i.e., brought to the attention of those who need to know about it for the security to be effective. Some examples of perfection methods include (but are not limited to) registration at Companies House, notification to third parties or registration at various other registries.

What is quasi-security?

Guarantees

Indemnities

Comfort Letters

- The above instruments are sometimes discussed by lenders in the same context as security, although they are not 'security' in the true legal sense.
- Quasi-security differs from security as quasi-security only provides the lender with a contractual claim against the guarantor or indemnity provider.
- Unlike security, these do not give the lender 'proprietary' rights over the borrower's assets- i.e., the lender has no right to take possession of or sell any of the borrower's assets.
- However, in some cases guarantors may be required to separately provide security for the secured liabilities owed by the borrower in which case the lender would obtain proprietary rights over the assets of the guarantor.
- Lenders will frequently require a guarantee/indemnity from each member of the borrower's group in respect of the borrower's payment obligations.

Guarantees and Indemnities

- A guarantee is a promise by one party (the guarantor) to answer for another party's liability on a default (i.e., if a borrower defaults under the loan agreement, the lender can pursue the guarantor directly for repayment).
- A guarantee is a **secondary obligation** between the parties in that its validity is dependent upon the **primary obligation** (i.e., the loan agreement between the lender and the borrower) being/remaining valid.
- Linked to this is the fact that if the primary obligation is void (or is discharged) the guarantee will fall away. Lenders will therefore include provisions to the effect that the guarantee will survive failure of the primary obligation (the borrower's obligation under a loan) and add an indemnity which creates a separate stand-alone primary obligation on the part of the guarantor to indemnify the lender for any loss if the borrower does not satisfy its obligations.
- The key point is an indemnity will survive the invalidity of the underlying loan agreement, whereas a guarantee will not.
- Consequently, the guarantee provisions in the LMA Agreement include both a guarantee and an indemnity.

Comfort letters

- Comfort letters are usually seen in the context of support being given by a parent to support the obligations of a subsidiary where it may not be possible for a lender to obtain security or a guarantee and indemnity. For example, the parent company may be constitutionally or contractually prevented from doing so.
- In such circumstances the lender may agree to accept a comfort letter (also known as a support letter or letter of intent) from the parent company. Such letters are not usually intended by either party to be legally binding, however they do represent a moral obligation which will provide some reassurance to the lender that a parent will stand by its subsidiary.
- Care needs to be taken when drafting comfort letters, so as to make the terms non-binding.
- Usually, they include very general statements of intention and support - e.g., that the intention of the comfort letter provider is to maintain investment in its subsidiary, and that it is aware of and supports its subsidiary's borrowing.

Summary of why would a lender want security/quasi-security?

If security is granted to a lender, the lender:

- has direct recourse to the asset over which the security was granted;
- can avoid the need for litigation if the borrower defaults;
- obtains better priority against other creditors on the insolvency of the borrower; and
- has an increased likelihood of recovering the debt.

If quasi-security is granted to a lender, the lender:

- can pursue a separate contractual right against the guarantor or indemnifier;
- can take steps to pursue a moral claim against the comfort letter provider;
- has an increased likelihood of recovering all or part of the debt from an alternative source to the borrower.

In short, it will protect a lender and give it a better chance of getting its money back. This is particularly important if the borrower is a higher credit risk to the lender.

Why would a borrower (or other obligor) agree to give security or quasi-security?

Cheaper borrowing: If a borrower is able and willing to give security and/or quasi-security, this may result in cheaper borrowing costs (the credit risk being taken by the lender is less, so a lower interest rate will usually be payable).

Weak credit status: If a borrower has a weak credit status, a lender may refuse to lend to it without the benefit of security and/or quasi-security.

Lack of credit history: If a borrower is a newly incorporated entity, it will not have historic financial or trading data. Without this it will be harder for the lender to assess the credit risk and the lender may require security and/or quasi-security to be given at least for an initial period of time.

Asset specific finance: If a borrower is raising funds to acquire a specific asset it would be usual to grant security over that asset to the provider of the finance. If the asset were later sold the proceeds realised would be applied to prepay the loan.

What is recourse?

- An important element of assessing the risk of a loan is working out where the money will come from to repay it, either from the borrower's operations (while it is still trading) or, in the worst case, from the sale of its assets on insolvency. The term used for the lender's claim on certain assets for repayment of the loan is "recourse", and the lender needs to ensure it has recourse to sufficient assets.
- Therefore, the scope of the security package needs to be appropriate in the context of the transaction as a whole, taking into account the credit rating of the borrower, the lender's assessment of risk, size and structure of the transaction and the borrower's key assets. This will then determine both which assets should be subject to security and what type of security interests should be taken.
- If a lender lends to a borrower in a corporate group, then the borrower and its subsidiaries and/or sister companies may be required to give guarantees and indemnities and security. Together we call the borrower, and any other group company giving a security/guarantee, the 'Obligors' (and each an 'Obligor'). This will be a defined term in the loan agreement.

Task: can you think of any situations where a borrower may be unable to give security or quasi-security?

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Why may a borrower be unable to give security/quasi security?

Restrictions in an existing loan agreement.

- **Negative pledge:** As you have seen, this is one of the general undertakings usually found in a loan agreement and it prohibits the creation of further security in competition with the lender which has advanced funds under the loan agreement.
- **No further financial indebtedness:** There may also be an undertaking included that restricts the total amount of financial indebtedness incurred by a borrower. As guarantees and indemnities are likely to fall within the definition of 'Financial Indebtedness', the giving of these may breach any such undertaking.
- **Financial Assistance.** The borrower's lawyers will need to be alive to whether the giving of any security or quasi-security (such as a guarantee or indemnity) as part of the transaction would amount to unlawful financial assistance under sections 677-683 Companies Act ('CA') 2006.

Why may a borrower be unable to give security/quasi-security?

- **Articles of Association:** The Articles of Association of a borrower may restrict or prohibit it from granting security and/or quasi-security. While it may be possible to amend the borrower's Articles in order to permit it to do so, this will depend on the entity in question, as for a public limited company with a large number of shareholders this may not be feasible.
- The check of a potential borrower's Articles of Association is something that is key at the outset of a transaction and the lender's lawyers (particularly trainees) are often tasked with checking this information. A particular concern in certain transactions will be restrictions in the Articles of Association making enforcement of security over shares problematic, such as directors having a discretion to refuse to enter a transferee (i.e., the lender) of the shares into the register of members of the borrower. Such restrictions will need to be removed from the Articles of Association.
- **Commercial contracts.** It could be the case that commercial contracts may contain an absolute prohibition on assignment or prohibit security being taken over the benefit of the contract without the prior consent of the contract counterparty. In either case the issue needs to be investigated as part of the due diligence and if necessary, addressed before the security is taken.



Types of security

This element explains the different types of security interest available to a lender, the assets that may be secured and some practical and commercial considerations when taking security.

Main types of security

Giving rights over assets:
Charges

Transferring ownership in asset:
Mortgages

Assignment by way of security (e.g. borrower's rights against a third party)

Taking physical possession of asset:
- Pledges
- Liens

Charges

What is a charge?

A charge is an equitable, proprietary interest in and to the asset.

What does the lender achieve?

A charge gives the lender the right to have recourse to the charged asset in order to satisfy the secured debt. There is no transfer of title to the asset itself.

The main types of charges are fixed and floating charges which we will look at in further detail on the next few slides.

Fixed Charges

- A fixed charge attaches to an asset as soon as the charge is created. It gives the lender a claim over the proceeds of sale of that asset in priority over other creditors of the borrower.
- For a fixed charge to be validly and effectively created as such (so that it is not instead classed as a floating charge), the lender has to show a sufficient level of **control** over the asset. This is normally done by insisting, in the security document, that the owner of the asset (the borrower) gets the consent of the lender to deal with the asset, e.g. to sell it or to create further charges over it.
- If the borrower sells an asset subject to a fixed charge, the buyer of that asset takes subject to the fixed charge as long as it has notice of the charge. Provided the fixed charge has been registered at Companies House in accordance with s. 859A-Q CA 2006, the buyer will have 'actual notice' of the fixed charge if it carries out a search of the charges register. The law is unclear as to whether registration would operate as 'constructive notice' on a buyer who has not carried out a search of the charges register, but further consideration of this point is outside the scope of this knowledge stream.
- A key element of a fixed charge to consider is that it will not be suitable for every type of asset, because a fixed charge will severely limit the borrower's ability to deal with that asset.

Floating Charges

- There are certain types of asset which the borrower needs to be able to deal with freely as part of its business, such as stock. The value of such assets will therefore regularly fluctuate. The most appropriate form of security for fluctuating assets is a floating charge.
- Under a floating charge, a borrower is able to deal with the charged assets in the ordinary course of its trade – e.g. to sell, hire or lease them without first obtaining the consent of the lender.
- A floating charge ‘floats’ over the charged assets until the occurrence of certain events. On the occurrence of one or more of these events, the charge ‘crystallises’ and fixes on the charged assets. The floating charge effectively becomes a fixed charge, in that the borrower no longer has the ability to deal with the assets over which the charge has crystallised without the lender’s consent.
- However, for insolvency purposes the charge itself is still treated as a floating charge for insolvency ranking. This means that the proceeds of sale of the assets subject to it will be applied in paying the fees, costs and expenses of the relevant insolvency office-holder, the debts owed to preferential creditors and in setting aside the prescribed part fund (discussed later) before being applied in satisfaction of the debt owed to the floating charge holder.

Crystallisation of floating charges

Crystallisation can occur as a matter of law on the following certain events:

- on the liquidation of a borrower;
- on the appointment of a receiver; or
- if the borrower ceases to carry on business.

A typical security document contains a list of additional triggers, for example an event of default under the loan agreement or any event which, in the opinion of the lender, would put the assets in jeopardy. If any of these events occurs then the floating charge would crystallise.

How to identify a floating charge?

- **Key case: Yorkshire Woolcomber's Association Ltd [1903] ('Yorkshire Woolcombers')**
- In this case the court discussed the characteristics of a floating charge. It was held that a charge would be deemed floating if:
 - it is a charge on a class of assets of a company present and future;
 - that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and
 - by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets.

Distinction between a fixed and floating charge

- Key case: **National Westminster Bank plc v Spectrum Plus Limited and others [2005] UKHL 41 ('Spectrum')**.
- The House of Lords reviewed the distinction between fixed and floating charges in the above case. The judges generally approved the Yorkshire Woolcomber's definition but focused particularly on the third element of that definition (i.e., until action is taken by the lender the borrowing company may carry on its business using those assets in the ordinary course of its business).
- According to the Spectrum, the essential characteristic of a floating charge, which distinguishes it from a fixed charge, is that "the asset subject to the charge is not finally appropriated as security for payment of the debt until the occurrence of some future event. In the meantime, the borrower is left free to use the charged asset and to remove it from the security". Conversely, it is an essential characteristic of a fixed charge that assets can be disposed free from the security only with the "active concurrence" of the lender.
- Note that the **substance** of the charge is more important than the **label** applied by the parties. To determine whether a charge labelled as fixed by the parties is in fact floating, you need to look at the element of **control** over the asset granted by the charging document, and the nature of the charge evidenced by the terms of the security document, **not** the name which the parties have given to the charge.

Distinction between a fixed and floating charge (continued)

- **Key case:** *Re Avanti Communications Limited (in administration) [2023] EWHC 940 (Ch)* ('Re Avanti').
- The recent case of Re Avanti is the first major case to have considered the Spectrum principles further in relation to the control required for a fixed charge.
- In Re Avanti, the High Court held that there should be a more nuanced approach than that taken in Spectrum and that it will not always be necessary for there to be an absolute prohibition on the chargor (i.e. the party providing security) dealing with the charged assets for a fixed charge to be valid.
- Instead, there should be a number of factors taken into consideration, including:
 - The nature of the assets;
 - The nature of the business of the chargor; and
 - The level of flexibility and freedom the chargor will have to deal with the charged assets.
- Where the chargor agrees to 'material and significant' restrictions on the disposal of the assets and a prohibition on the disposal of such assets in the ordinary course of business, the charge likely take effect as a fixed charge. This is on the basis that the lender (as chargee) will be retaining 'very significant control' over the charged assets.
- Equally, if there are some careful and considered exceptions to the prohibition on disposal, this does not always mean that the charge cannot take effect as a fixed charge.
- Therefore, **control** remains a significant factor in the determination of the charge as a fixed charge under both Spectrum and Re Avanti.

What are the disadvantages of a floating charge for a lender?

- The borrower is free to deal with the assets subject to a floating charge. Whilst this flexibility enables a borrower to run its business day to day, the risk for the lender is the reduction of the 'pool' of assets available to it on enforcement of its security. Although the lender will benefit from certain contractual protections to mitigate against this, the lender will nonetheless prefer to take fixed charges over important assets.
- Floating charges rank behind fixed charges (even those entered into after the floating charge), preferential creditors (such as employees) and the prescribed part fund.
- Administrator/liquidator fees, costs and expenses are taken out of floating charge assets (including any tax liability on capital gains arising from disposals made by the administrator in the course of administration).
- It is subject to more stringent avoidance rules as in certain circumstances floating charges are void if the borrower enters into liquidation or administration.
- A floating charge may not be recognised in other jurisdictions.

What are the advantages of a floating charge for a lender?

- The lender obtains security, but the borrower retains flexibility to run its business day to day as it is able to dispose of assets subject to a floating charge in the ordinary course of its trading.
- Provided the floating charge together with any other security the lender holds over the borrower's assets is over all or substantially all of the assets of the borrower, a lender will be a holder of a '**qualifying floating charge**' giving it the right to appoint an administrator out of court - see next slide.
- Historically, a lender with a floating charge could appoint an administrative receiver with wide-ranging powers to manage the borrower and sell the borrower's assets to repay the lender.
- However, for floating charges **created on or after 15 September 2003**, the lender will only be able to appoint an administrative receiver if the charge falls into one of the '**limited exceptions**' (e.g., the floating charge was created in relation to certain project financing or capital markets transactions). The detail of these exceptions is outside the scope of this knowledge stream.

What are the advantages of a floating charge for a lender?

- Therefore, if the floating charge was created on or after 15 September 2003 and **does not fall within one of the 'limited exceptions'**, the lender can **no longer** appoint an administrative receiver, but as a holder of a '**qualifying floating charge**' (as defined below) such a lender has the power to appoint its own choice of administrator by using an out-of-court procedure, which is quicker and cheaper than the court-based process of appointing an administrator.
- A '**qualifying floating charge**' is one which fulfils the requirements of paragraph 14 of Schedule B1 to the Insolvency Act 1986.
- Essentially, this means that (i) a floating charge, which together with any other security the lender holds over the company's assets is over the whole or substantially the whole of the company's assets and (ii) the document creating the floating charge must state that paragraph 14 applies or purport to grant to the lender the power to appoint an administrator or an administrative receiver.

Mortgages

What is a mortgage?

A mortgage is a transfer of ownership of an asset to the lender. In the case of a legal mortgage, it involves the transfer of legal ownership. In the case of an equitable mortgage, it involves the transfer of beneficial ownership.

With a legal mortgage the lender then becomes the owner of the asset, subject to a right of redemption following repayment by the borrower.

Legal Mortgage

Legal Ownership

Equitable Mortgage

Beneficial Ownership

Legal mortgage

- A legal mortgage involves a transfer of legal title to an asset to the lender, subject to:
 - an obligation on the lender to transfer the asset back to the borrower on repayment of the loan (known as the 'equity of redemption'); and
 - a right to take possession of and sell the asset on default.
- Assets which may be subject to a legal mortgage include ships and aircraft. Provided the mortgage is created by deed, the lender will enjoy a power of sale pursuant to s. 101 Law of Property Act 1925 (the '**LPA 1925**').
- A transfer of legal title to certain assets (such as shares) bring greater administrative burdens and potential liabilities, so an equitable mortgage or fixed charge may be preferable, as there is no transfer of legal title on their creation. Taking security over shares is considered further later on in these slides.
- Legal mortgages cannot be taken over future property- the asset must be owned by the chargor when the security is created. Also, legal mortgages can only be created over legal interests in assets (not equitable interests).

Mortgages over land

- Under the LPA 1925, a legal mortgage over land can only be created by way of a “charge by deed expressed to be by way of legal mortgage” (s. 87 LPA 1925). It does not transfer legal title to the asset but gives the secured creditor similar rights. Crucially, the lender benefits from a power of sale over the land.
- In practice this may be referred to as ‘a charge by way of legal mortgage’, ‘legal mortgage’ or a ‘first legal mortgage’. In addition to registration at Companies House, charges by way of legal mortgage should also be perfected by registering at the Land Registry in order to obtain priority over subsequently created security interest.
- As it is not possible to create a charge by way of legal mortgage over land acquired after the date of the security document (a debenture) then a lender will usually take an equitable mortgage over any future land with an assurance from the borrower that they will ‘upgrade’ the fixed charge over such land to a charge by way of legal mortgage as and when the lender requires it. This ‘upgrade’ will occur by the borrower executing a short supplemental mortgage and registering it at Companies House and the Land Registry.

Equitable mortgages

- Equitable mortgages do not involve a transfer of legal ownership but a transfer of the beneficial interest in an asset. An equitable mortgage is created with less formality than a legal mortgage. There is no practical difference between an equitable mortgage and a fixed charge – both will give the lender a proprietary interest in the asset concerned.
- A 'bona fide' purchaser for value without notice of an equitable mortgage would buy the asset free of the mortgage. Registration of the equitable mortgage at Companies House is therefore very important (and is a requirement pursuant to s.859A CA 2006 in any event).
- This will ensure a purchaser has 'actual notice' of the equitable mortgage by searching the charges register. The law is unclear as to whether registration itself would operate as 'constructive notice' on a purchaser who hasn't carried out a search of the charges register, but further consideration of this is point outside the scope of this knowledge stream.

The differences between mortgages, charges and charges by way of legal mortgage:

The theoretical difference between these three types of security is that:

- a **mortgage** is the conveyance of an asset to the lender - i.e., the transfer of title (either legal or beneficial) to the asset. The lender becomes the owner of the asset subject to a right of redemption – i.e., the lender has to transfer it back to the borrower following repayment of the underlying loan.
- a **charge** gives the lender proprietary rights in the asset, but there is no transfer of title to the asset itself.
- a **charge by way of legal mortgage (applies to land only)** does not transfer title to the asset. Instead, it grants the lender the same powers, protection and remedies as if the mortgage had been created by way of a lease for a term of 3,000 years.

Security by taking physical possession of an asset

(Note: these are not commonly used in debt finance transactions)

Pledge

A pledge arises where a lender takes actual or constructive delivery of an asset until repayment of a debt. An example of constructive delivery is where the lender receives the keys to a safe deposit box which contains the relevant asset. No other formalities are required, but to avoid any argument that an item has merely been deposited for safekeeping, a letter of pledge or a memorandum of deposit is usually provided. There is an implied power to sell the asset if the debt is not repaid.

To be valid, the pledge must provide the lender with control of the asset. The lender taking a pledge has liability as bailee and it must keep safe custody of the asset alongside ensuring that the asset is insured.

The borrower loses possession of the asset for income-generating purposes.

Lien

A lien is a right to retain another's property until that person meets an obligation such as payment for services. This is different from a pledge where an asset is delivered to and retained by a lender until a debt is repaid. The right arises automatically by operation of law and typically (although not always) involves possession of the property.

For example, where a mechanic is in possession of a car for repair they are able to retain the car until the owner has paid the repair bill.

Assignment by way of security

- The borrower's rights under a contract (also referred to as a 'chase in action') can be a valuable asset over which the lender may wish to take security. Examples of a borrower's contractual rights against a third party include where a borrower has (i) the benefit of an insurance policy with an insurance company, or (ii) is owed interest and principal under a loan it has made, or (iii) has a valuable income-stream under a supply contract with a third-party (the contract counterparty).
- The borrower can create security over the benefit of each of these arrangements in favour of a lender.
- This is subject to checking first whether the consent of the counterparty is required for an assignment, or whether a contract contains a prohibition on assignment. This issue needs to be addressed before security is taken. If consent cannot be obtained, there is little point in taking the security.

Assignment by way of security

- Security over contractual rights is usually taken in the form of an assignment by way of security or a fixed charge – this will generally be a matter of preference for the lender.
- An assignment will either be legal or equitable depending on how it is created, as discussed below.

Difference between legal and equitable assignment

Legal Assignment

If the assignment satisfies the criteria set out in s. 136 LPA 1925, it will be a **legal** assignment (or a 'statutory assignment') and will be equivalent to a legal mortgage in that the ownership of that right passes to the lender. However, because the assignment is only intended to serve as security, the security document will also contain a proviso for re-assignment on satisfaction of the secured obligation by the borrower.

Section 136 LPA 1925 sets out the requirements for a legal assignment. It must be:

- in writing;
- an absolute assignment (subject to a proviso to re-assign) in that the **whole** of the asset must be assigned, not just part of it;
- signed by the assignor; and
- **notified** to the original debtor/contract counterparty.

Equitable Assignment

An **equitable** assignment will arise if the parties intend to create an assignment, but one or more of the elements of s. 136 LPA 1925 are not satisfied. The element most likely to be missing in an assignment by way of security is notice to the original third party involved in the arrangement. For practical purposes, it is less important whether an assignment is legal or equitable and more important whether notice has been given.

Practical and commercial considerations when taking security

- The key point to bear in mind when considering the adequacy of a security package is that it is not its value at the time the security is taken which matters, but what its value would be in an enforcement situation – particularly in the event of the borrower's insolvency. So, in considering what security to take and which other matters to consider, it is the enforcement of the security which must be uppermost in a lawyer's mind.

Consequently, the lender and its lawyers must consider various issues, such as:

- if the consent of the contract counterparty is required for the assignment of a key contract, that issue needs to be addressed before the security is taken. If consent cannot be obtained, there is little point in taking the security in the first place;
- will the lender enforce security over the whole of a business by way of a share sale or an asset sale, or will the lender want the option of being able to do either - i.e., should the lender consider taking a charge over the shares of the borrower in addition to charges over the assets owned by the borrower?

Continued

Practical and commercial considerations when taking security

- will each secured asset retain its value? Is it a perishable item or an item which could quickly become obsolete? A lender needs to be aware of the risk of depreciation of certain assets (e.g. plant and machinery), although this in itself will not prevent a lender taking security over such assets;
- is there existing security over any asset(s)? If so, assess whether it will be possible for the borrower to grant further security over such asset(s) - i.e. will any negative pledges be triggered? Also, even if it is possible to grant further security, consider the implications of having more than one competing security over the same asset (i.e. a subsequent lender will rank below an original lender with prior security correctly created and registered);
- can the asset be sold easily? Is there a ready market for it? Can its value be ascertained? For instance, there may be no ready market for shares in a small private limited company; and

For certain assets there are further issues which need to be considered when contemplating taking security, which are discussed in the next few slides.

Practical and commercial considerations when taking security

- **Fixed charge over book debts:** It is not sufficient for the security document to describe the charge as 'fixed'. The judgement in *Spectrum* stated that the categorisation of whether a charge is fixed or floating depends upon the commercial nature and substance of the arrangement, not what the parties have called the charge in the security document.
- The label that the parties have given to the security may indicate the parties' intention in this respect, but it is not conclusive. It is a question of substance over form.
- The lender needs to demonstrate sufficient control over book debts and the proceeds of their collection for there to be a fixed charge. If control is lacking, it may be re-characterised as a floating charge.
- If a fixed charge is to be taken over book debts, some controls will usually be documented in the security document. It is common for a floating charge to be taken in respect of book debts arising from the sale of goods and services.

Practical and commercial considerations when taking security

- **Security over shares:** Practical steps to take when taking security over shares include checking that:
 - the directors do not have the right to refuse to register a transferee (i.e., the lender or a buyer of the shares following enforcement) in the register of members of the company; and
 - pre-emption rights do not apply to a transfer of the shares on enforcement.
 - If there is a right to refuse a transfer or pre-emption rights do apply, the Articles of Association of the relevant company must be amended **before** the relevant security is granted. This type of check is done at the outset of the deal through due diligence and can be a common trainee task. The Articles of Association (with any amendments) will be one of the conditions precedent documents.

Practical and commercial considerations when taking security

- **Security over shares:** Practical steps to take when taking security over shares include checking that:
 - Will the lender become a person of significant control ('PSC') (as covered in Business Law on the SQE 1 preparation course), giving rise to a registration requirement on the borrowing company's PSC Register. A company is required to request information from any legal entity it knows or reasonably believes to be a PSC required to be registered on its PSC register. If a legal entity with a relevant interest in the company (i.e. shares) fails to respond to the request, the company may issue a restrictions notice freezing the relevant interest. From a debt finance perspective, this is relevant in the context of taking security over shares. If a restrictions notice is issued, it could affect whether the security over shares can be taken, enforced or whether voting rights can be exercised.
 - Will the grant of security over shares trigger a mandatory notification requirement to the Secretary of State for Business, Energy and Industrial Strategy under the National Security and Investment Act 2021.

Practical and commercial considerations when taking security

- **Security over shares:** Further checks to make include:
 - Are the shares in an **unlimited liability company**? In this situation, the liability of the shareholder is not limited to the nominal value of the shares but is unlimited.
 - Is there any amount unpaid on the shares?
 - Are there any liens over the shares?
- Does the company whose shares are mortgaged or any of its subsidiaries operate a defined benefit pension scheme? If so, the lender needs to be advised that, should the scheme be in deficit at the time, or after enforcement, of the legal mortgage, the lender may be liable for that deficit if it is 'associated' or 'connected' with the company (see below). This can be the case even if the liability is in a subsidiary of the company whose shares are mortgaged.

Practical and commercial considerations when taking security

- **Security over shares:** The strongest form of security which can be taken over shares is a **legal mortgage**.
- In order to perfect a legal mortgage over shares, the borrower will execute a stock transfer form in favour of the lender and the lender will then be registered in the register of members of the company whose shares are being charged.
- The lender will also receive share certificates in its name – in other words, the lender becomes the legal owner of those shares, subject only to the right of redemption.
- This means the lender has the right to receive notices to vote, to receive dividends, to receive bonus shares, is treated as a member of the company and can more easily, effect a quick sale of the company.

Practical and commercial considerations when taking security

- **Security over shares:** However, there are disadvantages to a lender in taking a legal mortgage of shares, namely:
 - being a member of the company will involve a degree of administrative duties such as attending meetings and voting. A lender may appoint a nominee for this purpose;
 - if the shares are partly paid, the lender (as new owner) will be liable for the uncalled amount;
 - there is a risk to the lender of the company whose shares have been mortgaged to it becoming a subsidiary for the purposes of the CA 2006, or an associate company of the lender for the purposes of the Insolvency Act 1986;
 - the risk to the lender that it becomes liable for a deficit in a defined benefit pension scheme or for environmental issues; and
 - the risk to the lender that it becomes subject to the PSC regime (under Part 21A CA 2006).

Practical and commercial considerations when taking security

- **Security over shares:** Because of the disadvantages of taking a legal mortgage discussed above, a lender may choose to take an **equitable mortgage** or **fixed charge** over shares instead.
- In order to perfect an equitable mortgage/fixed charge, the lender will usually require the company creating the security to provide it with a signed, but undated, stock transfer form as well as the relevant share certificates.
- The charging document will generally also contain a security power of attorney. The intention is that the lender is able to date the stock transfer form and present it to the company whose shares are secured at such time as the lender wishes to become the registered holder of those shares on enforcement of the security.

Practical and commercial considerations when taking security

- **Assignment by way of security/fixed charge over contractual rights:** Where rights under a contract has been assigned, it may provide for payments to be redirected so that they are paid by the contract counterparty directly to the lender from the date of the assignment in which case clearly notice of the assignment will need to be given to the contract counterparty.
- Alternatively, the lender may be happy for payments under the contract to continue to be made to the borrower until an Event of Default or other trigger has occurred at which point notice will be served on the contract counterparty requiring payments to be re-directed to the lender.
- An unnotified assignment is not capable of being a legal assignment because it does not comply with the requirements of s. 136 LPA 1925 (mentioned above) but more importantly not giving notice will mean that the counterparty will be entitled to: (1) make payments under the contract to the borrower; (2) set off amounts owed to it by the borrower against the payments which it owes under the contract; and (3) amend the terms of the contract by agreement with the borrower, without requiring the lender's consent.

Practical and commercial considerations when taking security

- **Security over insurance contracts:** The lender may wish to take security over rights under insurance contracts by way of an assignment by way of security or a fixed charge. The main types of insurance contract over which a lender will take security are:
 - ‘Keyman’ insurance (this covers the risk to the borrower of something happening to an individual who is key to the business); and
 - buildings insurance.
- Insurance contracts are entered into on the basis of utmost good faith. If the insured misrepresented facts when entering into the contract, the policy will be void. Non-payment of premium will also invalidate the policy.
- Lenders may try to overcome these two issues with a clause in the security document and a specific agreement with the insurer that states that misrepresentation or non-payment will not invalidate the insurance policy. This is normally strongly resisted by insurers.

Practical and commercial considerations when taking security

- **Security over insurance contracts:** Lenders will generally not want to be '**jointly insured**' with the borrower, as this may increase their potential liability (e.g. they may be liable to pay the premium, and there is the risk that the lender may do something which invalidates the policy).
- Equally, being '**noted**' on the insurance policy is not sufficient protection for the lender, as it will not be a party to the insurance policy and will not be able to enforce the policy directly. The best position for the lender is for it to be referred to as "**co-insured in respect of its separate rights and interests**". This means that the cover provided is 'composite' (i.e., the policy contains two contracts of insurance (1) between the insurers and the borrower and (2) the insurers and the lender). If the borrower's interest falls away – for instance as a result of the borrower having failed to disclose something relevant or in the event of the borrower's insolvency – then the lender's interest should still stand.
- As an absolute minimum, the lender will want to ensure that its interest is noted on the insurance policy so that the bank is notified if the policy is varied in a material way, cancelled or not renewed and the insurers are aware that the bank may be able to claim the charged insurance monies directly or that they may be held by the borrower on trust.

Types of Security



Summary

- The main types of security explored on this workstream are:
 - Charges (fixed and floating)
 - Mortgages (legal mortgages, equitable mortgages and mortgages over land)
 - Taking physical possession of an asset (pledges and liens)
 - Assignment by way of security
- Certain practical and commercial issues (applicable to all assets and specific to particular assets) also need to be considered when determining the security package for a transaction.
- Broadly, lenders are more concerned about enforceability of security rather than the value of security on creation.

Nature and purpose of security and quasi-security



Summary

- The aim of security is to protect a lender against possible default by the borrower under the loan agreement.
- When a lender holds security over an asset of the borrower, if the borrower defaults, then the lender can step in and can have the sale proceeds of the relevant asset applied in repayment of any outstanding amount that is due on its loan to the borrower.
- Quasi-security does not give a lender rights over a borrower's assets but assists a lender in recovering its debt by allowing a personal claim against a guarantor or indemnity provider.
- Where an entity (e.g., a parent company) is unable to give security or a guarantee (e.g., due to undertakings in its other loan agreements), a lender may require a comfort letter as reassurance of the parent's continued support of its subsidiary (to which the lender is making the loan).
- Any contractual, constitutional or other legal restrictions preventing a borrower from granting security will also need to be considered by the lender at the outset.



Perfection and registration of security

This element explains how you perfect security (including the process of registering security at Companies House) and why this is important. It also addresses priority between competing security and some other legal issues to consider when taking security.

What is perfection of security?

- Where the lender has physical control of the secured assets, it is usually impossible for third parties to acquire rights over those assets without the lender's knowledge. Accordingly, it is generally held that the best way to secure an asset is to take possession of it (e.g., to take security by way of pledge).
- Where a borrower is still in possession of the secured assets, the borrower may try (fraudulently) to sell them – to help protect a lender from such a scenario there is the process of 'perfecting' the security.
- This is done so by bringing the security interest to the notice of third parties and helps to overcome the problem that equitable security interests (which will include all fixed charges) can be ignored by a bona fide purchaser (including a subsequent lender) for value without notice.

The manner and method of perfecting security will vary depending on the nature of the security interest taken over the asset and the type of asset.

What is perfection of security?

Perfection methods include:

- physical possession (as with a pledge);
- transfer of legal or beneficial title to the security holder (as with mortgages);
- notice to a relevant third party (such as to a contract counterparty in the case of assignments by way of security/fixed charges over contractual rights);
- registration at Companies House (in practice this will relate to all security); and
- registration with central registries relating to specific assets (such as the Land Registry for charges by way of legal mortgage over land).

We will firstly consider the formalities for registration at Companies House. The main aim of which is to give third parties notice of security and thereby make it valid against their claims.

Registering security at Companies House

- The Registrar of Companies shall register any security created by a company (or an LLP) at Companies House, provided the requisite statement of particulars of the charge have been delivered to it **within 21 days beginning with the day after the day on which the charge is created** (s. 859A(4) CA 2006).
- To register the security, the company or any person interested in the charge (such as the lender) must deliver to Companies House (either electronically or by paper filing, though now mostly electronically) the following:
 - a section 859D statement of particulars in relation to the security. This will be set out on **Form MR01** available on the Companies House website;
 - a certified copy of the security document (s. 859A(3) CA 2006); and
 - the relevant fee.

Registering security at Companies House

- This is a common trainee and/or junior associate task following the completion of the relevant financing. It is vitally important to attend to registration as soon as possible after the creation of the charge, in case of rejections for minor errors or other mistakes, so as to ensure sufficient time to re-submit documents if necessary.

Registering security at Companies House

- On receipt of the relevant documents, the Registrar will allocate to the security a **unique reference code** and will include on the register (i) a note of the unique reference code and (ii) the **certified copy of the security document** (s. 859I(2) CA 2006). The Registrar will issue a '**certificate of registration**' stating the name and number of the company in respect of which the security has been registered and the unique reference number allocated to the security (s. 859I(3)(4) and (5) CA 2006).
- This is conclusive evidence that the security has been correctly registered.
- Form MR01 is a relatively simple form. As well as including details of the company creating the charge, charge creation date and names of persons entitled to the charge, the Form MR01 only requires a short description of any land, ships, aircraft or intellectual property registered (or required to be registered) in the UK which is subject to a fixed charge.
- The rest of the form involves ticking appropriate boxes, including a signature and details of the presenter of the form (this will usually be the lender's lawyers).

Consequences of failure to register security

Under s. 859H CA 2006, if the charge is not registered at all, or is not registered within the 21 day period:

- the security is void against the liquidator, administrator and any creditor of the company; and
- the debt becomes immediately payable.

As a result of these consequences, registration of security will always be carried out in respect of all types of security created by a company.

In the absence of a priority agreement between creditors, priority between most competing charges of the same type (such as between two fixed charges) is determined by the date of creation, subject to correct registration within the 21-day time period. Accordingly, registration pursuant to s. 859A CA 2006 is very important to retain priority, as well as to prevent the charge being void against other creditors of the company.

Lenders may include a completed Form MR01 as a condition precedent in the loan agreement to which the security relates so that registration of the security document at Companies House can take place immediately after signing.

How is security released?

- The security document will provide for the release of the security once the secured debt is repaid. There are no strict formalities for the release of security, except for security over registered land for which the requisite form needs to be filed at the Land Registry (see below).
- However, it is in a company's interest to inform Companies House that a secured debt has been repaid and request for the register to be amended to show that the security has been released.
- This is so that third parties (such as potential new lenders) searching the register have notice that a prior debt has been satisfied and the relevant security has been released.

How is security released?

- To register a release of security, the following steps need to be completed:
 - the chargeholder (the lender) should execute a ‘Deed of Release’ and execute any other documents required to release security over specific assets (such as a Form DS1 to release a charge by way of legal mortgage over registered land, which should be registered at the Land Registry);
 - the company must deliver to the Registrar, with respect to the registered charge, one of the statements set out in s. 859L(2) CA 2006, being (i) a statement that the debt secured by the charge has been paid or satisfied in whole or in part (using Form MR04) or (ii) a statement that all or part of the property or undertaking charged has been released from the charge or ceased to form part of the company’s property and undertaking (using Form MR05). In addition, the company must include in the relevant form the particulars listed in s. 859L(4); and
 - the Registrar, following receipt of either Form MR04 or Form MR05, must include in the register in relation to the released charge (i) a statement of satisfaction in whole or in part; or (ii) a statement of the fact that all or part of the property or undertaking has been released from the charge or has ceased to form part of the company’s property or undertaking (as the case may be) (s. 859L(5) CA 2006).

Registration requirements for specific assets

- Security over certain assets will need to be registered in other registers **as well as being registered at Companies House.**
- This relates to the following assets:
 - **Land**
 - **Shares**
 - **Aircraft**
 - **Ships**
 - **Intellectual property**

Registration requirements for specific assets

Unregistered Land

Charges by way of legal mortgage now created over unregistered land trigger compulsory first registration of the land (and mortgage) and will be entered on the Charges Register of the relevant property at the Land Registry (once first registration of the relevant title has been completed).

Charges by way of legal mortgage over unregistered land created **before** compulsory registration will have been created by the deposit of the title deeds and the executed mortgage deed with the lender. They were not registrable at the Central Land Charges Register, but, because the lender had control of the title deeds, the borrower could not deal with the land without the lender's knowledge. Subsequent (puisne) mortgages of unregistered land should have been registered as Class C(i) Land Charges on the Central Land Charges Register.

Registered Land

Charges by way of legal mortgage over registered land should be registered against the title number of the relevant property at the Land Registry (the entry will appear in the Charges Register). Priority is by **date of registration**, regardless of when the security was created (hence the importance of carrying out a priority search and submitting the application for registration of the charge within the 30 working day priority period).

The Register of Overseas Entities

- Although not strictly related to registration of security, there is a further issue lenders need to be aware of when taking security over a borrower's assets if the borrower is an 'overseas entity'.
- Under the Economic Crime (Transparency and Enforcement Act) 2022, an 'overseas entity' (which includes a body corporate, partnership, or other entity that is a legal person governed by the law of a country or territory outside of the UK) that wishes to become the owner of a 'qualifying estate' (which would broadly include UK freehold or leasehold property) must register on the Register of Overseas Entities (the 'Register').
- Of particular relevance to debt finance transactions is the restriction on the creation of charges by way of legal mortgage in respect of property where the overseas entity is not correctly registered. Any charge by way of legal mortgage created after 1 August 2022 (subject to certain exemptions) would take effect as an equitable mortgage until such time as the overseas entity is registered on the Register (and receives its unique overseas entity ID).

Shares

As a legal mortgage transfers legal title to the shares to the mortgagee, this transfer must be registered in the **register of members** of the company whose shares have been mortgaged (N.B. **not** the register of shareholders of the company **creating** the security over those shares). In other words, the lender (or its nominee) will appear in the register of shareholders as the owner of the legal title to the shares. Note that beneficial interests cannot be noted on the register so no such registration is required for an equitable mortgage or fixed charge over shares.

Intellectual Property

The following registers will be relevant:

- **Patents** - Register of patents at the Intellectual Property Office.
- **Registered designs** - Register of designs at the Intellectual Property Office.
- **Registered trademarks** - Register of trademarks at the Intellectual Property Office.

Actual knowledge of an earlier registered charge in the Charges Register at Companies House will prevent a subsequent lender from taking priority, even if the subsequent lender's charge is registered at the Intellectual Property Office before that of the earlier created charge.

Aircraft

Mortgages over aircraft should be registered in the Register of Aircraft Mortgages with the Civil Aviation Authority.

Priority is by date of registration, regardless of when the mortgage was created.

Ships

Under the Merchant Shipping Act 1995, mortgages over ships are registered with the Registry of Shipping and Seamen in Cardiff.

Priority is by date of registration, regardless of when the mortgage was created.

Perfection of assignments by way of security/fixed charge over contractual rights

- Assignments by way of security over contractual rights are perfected by giving notice to the contract counterparty/debtor in accordance with s. 136 LPA 1925. Under the **Dearle v Hall rule**, the priority of assignments by way of security is generally determined by the date upon which notice is given to the contract counterparty. A notice to the counterparty/debtor will often also be given in relation to a fixed charge over contractual rights.
- However, the requirement to serve notice on all the contract counterparties could be administratively difficult. Accordingly, a lender may have to accept that a notified assignment is commercially impracticable. A compromise position may be for the borrower to sign the notices and to deliver them to the lender at the time the security is granted but for the lender to agree only to deliver the notices to the contract counterparty following an Event of Default under the terms of the finance documents.

Priority between competing security over same asset

- If the borrower enters into a liquidation or administration, assets will be sold and the proceeds of sale divided up among the creditors in accordance with the rules of priority.
- In general, secured creditors will rank ahead of unsecured creditors. As between different secured creditors holding fixed or floating charges over the same asset which have been registered at Companies House, priority is, subject to some caveats, as follows (on the assumption that each security interest has been registered within the prescribed time and in the prescribed manner):
 - fixed charges will have priority over floating charges (even if the fixed charge is created AFTER the floating charge);
 - fixed charges (and mortgages) will as between themselves rank in priority according to their date of creation; and
 - floating charges will as between themselves rank in priority according to their date of creation.

Priority between competing security over same asset

However, the following exceptions may apply:

- for security over assets requiring registration in a specialist registry (e.g. registered land at the Land Registry), this must be done in addition to registration at Companies House. In this case, it is usually the date of registration in the specialist registry which determines priority;
- a lender taking a floating charge can avoid losing priority to a later fixed charge holder by including a negative pledge in the security document containing the floating charge. The Form MR01 includes a box to tick 'Yes' or 'No' to indicate whether or not the terms of the security include a negative pledge. There is an argument that any new lender which carried out a search at Companies House would have actual notice of the negative pledge and hence any new security granted to them (in breach of the negative pledge) would not have priority over the prior floating charge;
- creditors may enter into contractual arrangements to change the order of priority the law would otherwise impose (e.g. an intercreditor agreement/deed of priority); and
- in the case of assignments over chose in action, e.g. contract rights, priority is dictated by the date on which notice is given to the relevant counterparty, rather than the date of creation – this is the rule in **Dearle v Hall**.

Other points to consider when taking security

**Financial
assistance**

Corporate benefit

**Corporate power
and authority**

**Maintenance
of capital**

Financial Assistance - where a loan is being provided to finance an acquisition of shares, depending on the nature of the proposed security and/or quasi-security and the details of the overall transaction being contemplated, there could be financial assistance issues arising for public companies and private companies that are subsidiaries of public companies.

Please refer back to the materials and examples of financial assistance considered on the SQE Business Law Preparation course.

Corporate power and authority – additional questions should be asked relating to the company's power to enter into any security, such as does the company have the corporate power to enter into the security and/or quasi-security document? Before taking any security, you need to check for any restrictions in the company's Articles of Association. If there are any such restrictions, a **special resolution** will be needed to amend the company's Articles of Association in order to permit it to do so, before the security is granted. The bank will also want to see copies of any such resolutions and any amended Articles of Association, as well as board minutes approving the execution of the security document. These will be required as conditions precedent in the loan agreement.

Corporate benefit - the lender should ensure the company granting the security (and/or quasi-security) derives some corporate benefit for the purposes of s.172(1) CA 2006 (the duty to promote the success of the company). This is particularly important where the company is not the borrower, for example where the security is being given by a subsidiary in respect of its' parent's obligations ('upstream') or in respect of the obligations of another company at the same level in the group ('cross-stream'). Common conditions precedent to the financing are board minutes and resolutions confirming that the directors of the company have considered this issue.

Maintenance of capital - if a subsidiary gives an upstream guarantee or security to guarantee or secure a loan made to its parent, then this will not result in a breach of the capital maintenance rules if the directors of the subsidiary consider in good faith and on reasonable grounds that the parent is likely to be able to repay or refinance the loan when it falls due for repayment (and so the guarantee or security is not likely to be enforced). If this is not the case, then the guarantee or security may be treated as a distribution for which the company must have sufficient distributable profits so that there will be no unlawful reduction in its capital. A lender will want to see evidence that the directors of the subsidiary giving an upstream guarantee or security have considered capital maintenance issues and concluded that the guarantee or security is not likely to be enforced and, therefore, no provision need be made in the subsidiary's balance sheet. Usually, a lender will want to see a certified copy of the board minutes or written resolutions of the directors and a certificate addressed to the lenders/agent, or a representation in the loan agreement, that the guarantee or security will not reduce the subsidiary's net assets by more than its distributable profits.

You will have looked at the doctrine of maintenance of capital on the SQE Business Law Preparation course.

Perfection and registration of security



Summary

- Perfection of security is vital in protecting a lender's interests as it ensures third parties are aware of the lender's security interest.
- Methods of perfection will depend on the nature of the asset and the security interest being created.
- Certain charges must be registered at Companies House, though in practice all security will be registered at Companies House. This is essential as correct registration will determine priority between competing creditors (in the absence of a priority agreement between the creditors).
- Other points which need to be considered when taking security include financial assistance, corporate power and authority, corporate benefit and maintenance of capital.

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SECTION 9

CHANGES TO PARTIES

30. CHANGES TO THE LENDERS

30.1 Assignments and transfers by the Lenders

Subject to this Clause 30 and to [Clause 31 (*Restriction on Debt Purchase Transactions*)]/[Clause 31 (*Debt Purchase Transactions*)]¹⁹⁶, a Lender (the "Existing Lender") may:

- (a) assign any of its rights; or
- (b) transfer by novation any of its rights and obligations,

under any Finance Document to another bank or financial institution or to a trust, fund or other entity which is regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets (the "New Lender").

30.2 [Parent consultation]¹⁹⁷

An Existing Lender must consult with the Parent for no more than [] days before it may make an assignment or transfer in accordance with Clause 30.1 (*Assignments and transfers by the Lenders*) unless the assignment or transfer is:

- (a) to another Lender or an Affiliate of any Lender;
- (b) to a fund which is a Related Fund of that Existing Lender;
- (c) without prejudice to paragraph (a) above, to an Arranger or an Affiliate of an Arranger and made in connection with the facilitation of either the primary syndication of any Facility or first utilisation under this Agreement [or first utilisation of an Incremental Facility]; or
- (d) made at a time when an Event of Default is continuing.] / OR

[Parent consent

- (a) The consent of the Parent is required for an assignment or transfer by an Existing Lender, unless the assignment or transfer is:

¹⁹⁶ Two (alternative) forms of Clause 31 are provided (see footnote to Clause 31 (*Restriction on Debt Purchase Transactions*)). Clause 30.1 (*Assignments and transfers by the Lenders*) should refer to whichever one is chosen to be included in the Agreement.

¹⁹⁷ Two (alternative) forms of Clause 30.2 are provided. The first option (entitled "*Parent consultation*") envisages that the Parent must be consulted before a transfer is made.

The second option (entitled "*Parent consent*") envisages that the Parent's consent must be given before a transfer is made if the proposed New Lender is not named on the Pre-Approved New Lender List.

The two forms of Clause 30.2 are mutually exclusive. Accordingly, it is NOT recommended that users include both forms in the same Agreement.

- (i) to any entity identified on the Pre-Approved New Lender List;
 - (ii) to another Lender or an Affiliate of any Lender;
 - (iii) to a fund which is a Related Fund of that Existing Lender;
 - (iv) without prejudice to paragraph (i) above, to an Arranger or an Affiliate of an Arranger and made in connection with the facilitation of either the primary syndication of any Facility or first utilisation under this Agreement [or first utilisation of an Incremental Facility]; or
 - (v) made at a time when an Event of Default is continuing.
- (b) The consent of the Parent to an assignment or transfer must not be unreasonably withheld or delayed. The Parent will be deemed to have given its consent five Business Days after the Existing Lender has requested it unless consent is expressly refused by the Parent within that time.
- (c) The Agent shall, within [] Business Days of a reasonable request by any Party, provide a copy of the Pre-Approved New Lender List to that Party.]

30.3 Other conditions of assignment or transfer

- (a) The consent of the Issuing Bank is required for any assignment or transfer by an Existing Lender of any of its rights and/or obligations under the Revolving Facility.
- (b) [An assignment or transfer of part of a Lender's participation must be in an amount such that the Base Currency Amount of that Lender's remaining participation (when aggregated with its Affiliates' and Related Funds' participation) in respect of Commitments or Utilisations made under [Facility [A]/[B]/[C]]/[each Incremental Facility]/[the Term Facilities (taken together)] is in a minimum amount of [].]
- (c) [(Other than in the case of an assignment permitted by paragraph (b) of Clause 31.1 (*Permitted Debt Purchase Transactions*)) an]¹⁹⁸ [An] assignment will only be effective on:
 - (i) receipt by the Agent (whether in the Assignment Agreement or otherwise) of written confirmation from the New Lender (in form and substance satisfactory to the Agent) that the New Lender will assume the same obligations to the other Finance Parties and the other Secured Parties as it would have been under if it had been an Original Lender;
 - (ii) the New Lender entering into the documentation required for it to accede as a party to the Intercreditor Agreement; and
 - (iii) performance by the Agent of all necessary "know your customer" or other similar checks under all applicable laws and regulations in relation

¹⁹⁸ Include if the second form of Clause 31 is used. See footnote to Clause 31 (*Restriction on Debt Purchase Transactions*).

to such assignment to a New Lender, the completion of which the Agent shall promptly notify to the Existing Lender and the New Lender.

- (d) A transfer will only be effective if the New Lender enters into the documentation required for it to accede as a party to the Intercreditor Agreement and if the procedure set out in Clause 30.6 (*Procedure for transfer*) is complied with.
- (e) If:
 - (i) a Lender assigns or transfers any of its rights or obligations under the Finance Documents or changes its Facility Office; and
 - (ii) as a result of circumstances existing at the date the assignment, transfer or change occurs, an Obligor would be obliged to make a payment to the New Lender or Lender acting through its new Facility Office under Clause 20 (*Increased Costs*),

then the New Lender or Lender acting through its new Facility Office is only entitled to receive payment under that Clause to the same extent as the Existing Lender or Lender acting through its previous Facility Office would have been if the assignment, transfer or change had not occurred. This paragraph (e) shall not apply in respect of an assignment or transfer made in the ordinary course of the primary syndication of any Facility.

- (f) Each New Lender, by executing the relevant Transfer Certificate or Assignment Agreement, confirms, for the avoidance of doubt, that the Agent has authority to execute on its behalf any amendment or waiver that has been approved by or on behalf of the requisite Lender or Lenders in accordance with this Agreement on or prior to the date on which the transfer or assignment becomes effective in accordance with this Agreement and that it is bound by that decision to the same extent as the Existing Lender would have been had it remained a Lender.

30.4 Assignment or transfer fee

- (a) Subject to paragraph (b) below, the New Lender shall, on the date upon which an assignment or transfer takes effect, pay to the Agent (for its own account) a fee of [].
- (b) No fee is payable pursuant to paragraph (a) above if:
 - (i) the Agent agrees that no fee is payable; or
 - (ii) the assignment or transfer is made by an Existing Lender:
 - (A) to an Affiliate of that Existing Lender;
 - (B) to a fund which is a Related Fund of that Existing Lender; or
 - (C) in connection with primary syndication of any Facility.

30.5 Limitation of responsibility of Existing Lenders

- (a) Unless expressly agreed to the contrary, an Existing Lender makes no representation or warranty and assumes no responsibility to a New Lender for:
- (i) the legality, validity, effectiveness, adequacy or enforceability of the Transaction Documents, the Transaction Security or any other documents;
 - (ii) the financial condition of any Obligor;
 - (iii) the performance and observance by any Obligor [or any other member of the Group] of its obligations under the Transaction Documents or any other documents; or
 - (iv) the accuracy of any statements (whether written or oral) made in or in connection with any Transaction Document or any other document,
- and any representations or warranties implied by law are excluded.
- (b) Each New Lender confirms to the Existing Lender, the other Finance Parties and the Secured Parties that it:
- (i) has made (and shall continue to make) its own independent investigation and assessment of the financial condition and affairs of each Obligor and its related entities in connection with its participation in this Agreement and has not relied exclusively on any information provided to it by the Existing Lender or any other Finance Party in connection with any Transaction Document or the Transaction Security; and
 - (ii) will continue to make its own independent appraisal of the creditworthiness of each Obligor and its related entities whilst any amount is or may be outstanding under the Finance Documents or any Commitment is in force.
- (c) Nothing in any Finance Document obliges an Existing Lender to:
- (i) accept a re-transfer or re-assignment from a New Lender of any of the rights and obligations assigned or transferred under this Clause 30; or
 - (ii) support any losses directly or indirectly incurred by the New Lender by reason of the non-performance by any Obligor of its obligations under the Transaction Documents or otherwise.

30.6 Procedure for transfer

- (a) Subject to the conditions set out in Clause 30.2 [(*Parent consultation*)]/[(*Parent consent*)] and Clause 30.3 (*Other conditions of assignment or transfer*) a transfer is effected in accordance with paragraph (c) below when the Agent executes an otherwise duly completed Transfer Certificate delivered to it by the Existing Lender and the New Lender. The Agent shall, subject to paragraph (b) below, as soon as reasonably practicable after receipt by it of a duly completed

Transfer Certificate appearing on its face to comply with the terms of this Agreement and delivered in accordance with the terms of this Agreement, execute that Transfer Certificate.

- (b) The Agent shall only be obliged to execute a Transfer Certificate delivered to it by the Existing Lender and the New Lender once it is satisfied it has complied with all necessary "know your customer" or other similar checks under all applicable laws and regulations in relation to the transfer to such New Lender.
- (c) [Subject to Clause 30.11 (*Pro rata interest settlement*), on]/[On] the Transfer Date:
 - (i) to the extent that in the Transfer Certificate the Existing Lender seeks to transfer by novation its rights and obligations under the Finance Documents and in respect of the Transaction Security each of the Obligors and the Existing Lender shall be released from further obligations towards one another under the Finance Documents and in respect of the Transaction Security and their respective rights against one another under the Finance Documents and in respect of the Transaction Security shall be cancelled (being the "**Discharged Rights and Obligations**");
 - (ii) each of the Obligors and the New Lender shall assume obligations towards one another and/or acquire rights against one another which differ from the Discharged Rights and Obligations only insofar as that Obligor or other member of the Group and the New Lender have assumed and/or acquired the same in place of that Obligor and the Existing Lender;
 - (iii) the Agent, the Arranger, the Security Agent, the New Lender, the other Lenders, the Issuing Bank and any relevant Ancillary Lender shall acquire the same rights and assume the same obligations between themselves and in respect of the Transaction Security as they would have acquired and assumed had the New Lender been an Original Lender with the rights, and/or obligations acquired or assumed by it as a result of the transfer and to that extent the Agent, the Arranger, the Security Agent, the Issuing Bank and any relevant Ancillary Lender and the Existing Lender shall each be released from further obligations to each other under the Finance Documents; and
 - (iv) the New Lender shall become a Party as a "Lender".

30.7 Procedure for assignment

- (a) Subject to the conditions set out in Clause 30.2 [(*Parent consultation*)]/[(*Parent consent*)] and Clause 30.3 (*Other conditions of assignment or transfer*) an assignment may be effected in accordance with paragraph (c) below when the Agent executes an otherwise duly completed Assignment Agreement delivered to it by the Existing Lender and the New Lender. The Agent shall, subject to paragraph (b) below, as soon as reasonably practicable after receipt by it of a duly completed Assignment Agreement appearing on its face to comply with

the terms of this Agreement and delivered in accordance with the terms of this Agreement, execute that Assignment Agreement.

- (b) The Agent shall only be obliged to execute an Assignment Agreement delivered to it by the Existing Lender and the New Lender once it is satisfied it has complied with all necessary "know your customer" or other similar checks under all applicable laws and regulations in relation to the assignment to such New Lender.
- (c) [Subject to Clause 30.11 (*Pro rata interest settlement*), on]/[On] the Transfer Date:
 - (i) the Existing Lender will assign absolutely to the New Lender its rights under the Finance Documents and in respect of the Transaction Security expressed to be the subject of the assignment in the Assignment Agreement;
 - (ii) the Existing Lender will be released from the obligations (the "**Relevant Obligations**") expressed to be the subject of the release in the Assignment Agreement (and any corresponding obligations by which it is bound in respect of the Transaction Security); and
 - (iii) the New Lender shall become a Party as a "Lender" and will be bound by obligations equivalent to the Relevant Obligations.¹⁹⁹
- (d) Lenders may utilise procedures other than those set out in this Clause 30.7 to assign their rights under the Finance Documents (but not, without the consent of the relevant Obligor or unless in accordance with Clause 30.6 (*Procedure for transfer*), to obtain a release by that Obligor from the obligations owed to that Obligor by the Lenders nor the assumption of equivalent obligations by a New Lender) **provided that** they comply with the conditions set out in Clause 30.2 [(*Parent consultation*)]/[(*Parent consent*)] and Clause 30.3 (*Other conditions of assignment or transfer*).

30.8 Copy of Transfer Certificate, Assignment Agreement or Increase Confirmation to Parent

The Agent shall, as soon as reasonably practicable after it has executed a Transfer Certificate, an Assignment Agreement or an Increase Confirmation, send to the Parent a copy of that Transfer Certificate, Assignment Agreement or Increase Confirmation.

30.9 Accession of Hedge Counterparties

Any person which becomes a party to the Intercreditor Agreement as a Hedge Counterparty shall, at the same time, become a Party to this Agreement as a "Hedge

¹⁹⁹ If the Assignment Agreement is used in place of a Transfer Certificate in order to avoid a novation of rights/obligations for reasons relevant to a civil jurisdiction, local law advice should be sought to check the suitability of the Assignment Agreement due to the assumption of obligations referred to in paragraph (c)(iii) of Clause 30.7 (*Procedure for assignment*).

- (iii) the transfer must take place no later than []²⁴⁶ after the notice referred to in paragraph (a) above;
 - (iv) in no event shall the Defaulting Lender be required to pay or surrender to the Replacement Lender any of the fees received by the Defaulting Lender pursuant to the Finance Documents; and
 - (v) the Defaulting Lender shall only be obliged to transfer its rights and obligations pursuant to paragraph (a) above once it is satisfied that it has complied with all necessary "know your customer" or other similar checks under all applicable laws and regulations in relation to that transfer to the Replacement Lender.
- (c) The Defaulting Lender shall perform the checks described in paragraph (b)(v) above as soon as reasonably practicable following delivery of a notice referred to in paragraph (a) above and shall notify the Agent and the Parent when it is satisfied that it has complied with those checks.

43. CONFIDENTIAL INFORMATION

43.1 Confidentiality

Each Finance Party agrees to keep all Confidential Information confidential and not to disclose it to anyone, save to the extent permitted by Clause 43.2 (*Disclosure of Confidential Information*) and Clause 43.3 (*Disclosure to numbering service providers*), and to ensure that all Confidential Information is protected with security measures and a degree of care that would apply to its own confidential information.

43.2 Disclosure of Confidential Information

Any Finance Party may disclose:

- (a) to any of its Affiliates and Related Funds and any of its or their officers, directors, employees, professional advisers, auditors, partners and Representatives such Confidential Information as that Finance Party shall consider appropriate if any person to whom the Confidential Information is to be given pursuant to this paragraph (a) is informed in writing of its confidential nature and that some or all of such Confidential Information may be price-sensitive information except that there shall be no such requirement to so inform if the recipient is subject to professional obligations to maintain the confidentiality of the information or is otherwise bound by requirements of confidentiality in relation to the Confidential Information;
- (b) to any person:
 - (i) to (or through) whom it assigns or transfers (or may potentially assign or transfer) all or any of its rights and/or obligations under one or more Finance Documents or which succeeds (or which may potentially succeed) it as Agent or Security Agent and, in each case, to any of that

²⁴⁶ Insert agreed time period.

person's Affiliates, Related Funds, Representatives and professional advisers;

- (ii) with (or through) whom it enters into (or may potentially enter into), whether directly or indirectly, any sub-participation in relation to, or any other transaction under which payments are to be made or may be made by reference to, one or more Finance Documents and/or one or more Obligors and to any of that person's Affiliates, Related Funds, Representatives and professional advisers;
- (iii) appointed by any Finance Party or by a person to whom paragraph (b)(i) or (b)(ii) above applies to receive communications, notices, information or documents delivered pursuant to the Finance Documents on its behalf (including, without limitation, any person appointed under paragraph (b) of Clause 33.15 (*Relationship with the Lenders*));
- (iv) who invests in or otherwise finances (or may potentially invest in or otherwise finance), directly or indirectly, any transaction referred to in paragraph (b)(i) or (b)(ii) above;
- (v) to whom information is required or requested to be disclosed by any court of competent jurisdiction or any governmental, banking, taxation or other regulatory authority or similar body, the rules of any relevant stock exchange or pursuant to any applicable law or regulation;
- (vi) to whom information is required to be disclosed in connection with, and for the purposes of, any litigation, arbitration, administrative or other investigations, proceedings or disputes;
- (vii) [to whom or for whose benefit that Finance Party charges, assigns or otherwise creates Security (or may do so) pursuant to Clause 30.10 (*Security over Lenders' rights*)]²⁴⁷;
- (viii) who is a Party; or
- (ix) with the consent of the Parent,

in each case, such Confidential Information as that Finance Party shall consider appropriate if:

- (A) in relation to paragraphs (b)(i), (b)(ii) and (b)(iii) above, the person to whom the Confidential Information is to be given has entered into a Confidentiality Undertaking except that there shall be no requirement for a Confidentiality Undertaking if the recipient is a professional adviser and is subject to professional obligations to maintain the confidentiality of the Confidential Information;

²⁴⁷ Include if optional Clause 30.10 (*Security over Lenders' rights*) is included.

SCHEDULE 4
FORM OF TRANSFER CERTIFICATE

To: [] as Agent and [] as Security Agent

From: *[The Existing Lender]* (the "Existing Lender") and *[The New Lender]* (the "New Lender")

Dated:

**[Parent] – [] Senior Facilities Agreement
dated [] (the "Facilities Agreement")**

1. We refer to the Facilities Agreement and to the Intercreditor Agreement (as defined in the Facilities Agreement). This agreement (the "Agreement") shall take effect as a Transfer Certificate for the purposes of the Facilities Agreement and as a Creditor Accession Undertaking for the purposes of the Intercreditor Agreement (and as defined in the Intercreditor Agreement). Terms defined in the Facilities Agreement have the same meaning in this Agreement unless given a different meaning in this Agreement.
2. We refer to Clause 30.6 (*Procedure for transfer*) of the Facilities Agreement:
 - (a) The Existing Lender and the New Lender agree to the Existing Lender transferring to the New Lender by novation and in accordance with Clause 30.6 (*Procedure for transfer*) of the Facilities Agreement all of the Existing Lender's rights and obligations under the Facilities Agreement, the other Finance Documents and in respect of the Transaction Security which relate to that portion of the Existing Lender's Commitment(s) and participations in Utilisations under the Facilities Agreement as specified in the Schedule.
 - (b) The proposed Transfer Date is [].
 - (c) The Facility Office and address, fax number and attention details for notices of the New Lender for the purposes of Clause 38.2 (*Addresses*) of the Facilities Agreement are set out in the Schedule.
3. The New Lender expressly acknowledges the limitations on the Existing Lender's obligations set out in paragraph (c) of Clause 30.5 (*Limitation of responsibility of Existing Lenders*) of the Facilities Agreement.
4. The New Lender confirms, for the benefit of the Agent and without liability to any Obligor, that it is:
 - (a) [a Qualifying Lender (other than a Treaty Lender);]
 - (b) [a Treaty Lender;]
 - (c) [not a Qualifying Lender].²⁶⁷

²⁶⁷ Delete as applicable. Each New Lender is required to confirm which of these three categories it falls within.

5. [The New Lender confirms that the person beneficially entitled to interest payable to that Lender in respect of an advance under a Finance Document is either:

- (a) a company resident in the United Kingdom for United Kingdom tax purposes;
- (b) a partnership each member of which is:
 - (i) a company so resident in the United Kingdom; or
 - (ii) a company not so resident in the United Kingdom which carries on a trade in the United Kingdom through a permanent establishment and which brings into account in computing its chargeable profits (within the meaning of section 19 of the CTA) the whole of any share of interest payable in respect of that advance that falls to it by reason of Part 17 of the CTA; or
- (c) a company not so resident in the United Kingdom which carries on a trade in the United Kingdom through a permanent establishment and which brings into account interest payable in respect of that advance in computing the chargeable profits (within the meaning of section 19 of the CTA) of that company.]²⁶⁸

5. [The New Lender confirms that it holds a passport under the HMRC DT Treaty Passport scheme (reference number []) and is tax resident in []*, so that interest payable to it by borrowers is generally subject to full exemption from UK withholding tax and requests that the Parent notify:

- (a) each Borrower which is a Party as a Borrower as at the Transfer Date; and
- (b) each Additional Borrower which becomes an Additional Borrower after the Transfer Date,

that it wishes that scheme to apply to the Facilities Agreement.]**

[5/6]. The New Lender confirms that it [is]/[is not]*** a Sponsor Affiliate.

[6/7]. [The New Lender confirms that it [is]/[is not]**** a Non-Acceptable L/C Lender.]*****

[7/8]. We refer to clause [22.5] (*Change of Senior Lender or Mezzanine Lender*) of the Intercreditor Agreement. In consideration of the New Lender being accepted as a Senior Lender for the purposes of the Intercreditor Agreement (and as defined therein), the New Lender confirms that, as from the Transfer Date, it intends to be party to the

²⁶⁸ Include if New Lender comes within paragraph (a)(ii) of the definition of Qualifying Lender in Clause 19.1 (*Definitions*).

* Insert jurisdiction of tax residence.

** Include if the New Lender holds a passport under the HMRC DT Treaty Passport scheme and wishes that scheme to apply to the Facilities Agreement.

*** Delete as applicable.

**** Delete as applicable

***** Include only if the transfer includes the transfer of a Revolving Facility Commitment/a participation in the Revolving Facility.

Intercreditor Agreement as a Senior Lender, and undertakes to perform all the obligations expressed in the Intercreditor Agreement to be assumed by a Senior Lender and agrees that it shall be bound by all the provisions of the Intercreditor Agreement, as if it had been an original party to the Intercreditor Agreement.

- [8/9]. This Agreement may be executed in any number of counterparts and this has the same effect as if the signatures on the counterparts were on a single copy of this Agreement.
- [9/10]. This Agreement [and any non-contractual obligations arising out of or in connection with it] [is/are]²⁶⁹ governed by English law.
- [10/11]. This Agreement has been entered into on the date stated at the beginning of this Agreement.

Note: **The execution of this Transfer Certificate may not transfer a proportionate share of the Existing Lender's interest in the Transaction Security in all jurisdictions. It is the responsibility of the New Lender to ascertain whether any other documents or other formalities are required to perfect a transfer of such a share in the Existing Lender's Transaction Security in any jurisdiction and, if so, to arrange for execution of those documents and completion of those formalities.**

²⁶⁹ This clause should follow the approach adopted as regards non-contractual obligations in Clause 48 (*Governing Law*). This should be done (and this footnote deleted) before the Agreement is signed.

THE SCHEDULE

Commitment/rights and obligations to be transferred

[Insert relevant details]

[Facility Office address, fax number and attention details for notices and account details for payments,]

[Existing Lender]

[New Lender]

By:

By:

This Agreement is accepted as a Transfer Certificate for the purposes of the Facilities Agreement by the Agent, and as a Creditor Accession Undertaking for the purposes of the Intercreditor Agreement by the Security Agent, and the Transfer Date is confirmed as [].

[Agent]

By:

[Security Agent]

By:

SCHEDULE 5
FORM OF ASSIGNMENT AGREEMENT

To: [] as Agent and [], [] as Security Agent, [] as Parent, for and on behalf of each Obligor

From: [the *Existing Lender*] (the "**Existing Lender**") and [the *New Lender*] (the "**New Lender**")

Dated:

**[Parent] – [] Senior Facilities Agreement
dated [] (the "Facilities Agreement")**

1. We refer to the Facilities Agreement and to the Intercreditor Agreement (as defined in the Facilities Agreement). This is an Assignment Agreement. This agreement (the "**Agreement**") shall take effect as an Assignment Agreement for the purposes of the Facilities Agreement and as a Creditor Accession Undertaking for the purposes of the Intercreditor Agreement (and as defined in the Intercreditor Agreement). Terms defined in the Facilities Agreement have the same meaning in this Agreement unless given a different meaning in this Agreement.
2. We refer to Clause 30.7 (*Procedure for assignment*) of the Facilities Agreement:
 - (a) The Existing Lender assigns absolutely to the New Lender all the rights of the Existing Lender under the Facilities Agreement, the other Finance Documents and in respect of the Transaction Security which correspond to that portion of the Existing Lender's Commitment(s) and participations in Utilisations under the Facilities Agreement as specified in the Schedule.
 - (b) The Existing Lender is released from all the obligations of the Existing Lender which correspond to that portion of the Existing Lender's Commitment(s) and participations in Utilisations under the Facilities Agreement specified in the Schedule.
 - (c) The New Lender becomes a Party as a Lender and is bound by obligations equivalent to those from which the Existing Lender is released under paragraph (b) above.²⁷⁰
3. The proposed Transfer Date is [].
4. On the Transfer Date the New Lender becomes:
 - (a) Party to the relevant Finance Documents (other than the Intercreditor Agreement) as a Lender; and

²⁷⁰ If the Assignment Agreement is used in place of a Transfer Certificate in order to avoid a novation of rights/obligations for reasons relevant to a civil jurisdiction, local law advice should be sought to check the suitability of the Assignment Agreement due to the assumption of obligations contained in paragraph 2(c). This issue should be addressed at Primary documentation stage. This footnote is not intended to be included in the scheduled form of Assignment Agreement in the signed Facilities Agreement.

- (b) Party to the Intercreditor Agreement as a Senior Lender (as defined in the Intercreditor Agreement).
5. The Facility Office and address, fax number and attention details for notices of the New Lender for the purposes of Clause 38.2 (*Addresses*) of the Facilities Agreement are set out in the Schedule.
6. The New Lender expressly acknowledges the limitations on the Existing Lender's obligations set out in paragraph (c) of Clause 30.5 (*Limitation of responsibility of Existing Lenders*) of the Facilities Agreement.
7. The New Lender confirms, for the benefit of the Agent and without liability to any Obligor, that it is:
- (a) [a Qualifying Lender (other than a Treaty Lender);]
 - (b) [a Treaty Lender;]
 - (c) [not a Qualifying Lender].²⁷¹
8. [The New Lender confirms that the person beneficially entitled to interest payable to that Lender in respect of an advance under a Finance Document is either:
- (a) a company resident in the United Kingdom for United Kingdom tax purposes;
 - (b) a partnership each member of which is:
 - (i) a company so resident in the United Kingdom; or
 - (ii) a company not so resident in the United Kingdom which carries on a trade in the United Kingdom through a permanent establishment and which brings into account in computing its chargeable profits (within the meaning of section 19 of the CTA) the whole of any share of interest payable in respect of that advance that falls to it by reason of Part 17 of the CTA; or
 - (c) a company not so resident in the United Kingdom which carries on a trade in the United Kingdom through a permanent establishment and which brings into account interest payable in respect of that advance in computing the chargeable profits (within the meaning of section 19 of the CTA) of that company.]²⁷²
8. [The New Lender confirms that it holds a passport under the HMRC DT Treaty Passport scheme (reference number []) and is tax resident in []*, so that interest payable to it by borrowers is generally subject to full exemption from UK withholding tax and requests that the Parent notify:

²⁷¹ Delete as applicable. Each New Lender is required to confirm which of these three categories it falls within.

²⁷² Include only if New Lender is a UK Non-Bank Lender ie falls within paragraph (a)(ii) of the definition of Qualifying Lender in Clause 19.1 (*Definitions*).

* Insert jurisdiction of tax residence.

- (a) each Borrower which is a Party as a Borrower as at the Transfer Date; and
- (b) each Additional Borrower which becomes an Additional Borrower after the Transfer Date,

that it wishes that scheme to apply to the Facilities Agreement.]**

[8/9]. The New Lender confirms that it [is]/[is not]*** a Sponsor Affiliate.

[9/10] [The New Lender confirms that it [is]/[is not]**** a Non-Acceptable L/C Lender.]*****

[10/11] We refer to clause [22.5] (*Change of Senior Lender or Mezzanine Lender*) of the Intercreditor Agreement. In consideration of the New Lender being accepted as a Senior Lender for the purposes of the Intercreditor Agreement (and as defined in the Intercreditor Agreement), the New Lender confirms that, as from the Transfer Date, it intends to be party to the Intercreditor Agreement as a Senior Lender, and undertakes to perform all the obligations expressed in the Intercreditor Agreement to be assumed by a Senior Lender and agrees that it shall be bound by all the provisions of the Intercreditor Agreement, as if it had been an original party to the Intercreditor Agreement.

[11/12] This Agreement acts as notice to the Agent (on behalf of each Finance Party) and, upon delivery in accordance with Clause 30.8 (*Copy of Transfer Certificate, Assignment Agreement or Increase Confirmation to Parent*), to the Parent (on behalf of each Obligor) of the assignment referred to in this Agreement.

[12/13] This Agreement may be executed in any number of counterparts and this has the same effect as if the signatures on the counterparts were on a single copy of this Agreement.

[13/14] This Agreement [and any non-contractual obligations arising out of or in connection with it] [is/are]²⁷³ governed by English law.

[14/15] This Agreement has been entered into on the date stated at the beginning of this Agreement.

Note: **The execution of this Assignment Agreement may not transfer a proportionate share of the Existing Lender's interest in the Transaction Security in all jurisdictions. It is the responsibility of the New Lender to ascertain whether any other documents or other formalities are required to perfect a transfer of such a share in the Existing Lender's Transaction Security in any jurisdiction and, if so, to arrange for execution of those documents and completion of those formalities.**

** Include if the New Lender holds a passport under the HMRC DT Treaty Passport scheme and wishes that scheme to apply to the Facilities Agreement.

*** Delete as applicable.

**** Delete as applicable.

*****Include only if the assignment includes the assignment of a Revolving Facility Commitment / a participation in the Revolving Facility.

²⁷³ This clause should follow the approach adopted as regards non-contractual obligations in Clause 48 (*Governing Law*). This should be done (and this footnote deleted) before the Agreement is signed.

2.4 Finance Parties' rights and obligations

- (a) The obligations of each Finance Party under the Finance Documents are several. Failure by a Finance Party to perform its obligations under the Finance Documents does not affect the obligations of any other Party under the Finance Documents. No Finance Party is responsible for the obligations of any other Finance Party under the Finance Documents.
- (b) The rights of each Finance Party under or in connection with the Finance Documents are separate and independent rights and any debt arising under the Finance Documents to a Finance Party from an Obligor is a separate and independent debt in respect of which a Finance Party shall be entitled to enforce its rights in accordance with paragraph (c) below. The rights of each Finance Party include any debt owing to that Finance Party under the Finance Documents and, for the avoidance of doubt, any part of a Loan or any other amount owed by an Obligor which relates to a Finance Party's participation in a Facility or its role under a Finance Document (including any such amount payable to the Agent on its behalf) is a debt owing to that Finance Party by that Obligor.
- (c) A Finance Party may, except as specifically provided in the Finance Documents, separately enforce its rights under or in connection with the Finance Documents.

2.5 Obligors' Agent

- (a) Each Obligor (other than the Parent) by its execution of this Agreement or an Accession Deed irrevocably appoints the Parent (acting through one or more authorised signatories) to act on its behalf as its agent in relation to the Finance Documents and irrevocably authorises:
 - (i) the Parent on its behalf to supply all information concerning itself contemplated by this Agreement to the Finance Parties and to give all notices and instructions (including, in the case of a Borrower, Utilisation Requests), [to agree any Incremental Facility Terms and to deliver any Incremental Facility Notice,] to make such agreements and to effect the relevant amendments, supplements and variations capable of being given, made or effected by any Obligor notwithstanding that they may affect the Obligor, without further reference to or the consent of that Obligor; and
 - (ii) each Finance Party to give any notice, demand or other communication to that Obligor pursuant to the Finance Documents to the Parent,

and in each case the Obligor shall be bound as though the Obligor itself had given the notices and instructions (including, without limitation, any Utilisation Requests) or executed or made the agreements or effected the amendments, supplements or variations, or received the relevant notice, demand or other communication.

- (b) Every act, omission, agreement, undertaking, settlement, waiver, amendment, supplement, variation, notice or other communication given or made by the

- (b) The Company shall, (and the Parent will procure that the Company and each relevant member of the Group will), take all reasonable and practical steps to preserve and enforce its rights (or the rights of any other member of the Group) and pursue any claims and remedies arising under any Acquisition Documents.

28.16 Negative pledge

In this Clause 28.16, "Quasi-Security" means an arrangement or transaction described in paragraph (b) below.

Except as permitted under paragraph (c) below:

- (a) No Obligor shall (and the Parent shall ensure that no other member of the Group will) create or permit to subsist any Security over any of its assets.
- (b) No Obligor shall (and the Parent shall ensure that no other member of the Group will):
- (i) sell, transfer or otherwise dispose of any of its assets on terms whereby they are or may be leased to or re-acquired by an Obligor [or any other member of the Group];
 - (ii) sell, transfer or otherwise dispose of any of its receivables on recourse terms;
 - (iii) enter into any arrangement under which money or the benefit of a bank or other account may be applied, set-off or made subject to a combination of accounts; or
 - (iv) enter into any other preferential arrangement having a similar effect,

in circumstances where the arrangement or transaction is entered into primarily as a method of raising Financial Indebtedness or of financing the acquisition of an asset.

- (c) Paragraphs (a) and (b) above do not apply to any Security or (as the case may be) Quasi-Security, which is:
- (i) Permitted Security; or
 - (ii) a Permitted Transaction.

28.17 Disposals

- (a) Except as permitted under paragraph (b) below, no Obligor shall (and the Parent shall ensure that no other member of the Group will) enter into a single transaction or a series of transactions (whether related or not) and whether voluntary or involuntary to sell, lease, transfer or otherwise dispose of any asset.

without limitation, by making Senior Management available for the purpose of making presentations to, or meeting, potential lending institutions) and will comply with all reasonable requests for information from potential syndicate members prior to completion of syndication.]¹⁹³

28.41 Conditions subsequent

- (a) [The Parent shall procure that within 30 days of the Closing Date [*insert name of Borrower of the Term Facilities*] enters into the Hedging Agreements.]
- (b) The Parent shall procure that each member of the Group identified in Part III of Schedule 2 (*Conditions precedent*) accedes as an Additional Obligor and [, subject to the Agreed Security Principles] grants the Transaction Security and carries out any action to protect, perfect or give priority to the Transaction Security by the specified date identified opposite the name of that member of the Group in Part III of Schedule 2 (*Conditions precedent*).
- (c) Each Obligor must use, and must procure that any other member of the Group that is a potential provider of Transaction Security uses, all reasonable endeavours lawfully available to avoid or mitigate the constraints on the provision of Security provided for in the Agreed Security Principles.
- (d) [].

29. EVENTS OF DEFAULT

Each of the events or circumstances set out in this Clause 29 is an Event of Default (save for Clause 29.20 (*Acceleration*) [and Clause 29.21 (*Clean-Up Period*)]).

29.1 Non-payment

An Obligor does not pay on the due date any amount payable pursuant to a Finance Document at the place at and in the currency in which it is expressed to be payable unless:

- (a) its failure to pay is caused by:
 - (i) administrative or technical error; or
 - (ii) a Disruption Event; and
- (b) [payment is made within:
 - (i) (in the case of paragraph (a)(i) above), [] Business Days of its due date; or
 - (ii) (in the case of paragraph (a)(ii) above), [] Business Days of its due date]/

¹⁹³ This Clause should be deleted if there is a separate syndication side letter.

OR

[payment is made within [] Business Days of its due date.]

29.2 Financial covenants and other obligations

- (a) Any requirement of Clause 27 (*Financial covenants*) is not satisfied [or an Obligor does not comply with the provisions of Clause 26 (*Information Undertakings*)] [and/or Clause 28 (*General Undertakings*)]¹⁹⁴.
- (b) An Obligor does not comply with any provision of any Transaction Security Document.

29.3 Other obligations

- (a) An Obligor does not comply with any provision of the Finance Documents (other than those referred to in Clause 29.1 (*Non-payment*) and Clause 29.2 (*Financial covenants and other obligations*)).
- (b) No Event of Default under paragraph (a) above will occur if the failure to comply is capable of remedy and is remedied within [] Business Days of the earlier of (i) the Agent giving notice to the Parent or relevant Obligor and (ii) the Parent or an Obligor becoming aware of the failure to comply.

29.4 Misrepresentation

Any representation or statement made or deemed to be made by an Obligor in the Finance Documents or any other document delivered by or on behalf of any Obligor under or in connection with any Finance Document is or proves to have been incorrect or misleading when made or deemed to be made.

29.5 Cross default

- (a) Any Financial Indebtedness of any member of the Group is not paid when due nor within any originally applicable grace period.
- (b) Any Financial Indebtedness of any member of the Group is declared to be or otherwise becomes due and payable prior to its specified maturity as a result of an event of default (however described).
- (c) Any commitment for any Financial Indebtedness of any member of the Group is cancelled or suspended by a creditor of any member of the Group as a result of an event of default (however described).
- (d) Any creditor of any member of the Group becomes entitled to declare any Financial Indebtedness of any member of the Group due and payable prior to its specified maturity as a result of an event of default (however described).

¹⁹⁴ Subject to negotiation as no grace periods apply to breaches of the clauses referred to in Clause 29.2 (*Financial covenants and other obligations*).

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PRR 2.1 General contents of prospectus

General contents of prospectus

PRR 2.1.1

UK

01/01/2021

Article 6(1) and (2) of the *Prospectus Regulation* provides for the general contents of a *prospectus*:

Article 6

The prospectus

1. Without prejudice to Article 14(2) and Article 18(1), a prospectus shall contain the necessary information which is material to an investor for making an informed assessment of:

- (a) the assets and liabilities, profits and losses, financial position and prospects of the issuer and of any guarantor;
- (b) the rights attaching to the securities; and
- (c) the reasons for the issuance and its impact on the issuer.

That information may vary depending on any of the following:

- (a) the nature of the issuer;
- (b) the type of securities;
- (c) the circumstances of the issuer;

(d) where relevant, whether or not the non-equity securities have a denomination per unit of at least EUR 100 000 or are to be traded only on a regulated market or a specific segment thereof, to which only qualified investors can have access for the purposes of trading in the securities.

2. The information in a prospectus shall be written and presented in an easily analysable, concise and comprehensible form, taking into account the factors set out in the second subparagraph of paragraph 1.

Summary

PRR 2.1.2

UK

01/01/2021

Article 7(1) (first sub-paragraph) and (2) of the *Prospectus Regulation* provides:

Article 7

The prospectus summary

1. The prospectus shall include a summary that provides the key information that investors need in order to understand the nature and the risks of the issuer, the guarantor and the securities that are being offered or admitted to trading on a regulated market, and that is to be read together with the other parts of the prospectus to aid investors when considering whether to invest in such securities.

...

2. The content of the summary shall be accurate, fair and clear and shall not be misleading. It is to be read as an introduction to the prospectus and it shall be consistent with the other parts of the prospectus.

When a summary is not required

Article 7(1) (second sub-paragraph) of the *Prospectus Regulation* provides:

Article 7

PRR 2.1.3

UK

01/01/2021

The prospectus summary

1.

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By way of derogation from the first subparagraph, no summary shall be required where the prospectus relates to the admission to trading on a regulated market of non-equity securities provided that:

- (a) such securities are to be traded only on a regulated market, or a specific segment thereof, to which only qualified investors can have access for the purposes of trading in such securities; or
- (b) such securities have a denomination per unit of at least EUR 100 000.

Contents of summary

PRR 2.1.4

UK

01/01/2021

The prospectus summary

...

3. The summary shall be drawn up as a short document written in a concise manner and of a maximum length of seven sides of A4-sized paper when printed. The summary shall:

- (a) be presented and laid out in a way that is easy to read, using characters of readable size;
- (b) be written in a language and a style that facilitate the understanding of the information, in particular, in language that is clear, non-technical, concise and comprehensible for investors.

4. The summary shall be made up of the following four sections:

- (a) an introduction, containing warnings;
- (b) key information on the issuer;
- (c) key information on the securities;
- (d) key information on the offer of securities to the public and/or the admission to trading on a regulated market.

5. The section referred to in point (a) of paragraph 4 shall contain:

- (a) the name and international securities identification number (ISIN) of the securities;
- (b) the identity and contact details of the issuer, including its legal entity identifier (LEI);
- (c) where applicable, the identity and contact details of the offeror, including its LEI if the offeror has legal personality, or of the person asking for admission to trading on a regulated market;
- (d) the identity and contact details of the competent authority approving the prospectus and, where different, the competent authority that approved the registration document or the universal registration document;
- (e) the date of approval of the prospectus;

It shall contain the following warnings:

- (a) the summary should be read as an introduction to the prospectus;
- (b) any decision to invest in the securities should be based on a consideration of the prospectus as a whole by the investor;
- (c) where applicable, that the investor could lose all or part of the invested capital and, where the investor's liability is not limited to the amount of the investment, a warning that the investor could lose more than the invested capital and the extent of such potential loss;
- (e) civil liability attaches only to those persons who have tabled the summary including any translation thereof, but only where the summary is misleading, inaccurate or inconsistent, when read together with the other parts of the prospectus, or where it does not provide, when read together with the other parts of the prospectus, key information in order to aid investors when considering whether to invest in such securities;
- (f) where applicable, the comprehension alert required in accordance with point (b) of Article 8(3) of [the *PRIIPs Regulation*].

6. The section referred to in point (b) of paragraph 4 shall contain the following information:

- (a) Under a sub-section entitled 'Who is the issuer of the securities?', a brief description of the issuer of the securities, including at least the following:
 - (i) its domicile and legal form, its LEI, the law under which it operates and its country of incorporation;
 - (ii) its principal activities;
 - (iii) its major shareholders, including whether it is directly or indirectly owned or controlled and by whom;

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PRR 2.2 Format of prospectus

Format of prospectus

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Article 6

7 K H S U R V S H F W X V

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3. The issuer, offeror or person asking for the admission to trading on a regulated market may draw up the prospectus as a single document or as separate documents.

Without prejudice to Article 8(8) and the second subparagraph of Article 7(1), a prospectus composed of separate documents shall divide the required information into a registration document, a securities note and a summary. The registration document shall contain the information relating to the issuer. The securities note shall contain the information concerning the securities offered to the public or to be admitted to trading on a regulated market.

Prospectuses consisting of separate documents

3 5 5

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Article 10 of the *Prospectus Regulation* provides for drawing up a *prospectus* consisting of separate documents:

Article 10

3 U R V S H F W X V H V F R Q V L V W L Q J R I V H S D U D W H G R F X P H Q W V

1. An issuer that has already had a registration document approved by the competent authority shall be required to draw up only the securities note and the summary, where applicable, when securities are offered to the public or admitted to trading on a regulated market. In that case, the securities note and the summary shall be subject to a separate approval.

Where, since the approval of the registration document, there has been a significant new factor, material mistake or material inaccuracy relating to the information included in the registration document which is capable of affecting the assessment of the securities, a supplement to the registration document shall be submitted for approval, at the latest at the same time as the securities note and the summary. The right to withdraw acceptances in accordance with Article 23(2) shall not apply in that case.

The registration document and its supplement, where applicable, accompanied by the securities note and the summary shall constitute a prospectus, once approved by the competent authority.

2. Once approved, the registration document shall be made available to the public without undue delay and in accordance with the arrangements set out in Article 21.

3. An issuer that has already had a universal registration document approved by the competent authority, or that has filed a universal registration document without prior approval pursuant to the second subparagraph of Article 9(2), shall be required to draw up only the securities note and the summary when securities are offered to the public or admitted to trading on a regulated market.

Where the universal registration document has already been approved, the securities note, the summary and all amendments to the universal registration document filed since the approval of the universal registration document shall be subject to a separate approval.

Where an issuer has filed a universal registration document without prior approval, the entire documentation, including amendments to the universal registration document, shall be subject to approval, notwithstanding the fact that those documents

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PRR 2.8 Omission of information

Omission of information

PRR 2.8.1

UK

01/01/2021

Article 18

Omission of information

1. The competent authority may authorise the omission from the prospectus, or constituent parts thereof, of certain information to be included therein, where it considers that any of the following conditions is met:

- (a) disclosure of such information would be contrary to the public interest;
- (b) disclosure of such information would be seriously detrimental to the issuer or to the guarantor, if any, provided that the omission of such information would not be likely to mislead the public with regard to facts and circumstances essential for an informed assessment of the issuer or guarantor, if any, and of the rights attached to the securities to which the prospectus relates;
- (c) such information is of minor importance in relation to a specific offer or admission to trading on a regulated market and would not influence the assessment of the financial position and prospects of the issuer or guarantor, if any.

2. Subject to adequate information being provided to investors, where, exceptionally, certain information required to be included in a prospectus, or constituent parts thereof, is inappropriate to the sphere of activity or to the legal form of the issuer or of the guarantor, if any, or to the securities to which the prospectus relates, the prospectus, or constituent parts thereof, shall contain information equivalent to the required information, unless no such information exists.

3. Where securities are guaranteed by a state, an issuer, an offeror or a person asking for admission to trading on a regulated market, when drawing up a prospectus in accordance with Article 4, shall be entitled to omit information pertaining to that state.

Request to omit information

PRR 2.8.2

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21/07/2019

Article 42(2) of the *PR Regulation* sets out requirements regarding the submission of requests to omit information from a prospectus. The *FCA* considers that a reasoned request for this purpose would:

- (1) be in writing from the *applicant*;
- (2) identify the specific information concerned and the reasons for its omission; and
- (3) State why in the *applicant's* opinion one or more of the grounds in article 18(1) of the *Prospectus Regulation* applies.

4. When applying paragraphs 1, 2 or 3, the competent authority shall request the issuer, offeror or person asking for admission to trading on a regulated market to confirm that all information in the final draft of the prospectus or universal registration document is up-to-date and contains all the information referred to in the Annexes to this Regulation applicable to that prospectus or universal registration document.
5. Where subsequent drafts of the prospectus are submitted to the competent authority, that competent authority, when scrutinising such subsequent drafts, shall only be required to apply the criteria laid down in Articles 36, 37 and 38 to changes made to the preceding draft and to any other information affected by those changes.

Article 42

Submission of an application for approval of a draft prospectus or filing of a universal registration document or of amendments thereto

1. All drafts of a prospectus shall be submitted to the competent authority in searchable electronic format via electronic means. When submitting the first draft of the prospectus, the issuer, offeror or person asking for admission to trading on a regulated market shall provide the competent authority with a contact point for the competent authority to submit all notifications in writing and by electronic means.
2. The following information shall also be submitted to the competent authority in searchable electronic format via electronic means:
 - (a) the list of cross references, where requested by the competent authority in accordance with Article 24(5) of this Regulation, or when submitted on own initiative;
 - (b) where no list of cross reference is requested, a document that identifies any items set out in the Annexes to this Regulation that, due to the nature or type of issuer, securities, offer or admission to trading, have not been included in the draft prospectus;
 - (c) any information that is incorporated into the prospectus by reference as referred to in Article 19 of [the *Prospectus Regulation*], unless such information has already been approved by or filed with the same competent authority in searchable electronic format;
 - (d) any reasoned request to the competent authority to authorise the omission of information from the prospectus as referred to in Article 18 of [the *Prospectus Regulation*];
 - (e) an appendix where required by Article 26(4) of [the *Prospectus Regulation*], unless no summary is required pursuant to the second subparagraph of Article 7(1) of that Regulation;
 - (f) a confirmation that, to the best of the knowledge of the issuer, all regulated information which was required to be disclosed under the UK law which implemented [the *Transparency Directive*], where applicable, and under Regulation (EU) No 596/2014 of the European Parliament and of the Council, has been filed and published in accordance with those acts over the last 18 months or over the period since the obligation to disclose that regulated information commenced, whichever is the shorter, where the issuer is submitting for approval a draft universal registration document or filing a universal registration document without prior approval and seeks to obtain the status of frequent issuer;
 - (g) where a universal registration document is filed without prior approval, an explanation as to how a request for amendment or supplementary information as referred to in the second subparagraph of Article 9(9) of [the *Prospectus Regulation*] has been taken into account in the universal registration document;
 - (h) any other information requested by the competent authority for the purposes of the scrutiny and approval of the prospectus or the scrutiny, review and approval of the universal registration document.
3. Where a universal registration document that is filed without prior approval is annotated in the margin in accordance with Article 24(6), it shall be accompanied by an identical version without annotations in the margin.
4. Where a universal registration document is filed without prior approval or where a universal registration document is amended, the information referred to in points (a), (b), (c), (d), (h) and (i) of paragraph 2 shall be submitted at the time when the universal registration document is filed with the competent authority whilst the information referred to in point (j) of paragraph 2 shall be submitted during the review process. In all other cases, the information referred to in paragraph 2 shall be submitted together with the first draft of the prospectus submitted to the competent authority or during the scrutiny process.
5. Where a frequent issuer informs the competent authority that it intends to submit an application for approval of a draft prospectus in accordance with the second sentence of the first subparagraph of Article 20(6) of [the *Prospectus Regulation*], that frequent issuer shall do so in writing and by electronic means.
The information referred to in the first subparagraph shall indicate the Annexes to this Regulation relevant for that draft prospectus.

Article 43

Changes to a draft prospectus during the approval procedure

1. Each version of the draft prospectus submitted after the first draft prospectus shall highlight all changes made to the preceding draft and shall be accompanied by an unmarked draft. The competent authority shall accept marked extracts of the preceding draft prospectus where only limited changes have been made.
2. Where the competent authority, in accordance with Article 45(2) of this Regulation, have notified the issuer, offeror or person asking for admission to trading on a regulated market that the draft prospectus does not meet the standards of completeness, comprehensibility and consistency as referred to in Article 20(4) of [the *Prospectus Regulation*], the subsequently submitted draft of the prospectus shall be accompanied by an explanation as to how the outstanding issues notified by the competent authority have been addressed.
3. Where changes made to a draft prospectus are self-explanatory or clearly address the outstanding issues notified by the competent authority, an indication of where the changes have been made to address the outstanding issues shall be considered sufficient explanation for the purposes of paragraph 2.

Article 44

Submission for approval of the final draft of the prospectus

1. The final draft of the prospectus shall be submitted for approval together with all the information referred to in Article 42(2) that has changed compared to the previous submission, with the exception of the information referred to in points (a) and (h) of that Article. The final draft of the prospectus shall not be annotated in the margin.
2. Where no changes have been made to the information referred to in Article 42(2), the issuer, offeror or person asking for admission to trading on a regulated market shall confirm so in writing and by electronic means.

Article 45

Acknowledgment of the receipt of an application for approval of a draft prospectus, or of the filing of a universal registration document or of an amendment thereto, and processing of an application for approval of a draft prospectus

1. The competent authority shall acknowledge receipt of the initial application for approval of a draft prospectus or of the filing of a universal registration document as referred to in the second subparagraph of Article 9(2) of [the *Prospectus Regulation*], or of an amendment to that universal registration document in writing and by electronic means as soon as possible and no later than by close of business on the second working day following the receipt of the application or filing. Upon receipt of the initial application for approval of a draft prospectus and of the filing of a universal registration document, or of an amendment thereto, the competent authority shall inform the issuer, offeror or person asking for admission to trading on a regulated market of the following:
 - (a) the reference number of the application or of the filing;
 - (b) the contact point within the competent authority to which queries regarding the application or the filing may be addressed.
2. Where the draft prospectus does not meet the standards of completeness, comprehensibility and consistency necessary for its approval or where changes or supplementary information are needed, the competent authority shall inform the issuer, offeror or person asking for admission to trading on a regulated market thereof in writing and by electronic means. Where the universal registration document referred to in the second subparagraph of Article 9(2) of [the *Prospectus Regulation*], or an amendment to that universal registration document, does not meet the standards of completeness, comprehensibility and consistency or where amendments or supplementary information are needed, the competent authority shall inform the issuer thereof in writing and by electronic means. Where the shortcoming must be addressed without undue delay, as required by the third subparagraph of Article 9(9) of [the *Prospectus Regulation*], the competent authority shall inform the issuer thereof.
3. The competent authority shall notify the issuer, offeror or person asking for admission to trading on a regulated market about its decision regarding the approval of the draft prospectus in writing and by electronic means as soon as possible and by no later than by close of business of the day on which that decision is taken.

Time limits for approval of prospectus

PRR 3.1.2

UK

01/01/2021

Article 20(2) to (6) of the *Prospectus Regulation* sets out the time limits for the approval of a *prospectus*:

Article 20

Scrutiny and approval of the prospectus

...

2. The competent authority shall notify the issuer, the offeror or the person asking for admission to trading on a regulated market of its decision regarding the approval of the prospectus within 10 working days of the submission of the draft prospectus. Where the competent authority fails to take a decision on the prospectus within the time limits laid down in the first subparagraph of this paragraph and paragraphs 3 and 6, such failure shall not be deemed to constitute approval of the application.

1. Each version of the draft prospectus submitted after the first draft prospectus shall highlight all changes made to the preceding draft and shall be accompanied by an unmarked draft. The competent authority shall accept marked extracts of the preceding draft prospectus where only limited changes have been made.
2. Where the competent authority, in accordance with Article 45(2) of this Regulation, have notified the issuer, offeror or person asking for admission to trading on a regulated market that the draft prospectus does not meet the standards of completeness, comprehensibility and consistency as referred to in Article 20(4) of [the *Prospectus Regulation*], the subsequently submitted draft of the prospectus shall be accompanied by an explanation as to how the outstanding issues notified by the competent authority have been addressed.
3. Where changes made to a draft prospectus are self-explanatory or clearly address the outstanding issues notified by the competent authority, an indication of where the changes have been made to address the outstanding issues shall be considered sufficient explanation for the purposes of paragraph 2.

Article 44

Submission for approval of the final draft of the prospectus

1. The final draft of the prospectus shall be submitted for approval together with all the information referred to in Article 42(2) that has changed compared to the previous submission, with the exception of the information referred to in points (a) and (h) of that Article. The final draft of the prospectus shall not be annotated in the margin.
2. Where no changes have been made to the information referred to in Article 42(2), the issuer, offeror or person asking for admission to trading on a regulated market shall confirm so in writing and by electronic means.

Article 45

Acknowledgment of the receipt of an application for approval of a draft prospectus, or of the filing of a universal registration document or of an amendment thereto, and processing of an application for approval of a draft prospectus

1. The competent authority shall acknowledge receipt of the initial application for approval of a draft prospectus or of the filing of a universal registration document as referred to in the second subparagraph of Article 9(2) of [the *Prospectus Regulation*], or of an amendment to that universal registration document in writing and by electronic means as soon as possible and no later than by close of business on the second working day following the receipt of the application or filing. Upon receipt of the initial application for approval of a draft prospectus and of the filing of a universal registration document, or of an amendment thereto, the competent authority shall inform the issuer, offeror or person asking for admission to trading on a regulated market of the following:
 - (a) the reference number of the application or of the filing;
 - (b) the contact point within the competent authority to which queries regarding the application or the filing may be addressed.
2. Where the draft prospectus does not meet the standards of completeness, comprehensibility and consistency necessary for its approval or where changes or supplementary information are needed, the competent authority shall inform the issuer, offeror or person asking for admission to trading on a regulated market thereof in writing and by electronic means. Where the universal registration document referred to in the second subparagraph of Article 9(2) of [the *Prospectus Regulation*], or an amendment to that universal registration document, does not meet the standards of completeness, comprehensibility and consistency or where amendments or supplementary information are needed, the competent authority shall inform the issuer thereof in writing and by electronic means. Where the shortcoming must be addressed without undue delay, as required by the third subparagraph of Article 9(9) of [the *Prospectus Regulation*], the competent authority shall inform the issuer thereof.
3. The competent authority shall notify the issuer, offeror or person asking for admission to trading on a regulated market about its decision regarding the approval of the draft prospectus in writing and by electronic means as soon as possible and by no later than by close of business of the day on which that decision is taken.

Time limits for approval of prospectus

PRR 3.1.2

UK

01/01/2021

Article 20(2) to (6) of the *Prospectus Regulation* sets out the time limits for the approval of a *prospectus*:

Article 20

Scrutiny and approval of the prospectus

...

2. The competent authority shall notify the issuer, the offeror or the person asking for admission to trading on a regulated market of its decision regarding the approval of the prospectus within 10 working days of the submission of the draft prospectus. Where the competent authority fails to take a decision on the prospectus within the time limits laid down in the first subparagraph of this paragraph and paragraphs 3 and 6, such failure shall not be deemed to constitute approval of the application.

3. The time limit set out in the first subparagraph of paragraph 2 shall be extended to 20 working days where the offer to the public involves securities issued by an issuer that does not have any securities admitted to trading on a regulated market and that has not previously offered securities to the public.

The time limit of 20 working days shall only be applicable for the initial submission of the draft prospectus. Where subsequent submissions are necessary in accordance with paragraph 4, the time limit set out in the first subparagraph of paragraph 2 shall apply.

4. Where the competent authority finds that the draft prospectus does not meet the standards of completeness, comprehensibility and consistency necessary for its approval and/or that changes or supplementary information are needed:

(a) it shall inform the issuer, the offeror or the person asking for admission to trading on a regulated market of that fact promptly and at the latest within the time limits set out in the first subparagraph of paragraph 2 or, as applicable, paragraph 3, as calculated from the submission of the draft prospectus and/or the supplementary information; and

(b) it shall clearly specify the changes or supplementary information that are needed. In such cases, the time limit set out in the first subparagraph of paragraph 2 shall then apply only from the date on which a revised draft prospectus or the supplementary information requested are submitted to the competent authority.

5. Where the issuer, the offeror or the person asking for admission to trading on a regulated market is unable or unwilling to make the necessary changes or to provide the supplementary information requested in accordance with paragraph 4, the competent authority shall be entitled to refuse the approval of the prospectus and terminate the review process. In such case, the competent authority shall notify the issuer, the offeror or the person asking for admission to trading on a regulated market of its decision and indicate the reasons for such refusal.

6. By way of derogation from paragraphs 2 and 4, the time limits set out in the first subparagraph of paragraph 2 and paragraph 4 shall be reduced to five working days for a prospectus consisting of separate documents drawn up by frequent issuers referred to in Article 9(11). The frequent issuer shall inform the competent authority at least five working days before the date envisaged for the submission of an application for approval.

A frequent issuer shall submit an application to the competent authority containing the necessary amendments to the universal registration document, where applicable, the securities note and the summary submitted for approval.

Applying for approval

PRR 3.1.3

R

21/07/2019

If the order of disclosure items in the *prospectus* does not coincide with the order set out in the Annexes to the *PR Regulation*, an *applicant* must provide the *FCA* with a cross-reference list identifying the pages where each disclosure item can be found in the *prospectus*.

[Note: Articles 24(5) and 25(6) of the *PR Regulation*]

PRR 3.1.4

R

21/07/2019

An *applicant* must take all reasonable care to ensure that any *prospectus* submitted for approval, for which it is responsible, contains:

(1) the necessary information as required under article 6 of the *Prospectus Regulation*; and

(2) the information items required in the Annexes of the *PR Regulation*, as appropriate to its application.

PRR 3.1.5

R

21/07/2019

An *applicant* must take all reasonable care to ensure that any *prospectus* submitted for approval for which it is responsible is, to the best of its knowledge, in accordance with the facts and contains no omission likely to affect its import.

Timeframe for submission

PRR 3.1.6

R

10/01/2022

(1) The *applicant* must submit to the *FCA* by the date specified in paragraph (2):

(a) a completed Form A.

[Note: Article 42(2)(j) of the *PR Regulation*. This form is available on the *FCA* website, see <https://www.fca.org.uk/markets/primary-markets/forms> .]

(b) the relevant fee; and

[Note: *FEES* 3 sets out the relevant fee payable to the *FCA*.]

(c) the first draft of the *prospectus* (accompanied, where relevant, by the additional information set out in article 42(2) of the *PR Regulation*).

(2) The date referred to in paragraph (1) is:

(a) at least 10 *working days* before the intended approval date of the *prospectus*; or

- (b) at least 20 *working days* before the intended approval date of the *prospectus* if the *applicant* does not have *transferable securities admitted to trading* and has not previously made an *offer*; or
 - (c) as soon as practicable in the case of a *supplementary prospectus*.
- (3) The applicant must submit the final version of the draft *prospectus* and the additional information set out in article 44 of the *PR Regulation* to the *FCA* before midday on the day on which approval is required to be granted.
- [**Note:** Article 44 of the *PR Regulation* is reproduced for the convenience of readers in *PRR 3.1.1UK*.]

Copy of resolution to be kept

PRR 3.1.7

R

21/07/2019

Decision-making procedures

PRR 3.1.9

R

21/07/2019

The *FCA* will follow the *executive procedures* for *statutory notice decisions* and *statutory notice associated decisions* if it:

- (1) proposes to refuse to approve a *prospectus*; or
- (2) decides to refuse to approve a *prospectus* after having given the *applicant* a written notice.

[**Note:** *DEPP 4* sets out the *executive procedures* for *statutory notice decisions* and *statutory notice associated decisions*.]

Prospectus not to be published until approved

PRR 3.1.10

UK

01/01/2021

Scrutiny and approval of the prospectus

1. A prospectus shall not be published unless the competent authority has approved it, or all of its constituent parts in accordance with Article 10.

Prospectus comprising separate documents

PRR 3.1.11

R

21/07/2019

If the *prospectus* is not a single document but comprises separate documents:

- (1) an application for approval may relate to one or more of those separate documents; and
- (2) a reference in this section to a *prospectus* is, unless the context otherwise requires, to be taken to be a reference to the document or documents to which the application relates.

Service of Notice Regulations

PRR 3.1.14

G

01/01/2021

Regulation 7 of the *Financial Services and Markets Act 2000 (Service of Notice Regulations) 2001* (SI 2001/1420) contains provisions relating to the possible methods of serving documents on the *FCA*. Regulation 7 does not apply to the submission of a draft *prospectus* or *listing particulars* to the *FCA* for approval because of the provisions set out in *PRR 3.1.1UK*.

We are developing a new FCA Handbook website.

Try the beta version. 

PRR 5.3 Persons responsible for a prospectus

Equity shares

PRR 5.3.2

R

21/07/2019

(1) This *rule* applies to a *prospectus* relating to:

- (a) *equity shares*;
 - (b) warrants or options to subscribe for *equity shares*, that are issued by the *issuer* of the *equity shares*; and
 - (c) other *transferable securities* that have similar characteristics to *transferable securities* referred to in paragraphs (a) or (b).
- (2) Each of the following *persons* are responsible for the *prospectus*:
- (a) the *issuer* of the *transferable securities*;
 - (b) if the *issuer* is a *body corporate*:
 - (i) each *person* who is a *director* of that *body corporate* when the *prospectus* is published;
 - (ii) each *person* who has authorised themselves to be named, and is named, in the *prospectus* as a *director* or as having agreed to become a *director* of that *body corporate* either immediately or at a future time; and
 - (iii) each *person* who is a senior executive of any *external management company* of the *issuer*;
 - (c) each *person* who accepts, and is stated in the *prospectus* as accepting, responsibility for the *prospectus*;
 - (d) in relation to an *offer*:
 - (i) the *offeror*, if this is not the *issuer*; and
 - (ii) if the *offeror* is a *body corporate* and is not the *issuer*, each *person* who is a *director* of the *body corporate* when the *prospectus* is published;
 - (e) in relation to a request for the *admission to trading* of *transferable securities*:
 - (i) the *person* requesting admission, if this is not the *issuer*; and
 - (ii) if the *person* requesting admission is a *body corporate* and is not the *issuer*, each *person* who is a *director* of the *body corporate* when the *prospectus* is published; and
 - (f) each *person* not falling within any of the previous paragraphs who has authorised the contents of the *prospectus*.

PRR 5.3.3

R

21/07/2019

In *PRR 5.3.2R(2)(b)(iii)*, *external management company* means in relation to an *issuer* that is a *company* which is not a collective investment undertaking, a *person* who is appointed by the *issuer* (whether under a contract of service, a contract for services or any other commercial arrangement) to perform functions that would ordinarily be performed by *officers* of the *issuer* and to make recommendations in relation to strategic matters.

PRR 5.3.4

G

21/07/2019

In considering whether the functions the *person* performs would ordinarily be performed by *officers* of the *issuer*, the *FCA* will consider, among other things:

- (1) the nature of the board of the *issuer* to which the *person* provides services, and whether the board has the capability to act itself on strategic matters in the absence of that *person's* services;
- (2) whether the appointment relates to a one-off transaction or is a longer-term relationship; and
- (3) the proportion of the functions ordinarily performed by *officers* of the *issuer* that is covered by the arrangement.

All other securities

PRR 5.3.5**R**

21/07/2019

(1) This *rule* applies to a *prospectus* relating to *transferable securities* other than those to which **PRR 5.3.2R** applies.(2) Each of the following *persons* are responsible for the *prospectus*:

- (a) the *issuer* of the *transferable securities*;
- (b) each *person* who accepts, and is stated in the *prospectus* as accepting, responsibility for the *prospectus*;
- (c) in relation to an *offer*, the *offeror* of the *transferable securities*, if this is not the *issuer*;
- (d) in relation to a request for an *admission to trading* of *transferable securities*, the *person* requesting admission, if this is not the *issuer*;
- (e) if there is a *guarantor* for the issue, the *guarantor* in relation to information in the *prospectus* that relates to the *guarantor* and the *guaranteee*; and
- (f) each *person* not falling within any of the previous paragraphs who has authorised the contents of the *prospectus*.

Issuer not responsible if it has not authorised offer or admission to trading

PRR 5.3.6**R**

21/07/2019

Publication without director's consent

PRR 5.3.7**R**

21/07/2019

Offeror not responsible in certain circumstances

PRR 5.3.8**R**

21/07/2019

A *person* is not responsible for a *prospectus* under **PRR 5.3.2R(2)(b)(i)** if it is published without their knowledge or consent and on becoming aware of its publication they, as soon as practicable, gives reasonable public notice that it was published without their knowledge or consent.

- (1) the *issuer* is responsible for the *prospectus* in accordance with the *rules* in this section;
- (2) the *prospectus* was drawn up primarily by the *issuer*, or by one or more *persons* acting on behalf of the *issuer*, and
- (3) the *offeror* is making the *offer* in association with the *issuer*.

Person may accept responsibility for, or authorise, part of contents

PRR 5.3.9**R**

21/07/2019

A *person* who accepts responsibility for a *prospectus* under **PRR 5.3.2R(2)(c)** or **PRR 5.3.5R(2)(b)** or authorises the contents of a *prospectus* under **PRR 5.3.2R(2)(f)** or **PRR 5.3.5R(2)(f)**, may state that they do so only in relation to specified parts of the *prospectus*, or only in specified respects, and in that case the *person* is responsible under those paragraphs:

- (1) only to the extent specified; and
- (2) only if the material in question is included in (or substantially in) the form and context to which the *person* has agreed.

Advice in professional capacity

PRR 5.3.10**R**

21/07/2019

Nothing in the *rules* in this section is to be construed as making a *person* responsible for any *prospectus* by reason only of the *person* giving advice about its contents in a professional capacity.

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Financial Services and Markets Act 2000 c. 8

s. 84 Matters which may be dealt with by prospectus rules

Law In Force With Amendments Pending

Version 6 of 7

31 December 2020 - Present

Subjects

Financial regulation

Keywords

Disclosure; Financial Conduct Authority; Issuers; Listing; Prospectus Rules; Securities

[

84 Matters which may be dealt with by prospectus rules

(1) Prospectus rules may make provision as to—

- (a) the required form and content of a prospectus [...]² ;
- (b) the cases in which a summary need not be included in a prospectus;
- (c) the languages which may be used in a prospectus [...]³ ;
- (d) the determination of the persons responsible for a prospectus;
- (e) the manner in which applications to the [FCA]⁴ for the approval of a prospectus are to be made.

[

(1A) In subsection (1) "prospectus" includes any part of a prospectus, and in particular includes a summary and a supplement.

]⁵

(2) Prospectus rules may also make provision as to—

- (a) the period of validity of a prospectus;
- (b) the disclosure of the maximum price or of the criteria or conditions according to which the final offer price is to be determined, if that information is not contained in a prospectus;
- (c) the disclosure of the amount of the transferable securities which are to be offered to the public or of the criteria or conditions according to which that amount is to be determined, if that information is not contained in a prospectus;
- (d) the required form and content of other summary documents (including the languages which may be used in such a document);
- (e) the ways in which a prospectus that has been approved by the [FCA]⁴ may be made available to the public;
- (f) the disclosure, publication or other communication of such information as the [FCA]⁴ may reasonably stipulate;

(g) the principles to be observed in relation to advertisements in connection with an offer of transferable securities to the public or admission of transferable securities to trading on a regulated market and the enforcement of those principles;

(h) the suspension of trading in transferable securities where continued trading would be detrimental to the interests of investors;

[

(i) the exercise of entitlements under Article 4 of the prospectus regulation [...]⁷.

]⁶

[...]⁸

(4) Prospectus rules may make provision for the purpose of dealing with matters arising out of or related to any provision of the prospectus [regulation]⁹.

[...]¹⁰

(7) Nothing in this section affects the [FCA's]⁴ general power to make prospectus rules.

]¹

Notes

1 Ss.84-87R substituted for ss.84-87 by Prospectus Regulations 2005/1433 Sch.1 para.5 (July 1, 2005)

2 Words repealed by Financial Services and Markets Act 2000 (Prospectus) Regulations 2019/1043 Pt 2 reg.5(2)(a) (July 21, 2019: repeal has effect subject to transitional provisions specified in SI 2019/1043 reg.40)

3 Words repealed by Financial Services and Markets Act 2000 (Prospectus) Regulations 2019/1043 Pt 2 reg.5(2)(b) (July 21, 2019: repeal has effect subject to transitional provisions specified in SI 2019/1043 reg.40)

4 Words substituted by Financial Services Act 2012 c. 21 Pt 2 s.16(3)(a) (January 24, 2013 for the purpose of making rules as specified in SI 2013/113 art.2 and Sch.1 Pt 3; April 1, 2013 otherwise)

5 Added by Financial Services and Markets Act 2000 (Prospectus) Regulations 2019/1043 Pt 2 reg.5(3) (July 21, 2019: insertion has effect subject to transitional provisions specified in SI 2019/1043 reg.40)

6 Substituted by Financial Services and Markets Act 2000 (Prospectus) Regulations 2019/1043 Pt 2 reg.5(4) (July 21, 2019: substitution has effect subject to transitional provisions specified in SI 2019/1043 reg.40=)

7 Words repealed by Prospectus (Amendment etc.) (EU Exit) Regulations 2019/1234 Pt 2 reg.3 (December 31, 2020: shall come into force on IP completion day not exit day as specified in 2020 c.1 s.39(1) and Sch.5 para.1)

8 Repealed by Prospectus Regulations 2012/1538 reg.3(1) (July 1, 2012)

9 Word substituted by Financial Services and Markets Act 2000 (Prospectus) Regulations 2019/1043 Pt 2 reg.5(5) (July 21, 2019: substitution has effect subject to transitional provisions specified in SI 2019/1043 reg.40)

10 Repealed by Financial Services and Markets Act 2000 (Prospectus) Regulations 2019/1043 Pt 2 reg.5(6) (July 21, 2019: repeal has effect subject to transitional provisions specified in SI 2019/1043 reg.40)

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Financial Services and Markets Act 2000 c. 8

s. 85 Prohibition of dealing etc. in transferable securities without approved prospectus

Law In Force With Amendments Pending

Version 4 of 5

31 December 2020 - Present

Subjects

Criminal law; Financial regulation

Keywords

Listing applications and prospectus offences; Public offers; Securities

[

85 Prohibition of dealing etc. in transferable securities without approved prospectus

(1) It is unlawful for transferable securities to which this subsection applies to be offered to the public in the United Kingdom unless an approved prospectus has been made available to the public before the offer is made.

(2) It is unlawful to request the admission of transferable securities to which this subsection applies to trading on a regulated market situated or operating in the United Kingdom unless an approved prospectus has been made available to the public before the request is made.

(3) A person who contravenes subsection (1) or (2) is guilty of an offence and liable—

(a) on summary conviction, to imprisonment for a term not exceeding 3 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine or both.

(4) A contravention of subsection (1) or (2) is actionable, at the suit of a person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.

(5) Subsection (1) applies to all transferable securities other than—[

(a) those listed in Article 1(2) of the prospectus regulation;

(b) any offered in an offer falling within Article 1(3) of the prospectus regulation.

]²

(6) Subsection (2) applies to all transferable securities [other than those listed in Article 1(2) of the prospectus regulation.]³ [...]³

(b) such other transferable securities as may be specified in prospectus rules.

[

(6A) Schedule 11A makes provision that applies for the purposes of Article 1(2)(e) of the prospectus regulation.

]⁴

(7) “*Approved prospectus*” means, in relation to transferable securities to which this section applies, a prospectus approved by the [FCA]⁵.

[...]⁶]¹

Notes

- ¹ Ss.84-87R substituted for ss.84-87 by Prospectus Regulations 2005/1433 [Sch.1 para.5](#) (July 1, 2005)
- ² Substituted by Financial Services and Markets Act 2000 (Prospectus) Regulations 2019/1043 [Pt 2 reg.6\(2\)](#) (July 21, 2019: substitution has effect subject to transitional provisions specified in SI 2019/1043 reg.40)
- ³ Words substituted by Financial Services and Markets Act 2000 (Prospectus) Regulations 2019/1043 [Pt 2 reg.6\(3\)](#) (July 21, 2019: substitution has effect subject to transitional provisions specified in SI 2019/1043 reg.40)
- ⁴ Added by Financial Services and Markets Act 2000 (Prospectus) Regulations 2019/1043 [Pt 2 reg.6\(4\)](#) (July 21, 2019: insertion has effect subject to transitional provisions specified in SI 2019/1043 reg.40)
- ⁵ Words substituted by Official Listing of Securities, Prospectus and Transparency (Amendment etc.) (EU Exit) Regulations 2019/707 [Pt 2\(1\) reg.7](#) (December 31, 2020: substitution has effect subject to transitional provisions specified in SI 2019/707 reg.73)
- ⁶ Repealed by Prospectus (Amendment etc.) (EU Exit) Regulations 2019/1234 [Pt 2 reg.4](#) (December 31, 2020: shall come into force on IP completion day not exit day as specified in 2020 c.1 s.39(1) and Sch.5 para.1)

*Part VI OFFICIAL LISTING > Transferable securities: public offers and admission to trading
> s. 85 Prohibition of dealing etc. in transferable securities without approved prospectus*

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Financial Services and Markets Act 2000 c. 8

s. 87A Criteria for approval of prospectus by FCA

Law In Force With Amendments Pending

Version 6 of 7

31 December 2020 - Present

Subjects

Financial regulation

Keywords

Approvals; Financial Conduct Authority; Information; Issuers; Prospectuses; Securities

[

87A Criteria for approval of prospectus by [FCA]²

- (1) The [FCA]³ may not approve a prospectus unless it is satisfied that— [...]⁴
 - (b) the prospectus contains the [information required by Article 6(1) or 14(2) of the prospectus regulation]⁵, and
 - (c) all of the other requirements imposed by or in accordance with this Part [, the prospectus regulation or prospectus rules]⁶ have been complied with (so far as those requirements apply to a prospectus for the transferable securities in question).

[

- (2) The necessary information is—
 - (a) the information required by Article 6(1) of the prospectus regulation, or
 - (b) in a case within Article 14(1) of that regulation, the information required by Article 14(2) of that regulation.

]⁷ [

- (2A) If, in the case of transferable securities to which section 87 applies, the prospectus states that the guarantor is a specified [...]⁹ State, the prospectus is not required to include other information about the guarantor.

]⁸ [...]¹⁰ [...]¹¹

- (8) “Prospectus” [...]¹² includes a supplementary prospectus.

[...]¹³]¹

Notes

¹ Ss.84-87R substituted for ss.84-87 by Prospectus Regulations 2005/1433 Sch.1 para.5 (July 1, 2005)

Notes

- 2 Words substituted by Financial Services Act 2012 c. 21 [Pt 2 s.16\(6\)\(c\)](#) (January 24, 2013 for the purpose of making rules as specified in SI 2013/113 art.2 and Sch.1 Pt 3; April 1, 2013 otherwise)
- 3 Words substituted by Financial Services Act 2012 c. 21 [Pt 2 s.16\(6\)\(a\)](#) (January 24, 2013 for the purpose of making rules as specified in SI 2013/113 art.2 and Sch.1 Pt 3; April 1, 2013 otherwise)
- 4 Repealed by Official Listing of Securities, Prospectus and Transparency (Amendment etc.) (EU Exit) Regulations 2019/707 [Pt 2\(1\) reg.10\(2\)\(a\)](#) (December 31, 2020: shall come into force on exit day as specified in 2018 c.16 s.20(1))
- 5 Words substituted by Financial Services and Markets Act 2000 (Prospectus) Regulations 2019/1043 [Pt 2 reg.9\(2\)](#) (July 21, 2019: substitution has effect subject to transitional provisions specified in SI 2019/1043 reg.40)
- 6 Words substituted by Financial Services and Markets Act 2000 (Prospectus) Regulations 2019/1043 [Pt 2 reg.9\(3\)](#) (July 21, 2019: substitution has effect subject to transitional provisions specified in SI 2019/1043 reg.40)
- 7 Substituted by Financial Services and Markets Act 2000 (Prospectus) Regulations 2019/1043 [Pt 2 reg.9\(4\)](#) (July 21, 2019: substitution has effect subject to transitional provisions specified in SI 2019/1043 reg.40)
- 8 Added by Prospectus Regulations 2012/1538 [reg.2\(3\)](#) (July 1, 2012)
- 9 Word repealed by Official Listing of Securities, Prospectus and Transparency (Amendment etc.) (EU Exit) Regulations 2019/707 [Pt 2\(1\) reg.10\(3\)](#) (December 31, 2020: shall come into force on exit day as specified in 2018 c.16 s.20(1))
- 10 Repealed by Financial Services and Markets Act 2000 (Prospectus) Regulations 2019/1043 [Pt 2 reg.9\(5\)](#) (July 21, 2019: repeal has effect subject to transitional provisions specified in SI 2019/1043 reg.40)
- 11 Repealed by Payments to Governments and Miscellaneous Provisions Regulations 2014/3293 [reg.2\(2\)](#) (December 17, 2014)
- 12 Words repealed by Financial Services and Markets Act 2000 (Prospectus) Regulations 2019/1043 [Pt 2 reg.9\(6\)](#) (July 21, 2019: repeal has effect subject to transitional provisions specified in SI 2019/1043 reg.40)
- 13 Repealed by Financial Services and Markets Act 2000 (Prospectus) Regulations 2019/1043 [Pt 2 reg.9\(7\)](#) (July 21, 2019: repeal has effect subject to transitional provisions specified in SI 2019/1043 reg.40)

Part VI OFFICIAL LISTING > Approval of prospectus > s. 87A Criteria for approval of prospectus by FCA

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Financial Services and Markets Act 2000 c. 8

s. 90 Compensation for statements in listing particulars or prospectus

Law In Force With Amendments Pending

Version 5 of 6

21 July 2019 - Present

Subjects

Financial regulation

Keywords

Compensation; False statements; Listing particulars; Loss; Misleading statements; Non-compliance; Omissions; Prospectuses; Securities

90.— [Compensation for statements in listing particulars or prospectus]¹

- (1) Any person responsible for listing particulars is liable to pay compensation to a person who has—
 - (a) acquired securities to which the particulars apply; and
 - (b) suffered loss in respect of them as a result of—
 - (i) any untrue or misleading statement in the particulars; or
 - (ii) the omission from the particulars of any matter required to be included by [section 80 or 81](#).
- (2) Subsection (1) is subject to exemptions provided by [Schedule 10](#).
- (3) If listing particulars are required to include information about the absence of a particular matter, the omission from the particulars of that information is to be treated as a statement in the listing particulars that there is no such matter.
- (4) Any person who fails to comply with [section 81](#) is liable to pay compensation to any person who has—
 - (a) acquired securities of the kind in question; and
 - (b) suffered loss in respect of them as a result of the failure.
- (5) Subsection (4) is subject to exemptions provided by [Schedule 10](#).
- (6) This section does not affect any liability which may be incurred apart from this section.
- (7) References in this section to the acquisition by a person of securities include references to his contracting to acquire them or any interest in them.
- (8) No person shall, by reason of being a promoter of a company or otherwise, incur any liability for failing to disclose information which he would not be required to disclose in listing particulars in respect of a company's securities—
 - (a) if he were responsible for those particulars; or
 - (b) if he is responsible for them, which he is entitled to omit by virtue of [section 82](#).

(9) The reference in subsection (8) to a person incurring liability includes a reference to any other person being entitled as against that person to be granted any civil remedy or to rescind or repudiate an agreement.

(10) “*Listing particulars*” , in subsection (1) and [Schedule 10](#), includes supplementary listing particulars.

[

(11) This section applies in relation to a prospectus as it applies to listing particulars, with the following modifications—

(a) references in this section or in [Schedule 10](#) to listing particulars, supplementary listing particulars or [sections 80, 81 or 82](#) are to be read, respectively, as references to a prospectus, supplementary prospectus and [Articles 6 and 14(2), Article 23 and Article 18 of the prospectus regulation]³ ;

(b) references in Schedule 10 to admission to the official list are to be read as references to admission to trading on a regulated market;

(c) in relation to a prospectus, “*securities*” means “transferable securities”.

[

(11A) In subsection (11)(a) “*supplementary prospectus*” includes, where final terms (see Article 8 of the prospectus regulation) are contained in a separate document that is neither a prospectus nor a supplementary prospectus, that separate document.

]⁴ [

(12) A person is not to be subject to civil liability solely on the basis of a summary in a prospectus unless the summary, when read with the rest of the prospectus—

(a) is misleading, inaccurate or inconsistent; or

(b) does not provide key information [specified by Article 7 of the prospectus regulation]⁶ ,

and in this subsection a summary includes any translation of it.

]⁵]²

Notes

¹ Heading substituted by Companies Act 2006 c. 46 [Sch.15\(1\) para.5](#) (November 8, 2006)

² Added by Prospectus Regulations 2005/1433 [Sch.1 para.6\(2\)](#) (July 1, 2005)

³ Words substituted by Financial Services and Markets Act 2000 (Prospectus) Regulations 2019/1043 [Pt 2 reg.25\(2\)](#) (July 21, 2019: substitution has effect subject to transitional provisions specified in SI 2019/1043 reg.40)

⁴ Added by Financial Services and Markets Act 2000 (Prospectus) Regulations 2019/1043 [Pt 2 reg.25\(3\)](#) (July 21, 2019: insertion has effect subject to transitional provisions specified in SI 2019/1043 reg.40)

⁵ Substituted by Prospectus Regulations 2012/1538 [reg.7](#) (July 1, 2012)

⁶ Words substituted by Financial Services and Markets Act 2000 (Prospectus) Regulations 2019/1043 [Pt 2 reg.25\(4\)](#) (July 21, 2019: substitution has effect subject to transitional provisions specified in SI 2019/1043 reg.40)

Part VI OFFICIAL LISTING > Compensation for false or misleading statements etc > s. 90 Compensation for statements in listing particulars or prospectus

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Financial Services and Markets Act 2000 c. 8

Schedule 10 COMPENSATION: EXEMPTIONS

para. 1 Statements believed to be true

Law In Force

Version 2 of 2

24 January 2013 - Present

Subjects

Financial regulation

Keywords

Compensation; Exemptions; False statements; Listing particulars; Misleading statements; Non-disclosure; Prospectuses; Reasonable belief

1.— Statements believed to be true

(1) In this paragraph “*statement*” means—

- (a) any untrue or misleading statement in listing particulars; or
- (b) the omission from listing particulars of any matter required to be included by [section 80 or 81](#).

(2) A person does not incur any liability under [section 90\(1\)](#) for loss caused by a statement if he satisfies the court that, at the time when the listing particulars were submitted to the [FCA]¹, he reasonably believed (having made such enquiries, if any, as were reasonable) that—

- (a) the statement was true and not misleading, or
- (b) the matter whose omission caused the loss was properly omitted,

and that one or more of the conditions set out in sub-paragraph (3) are satisfied.

(3) The conditions are that—

- (a) he continued in his belief until the time when the securities in question were acquired;
- (b) they were acquired before it was reasonably practicable to bring a correction to the attention of persons likely to acquire them;
- (c) before the securities were acquired, he had taken all such steps as it was reasonable for him to have taken to secure that a correction was brought to the attention of those persons;
- (d) he continued in his belief until after the commencement of dealings in the securities following their admission to the official list and they were acquired after such a lapse of time that he ought in the circumstances to be reasonably excused.

Notes

- ¹ Words substituted by Financial Services Act 2012 c. 21 [Pt 2 s.16\(13\)](#) (January 24, 2013 for the purpose of making rules as specified in SI 2013/113 art.2 and Sch.1 Pt 3; April 1, 2013 otherwise)
-

Schedule 10 COMPENSATION: EXEMPTIONS > para. 1 Statements believed to be true

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Financial Services and Markets Act 2000 c. 8

Schedule 10 COMPENSATION: EXEMPTIONS

para. 2 Statements by experts

Law In Force

Version 2 of 2

24 January 2013 - Present

Subjects

Financial regulation

Keywords

Compensation; Exemptions; Experts; False statements; Listing particulars; Misleading statements; Prospectuses; Reasonable belief

2.— Statements by experts

- (1) In this paragraph “*statement*” means a statement included in listing particulars which—
 - (a) purports to be made by, or on the authority of, another person as an expert; and
 - (b) is stated to be included in the listing particulars with that other person's consent.
- (2) A person does not incur any liability under section 90(1) for loss in respect of any securities caused by a statement if he satisfies the court that, at the time when the listing particulars were submitted to the [FCA]¹, he reasonably believed that the other person—
 - (a) was competent to make or authorise the statement, and
 - (b) had consented to its inclusion in the form and context in which it was included,and that one or more of the conditions set out in sub-paragraph (3) are satisfied.
- (3) The conditions are that—
 - (a) he continued in his belief until the time when the securities were acquired;
 - (b) they were acquired before it was reasonably practicable to bring the fact that the expert was not competent, or had not consented, to the attention of persons likely to acquire the securities in question;
 - (c) before the securities were acquired he had taken all such steps as it was reasonable for him to have taken to secure that that fact was brought to the attention of those persons;
 - (d) he continued in his belief until after the commencement of dealings in the securities following their admission to the official list and they were acquired after such a lapse of time that he ought in the circumstances to be reasonably excused.

Notes

- ¹ Words substituted by Financial Services Act 2012 c. 21 [Pt 2 s.16\(13\)](#) (January 24, 2013 for the purpose of making rules as specified in SI 2013/113 art.2 and Sch.1 Pt 3; April 1, 2013 otherwise)
-

Schedule 10 COMPENSATION: EXEMPTIONS > para. 2 Statements by experts

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Financial Services and Markets Act 2000 c. 8

Schedule 10 COMPENSATION: EXEMPTIONS

para. 3 Corrections of statements

Law In Force

Version 1 of 1

1 December 2001 - Present

Subjects

Financial regulation

Keywords

Compensation; Exemptions; False statements; Listing particulars; Misleading statements; Non-disclosure; Prospectuses; Rectification

3.— Corrections of statements

- (1) In this paragraph “*statement*” has the same meaning as in [paragraph 1](#).
- (2) A person does not incur liability under [section 90\(1\)](#) for loss caused by a statement if he satisfies the court—
 - (a) that before the securities in question were acquired, a correction had been published in a manner calculated to bring it to the attention of persons likely to acquire the securities; or
 - (b) that he took all such steps as it was reasonable for him to take to secure such publication and reasonably believed that it had taken place before the securities were acquired.
- (3) Nothing in this paragraph is to be taken as affecting [paragraph 1](#).

Schedule 10 COMPENSATION: EXEMPTIONS > para. 3 Corrections of statements

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Financial Services and Markets Act 2000 c. 8

Schedule 10 COMPENSATION: EXEMPTIONS

para. 4 Corrections of statements by experts

Law In Force

Version 1 of 1

1 December 2001 - Present

Subjects

Financial regulation

Keywords

Compensation; Exemptions; Experts; False statements; Listing particulars; Misleading statements; Prospectuses; Rectification

4.— Corrections of statements by experts

- (1) In this paragraph “*statement*” has the same meaning as in [paragraph 2](#).
- (2) A person does not incur liability under [section 90\(1\)](#) for loss caused by a statement if he satisfies the court—
 - (a) that before the securities in question were acquired, the fact that the expert was not competent or had not consented had been published in a manner calculated to bring it to the attention of persons likely to acquire the securities; or
 - (b) that he took all such steps as it was reasonable for him to take to secure such publication and reasonably believed that it had taken place before the securities were acquired.
- (3) Nothing in this paragraph is to be taken as affecting [paragraph 2](#).

Schedule 10 COMPENSATION: EXEMPTIONS > para. 4 Corrections of statements by experts

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Financial Services and Markets Act 2000 c. 8

Schedule 10 COMPENSATION: EXEMPTIONS

para. 5 Official statements

Law In Force

Version 1 of 1

1 December 2001 - Present

Subjects

Financial regulation

Keywords

Compensation; Exemptions; False statements; Listing particulars; Misleading statements; Official publications; Prospectuses

5. Official statements

A person does not incur any liability under [section 90\(1\)](#) for loss resulting from—

- (a) a statement made by an official person which is included in the listing particulars, or
- (b) a statement contained in a public official document which is included in the listing particulars,

if he satisfies the court that the statement is accurately and fairly reproduced.

Schedule 10 COMPENSATION: EXEMPTIONS > para. 5 Official statements

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Financial Services and Markets Act 2000 c. 8

Schedule 10 COMPENSATION: EXEMPTIONS

para. 6 False or misleading information known about

Law In Force

Version 1 of 1

1 December 2001 - Present

Subjects

Financial regulation

Keywords

Compensation; Exemptions; False statements; Knowledge; Listing particulars; Misleading statements; Non-disclosure; Prospectuses

6. False or misleading information known about

A person does not incur any liability under [section 90\(1\)](#) or [\(4\)](#) if he satisfies the court that the person suffering the loss acquired the securities in question with knowledge—

- (a) that the statement was false or misleading,
- (b) of the omitted matter, or
- (c) of the change or new matter,

as the case may be.

Schedule 10 COMPENSATION: EXEMPTIONS > para. 6 False or misleading information known about

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Schedule 10 COMPENSATION: EXEMPTIONS

para. 7 Belief that supplementary listing particulars not called for

Law In Force

Version 1 of 1

1 December 2001 - Present

Subjects

Financial regulation

Keywords

Compensation; Exemptions; Listing particulars; Non-disclosure; Reasonable belief

7. Belief that supplementary listing particulars not called for

A person does not incur any liability under [section 90\(4\)](#) if he satisfies the court that he reasonably believed that the change or new matter in question was not such as to call for supplementary listing particulars.

Schedule 10 COMPENSATION: EXEMPTIONS > para. 7 Belief that supplementary listing particulars not called for

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Financial Services and Markets Act 2000 c. 8

Schedule 10 COMPENSATION: EXEMPTIONS

para. 8 Meaning of "expert"

Law In Force

Version 1 of 1

1 December 2001 - Present

Subjects

Financial regulation

Keywords

Compensation; Exemptions; Experts; False statements; Interpretation; Listing particulars; Misleading statements; Prospectuses

8. Meaning of "expert"

"Expert" includes any engineer, valuer, accountant or other person whose profession, qualifications or experience give authority to a statement made by him.

Schedule 10 COMPENSATION: EXEMPTIONS > para. 8 Meaning of "expert"

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Asset finance: overview

by Kenneth Gray and Katie Knight, Norton Rose Fulbright LLP

Practice note: overview | **Maintained** | England, International, Wales

An introduction to the types of structures used in asset financing and some of the key issues relevant to those structures.

What is asset finance?

Any asset can be financed. Examples of assets which are typically financed range from the large, so-called “big ticket” assets such as ships, aircraft and rolling stock to smaller items of plant and machinery such as ship containers, portakabins, buses, wheelybins, factory machine tools, and even films.

Financing can be of a single asset, such as an aircraft, a whole series of assets, such as a fleet of vehicles, or hundreds of assets, each with a low individual value, such as ship containers.

In an asset finance transaction, the corporate risk of the transaction will be offset by the asset value and, as such, the usual corporate considerations applicable to any financing transaction will be supplemented by asset based considerations, such as:

The location of the asset. (Is it a mobile or a fixed asset?)

Is it possible to take security over the asset (and enforce that security)?

The earning potential of the asset.

The potential resale value of the asset.

This note outlines:

The types of financing structures used in asset finance.

Some of the key issues relevant to such structures.

For a guide to Practical Law Finance’s asset finance resources, see [*Practice note, A guide to key resources: asset finance*](#).

For an overview of:

Shipping finance, see [*Practice note, Shipping finance: overview*](#).

Aircraft finance, see [*Practice note, Aircraft finance: overview*](#).

Film finance, see [*Practice note, Film finance: overview*](#).

For an article looking at debt capital markets financing for shipping and offshore maritime assets, see [*Article, Debt capital markets financing for shipping and offshore maritime assets*](#).

Asset finance structures

There are two main types of asset finance structures:

Secured lending.

Leasing.

In addition, these two types of financing may be combined.

Further, asset finance may involve:

Export credit financing.

Asset value support.

Each of these is considered below.

Secured lending

In a pure secured loan structure, a lender will:

Lend money to the prospective owner/operator of the asset to finance its acquisition of the asset.

Where possible, take security over and in respect of the asset. (For more on the security in a secured asset financing loan, see *Security* below.)

Debt may be provided by a loan advanced by a traditional bank or other financial institutions. It may also take the form of a capital markets notes issue.

The asset will remain on the balance sheet of the owner, who may be able to benefit from tax allowances granted in relation to the capital expenditure incurred, which it will offset against the cost of the asset.

For more information, see *Practice note, Types of lending and facilities*.

Structure of an asset finance secured lending transaction

Leasing

There are two forms of lease used in asset finance:

Operating leases.

Finance leases.

Both involve an owner of an asset leasing it to an operator. However, in the case of an operating lease the so-called “economic ownership” of the asset, that is, the economic benefits and burdens associated with owning the asset remain with the owner of the asset whereas in a finance lease the economic ownership is with the operator.

Since 1 January 2019, the accounting standard, IFRS 16, has eliminated the previous distinction by which the asset appeared on the owner’s balance sheet in an operating lease and on the operator’s balance sheet in a finance lease. IFRS 16 requires all leases to be reported on a lessee’s balance sheet as assets and liabilities, subject to only limited exemptions, such as leases of under 12 months and leases of low-value assets (for example, personal computers). For more information on IFRS 16, (see *Legal update, New lease accounting standard, IFRS 16* and *Practice note, Equipment leasing: tax: box, Accounting for leases*).

A leasing structure may also involve the operator assigning certain rights associated with the asset (such as rights under insurance contracts) to the owner.

For more information on leasing, see [*Practice note, Leasing as a financing technique: overview*](#).

Operating leases

In a pure operating lease structure, the owner will lease the asset to the operator, who will pay rental in return for the use of the asset. At the end of the lease term, the operator will return the asset to the owner, whose primary interest will be its ownership rights in the asset. The owner will retain substantially all of the risks and rewards relating to the ownership of the asset and so will be looking to preserve the future value of the asset and its earning potential. However, the owner will not automatically be looking to the rentals paid by a single operator to amortise fully the acquisition costs of the asset.

Operating leases are often used to provide flexibility to the operator, as leases can be short term, allowing the operator to have extra capacity as and when required, for example, charter airlines who lease extra aircraft during the busy summer season.

Finance leases

The primary purpose of a finance lease is to finance the operator's acquisition of the asset. As with an operating lease, the owner will lease the asset to the operator. However, the rentals paid will be calculated so that over the term of the lease the operator will effectively pay the owner's costs of acquiring the asset. The operator is regarded as having the economic ownership of the asset, including the benefit of any residual value left in the asset once the financing has been repaid, while the legal ownership remains with the owner.

At the end of the lease term, the operator may have the right to acquire the asset for a small residual sum, or alternatively, the owner may sell the asset, returning any excess proceeds over the acquisition cost of the asset to the operator, by way of a rebate of rental. The specific provisions relating to the sale at the end of the lease term will be driven by the particular accounting considerations and tax treatment of the transaction. For more on the tax aspects of finance leasing, see [*Practice note, Equipment leasing: tax*](#).

Structure of an asset finance leasing transaction

Combined secured lending and leasing

Secured lending and leasing structures are often combined, particularly for high-value assets such as aircraft and ships, to create tax and accounting-efficient structures. In these structures, the owner will enter into:

A secured lending transaction with financiers to finance its acquisition of the asset.

A lease agreement with the operator, with the rentals paid under the lease agreement used to repay the principal and interest due under the loan agreement.

The owner of the asset will often be a *special purpose vehicle* (SPV), incorporated solely to act as the borrower and owner (lessor) of the asset. In the case of pure operating leases the operating lessor will generally be a company whose primary business is the ownership and leasing of assets or an SPV controlled by it.

The advantages of using an SPV are that:

The SPV will usually only be involved in one transaction, making it insolvency remote.

The SPV can be incorporated in a tax-neutral jurisdiction, such as the Cayman Islands.

However, the financiers may require the SPV's parent company to provide:

Security in the form of a share charge over the SPV's shares.

A guarantee of the SPV's obligations.

An SPV will not always be used as there may be tax considerations in a structure which would make its use inefficient.

Historically, there have been a number of tax jurisdictions which have offered parties the opportunity to structure tax driven transactions, such as Japan. However, tax structures are constantly under review by the relevant tax authorities and a number of traditionally used tax based structures are no longer available.

In any structure, the parties will need to consider carefully which party is to bear certain specified risks of the transaction such as:

Tax changes.

Increased costs.

The imposition of withholding taxes.

The loss of tax benefits.

Specialised tax advice should always be sought in the case of structured, tax-based transactions.

Structure of a combined secured lending and leasing asset financing

Export credit financing

A source of indirect finance in international transactions are the *export credit agencies* (ECAs), such as the UK Export Finance (the operational name of the *Export Credits Guarantee Department* or ECGD) in the United Kingdom, Ex-Im Bank in the United States and JBIC in Japan.

These governmental agencies provide support to manufacturers of goods and services which are to be exported. With regard to assets, this is usually by way of a guarantee to the lenders, guaranteeing repayment of their loan in certain circumstances, or by the agencies guaranteeing a notes issue into the capital markets. Such a guarantee lowers the risk of a transaction and allows lenders or noteholders to enter into financings which might otherwise not be possible, due to credit or jurisdictional issues.

An ECA may also provide support by way of loan or insurance depending on the mandate the ECA has been given by its government. If support is provided by way of loan, an ECA will provide a loan to the overseas purchaser of an export to enable that purchaser to finance the purchase. In the case of insurance support, an ECA will provide insurance (and sometimes *reinsurance*) to exporters against non-payment by the overseas purchasers of their products or, sometimes, covering the inability of the creditor (the exporter) to repossess the asset.

For more information on export credit agency finance, see:

Practice note, Export credit agency finance: overview.

Practice note, Export credit agency finance: types of cover.

Practice note, Export credit agency finance: key documents and terms.

In 2011, the *Organisation for Economic Co-operation and Development* (OECD) published its Arrangement on Officially Supported Export Credits and its sector understanding on export credits for civil aircraft (Aircraft sector understanding or ASU). The Arrangement on Officially Supported Export Credits is a framework for the orderly use of officially supported export credits and the ASU contains rules on the use of state financing to support commercial aircraft exports. The ASU set out the most favourable terms and conditions on which officially supported export credits could be provided, and signatories to the ASU included Brazil, Canada, the EU, Japan and the US. For more information, see [*Legal update, OECD Arrangement on Officially Supported Export Credits and Aircraft Sector Understanding \(September 2011 version\)*](#). The Arrangement on Officially Supported Export Credits and the ASU have been amended a number of times since then, with the most recent being dated January 2019 (see [*Legal update: OECD Arrangement on Officially Supported Export Credits \(January 2019 version\)*](#)).

Asset value support

Parties may also be able to obtain support as to the residual value of an asset. This may be by way of a guarantee from the manufacturers of new assets, or by way of an insurance policy, in each case providing that if the value of the asset at a certain point in the future falls below a certain level, the manufacturer or insurance company will make good the difference in the value.

Asset value support may be expensive and is not something which is routinely present in all transactions, particularly in sectors such as shipping, where predicting the future value of a ship is difficult.

Key issues

The primary security for the transaction will be the asset itself. It is, therefore, vitally important to ensure that, to the fullest extent possible:

The value of the asset is maintained.

Valid security is granted over the asset.

It is also important in an international transaction to consider relevant foreign law issues.

Maintaining the asset value

All lenders and lessors in asset finance transactions are concerned to ensure that the value of the asset is maintained:

Lenders and finance lessors in case, following a default by the operator, they have to repossess and sell the asset to recover their outstanding investment.

Operating lessors as they are concerned with the future value and earning potential of the asset after its return from the operator.

These concerns are dealt with in the lease agreement (or where the loan is directly to the operator, in the loan agreement), by way of covenants from the operator, which restrict its use and operation of the asset, and require minimum standards of maintenance and insurance to be met.

While lenders and owners are concerned with asset protection and preservation and will, therefore, seek to control the operator's use and operation of the asset, the operator will, on the other hand, wish to retain as much operational freedom as possible. The balance between the two competing interests is a matter to be negotiated in each transaction and will be dependent on a number of factors, such as the operator's credit position and history of operation, the jurisdiction where the assets are located and the security position in that jurisdiction.

A typical set of covenants will cover:

How the asset should be maintained and repaired.

Restrictions on sub-leasing by the operator.

The condition in which the asset should be returned to the owner.

Insurance.

The operator's right to "quiet enjoyment" of the asset.

Maintenance

The loan agreement and/or lease agreement will contain covenants as to the maintenance of the asset. These will be particularly detailed in respect of high-worth and technical assets such as aircraft, requiring the operator to comply with the manufacturer's and relevant authorities' maintenance requirements. These agreements may also give the lender (owner) rights to inspect the asset and to receive information about the use of the asset and the status of its maintenance. If the operator does not have the technical knowledge and capacity to maintain the asset itself, the owner may agree to be responsible for detailed maintenance of the asset and will build the cost of that maintenance into the rent payable by the operator.

For assets such as aircraft, where maintenance can be expensive, the operator may sometimes be required (especially where the operator does not have sufficient financial standing), to make payments during the lease term in respect of maintenance costs, so as to build up a reserve to pay for the costs of major maintenance. Such monies will generally be paid to an account of the owner, to hold for the operator, and may be charged to the lenders (if any).

In an aircraft related transaction, the lender or owner may look to enter into arrangements in respect of the airframe and engine warranties with the manufacturers so that, following enforcement, they can benefit from such warranties directly.

Sub-leasing

The lender or owner will want to control the sub-leasing rights of the operator, so as to ensure that it retains control over the asset. In deciding to enter an asset finance transaction, the lender or owner will have made an assessment of:

The credit of the operator.

The legal position with regard to such matters as enforceability and repossession rights in the state where the owner is located and, where applicable, the state where the asset is located.

Therefore, the lender or owner will not want to give the operator an unrestricted right to part with possession of the asset.

Return conditions

In an operating lease structure, the lease agreement will contain detailed return conditions, specifying the physical and maintenance condition in which the asset must be returned at the end of the lease term and listing the accompanying documentation that will be required. These are important as compliance with such conditions by the operator will help to safeguard the value of the asset and thus the owner's ability to sell or the re-lease the asset. Return conditions will be of particular importance in an operating lease transaction.

Insurance

Insurance may also be a major concern for lenders and owners, both in respect of the value of the asset and also with regard to liability coverage. The importance of insurance depends on:

The value of the asset concerned.

The capacity of the asset to cause damage.

The parties need to ensure that the asset is adequately insured so that, if it is damaged, the insurance cover will be sufficient to repair the asset or, in the case of a "total loss", to allow the owner either to buy a new asset or to use the insurance proceeds to repay the financing, as applicable.

Lenders and owners are also concerned to protect themselves from third party liability incurred as a result of the operator's use of the asset. In some countries, owners may be liable under the concept of "strict liability" for damage caused by their

asset. For example, an owner may be strictly liable for oil pollution from a ship it owns, even where the ship was not within the owner's control because it was in the operator's possession.

Even in countries where an owner cannot be strictly liable, lenders will wish to cover themselves against the possibility of injured parties taking action against them, regarding them as having the "deepest pockets" of the parties in the transaction.

The insurance provisions of the documents should always be drafted to allow the lenders to require changes to be made to the terms of the insurances should the market conditions change and the terms of the documents no longer reflect what is available in the insurance market.

For more information generally on insurance, see *Practice note, Insurance contract law: general principles*.

Quiet enjoyment

In any combined secured lending and leasing transaction, there will be a number of competing commercial interests to be balanced, such as the rights of the lenders under the mortgage as against those of the operator.

In particular, an operator will want to ensure that its use of the asset is not interrupted. Operators will generally ask lenders and owners to provide them with a covenant of "quiet enjoyment", confirming that if the operator is in compliance with its obligations under the lease agreement, it will be entitled to quiet use and enjoyment of the asset, without interference. In a combined secured lending and leasing transaction, lenders will need to consider this covenant if the mortgage is enforced, because if enforcement results from a default of the owner where the operator is not also in default, the lenders may only be able to repossess the asset subject to the operator's rights under the lease agreement.

Security

The security taken in an asset financing may, depending on the structure of the transaction, include:

A mortgage, charge or other security over the asset (depending on its location and/or its state of registration or flag).

An assignment of rights under the insurance contract(s) in respect of the asset.

An assignment of the owner's rights under the lease/charter agreement.

A share charge over the shares in the SPV, in an asset financing involving an SPV.

Mortgages

In common law countries such as the UK, a mortgage can be granted over almost any asset, at least insofar as corporate borrowers are concerned.

However, in many civil law countries security has traditionally been granted by way of a pledge, which requires physical possession of the asset to be delivered to the pledgee (the lenders), which is not practical in asset finance. Certain jurisdictions have created mortgages by way of statute for high-value assets such as aircraft and ships. However, such mortgages will only apply to certain specific assets. Advice should always be taken at the outset of the transaction as to whether a mortgage is available.

Even where a mortgage is available, the parties will need to consider how the security granted can be perfected and protected. For aircraft and ships, which must be registered with the relevant authorities in order to be operated, it is often possible to register the mortgage against the actual asset. For example, for aircraft registered in the UK, a mortgage can be filed against the aircraft with the Civil Aviation Authority. For assets such as plant and machinery, which have no dedicated asset register, it may only be possible to register the mortgage against the company granting the mortgage, for example, at Companies House in the UK. Even where a mortgage can be registered against the asset, this may not guarantee the lenders' rights above all other parties, as there may be other interests, such as tax and repairers' liens, which take priority.

Lenders will need to consider, and take advice on, the validity of any mortgage taken. In *Blue Sky One Ltd & Ors v Mahan Air & Anor (Rev 1) [2010] EWHC 631 (Comm)*, the High Court case considered the validity of English-law governed mortgages over two aircraft, concluding that their validity was to be determined by the domestic law of the *lex situs* jurisdiction (that is the law of the place where the aircraft were situated at the time the mortgages were created), without reference to that jurisdiction's conflict of law rules. For more detail on this case, see *Legal update, Renvoi does not apply to*

choice of law rule on movables. In the case of aircraft, this issue can largely be avoided by taking security under the Convention on International Interests in Mobile Equipment (the Cape Town Convention) and the related Protocol on Matters Specific to Aircraft Equipment, provided that the owner of the aircraft is ‘situated’ in a Contracting State. The United Kingdom became a Contracting State on 1 November, 2015. For more information on this, see [Article, Ratification of the Cape Town Convention by the United Kingdom](#) and [Legal update, UK ratifies Cape Town Convention and Aircraft Protocol](#).

Lenders will also need to consider the legalities and practicalities of enforcing a mortgage in the relevant jurisdiction. In common law countries, “self-help” remedies may be available, allowing the lenders to repossess the asset without court action. In civil law countries, court action is generally required, which can be lengthy and expensive.

Assignment of insurances

Lenders and owners may often look to take an assignment of the operator’s rights in the property insurances taken out in respect of the asset. This will be in addition to any rights which they may have either as an additional named insured or under the loss payable clause under the insurances.

An assignment will be necessary where the parties are not additional named insured under the insurances, but even where the parties are named, an assignment may still be granted as the lender or owner may regard the assignment as giving them control over the proceeds of the insurances, preventing the operator from objecting to the terms of the insurance settlement. The assignment will also create a charge over any insurance proceeds which would be paid to the operator, which may be beneficial in the case of the insolvency of the operator.

For more information on the legal principles that apply when assigning an insurance policy or the right to receive the insurance monies due under the policy to a third party, see [Sectors note, Assignment of insurance policies and claims](#).

Assignment of rights in the lease agreement

In a combined secured lending and leasing asset financing, the owner may grant an assignment of its rights in the lease agreement to the lenders under the loan agreement. This will allow the lenders to step in and exercise the rights of the lessor in specified circumstances. Where the operator has granted an assignment of insurances, the security assignment of the owner’s rights in the lease agreement will also contain an onward assignment by the owner of the rights granted to it under any assignment of insurances.

Lenders and owners need to consider their ability to repossess the asset if the lease agreement is terminated due to operator default. As with mortgages, if the asset is located outside the UK, self-help remedies may not be available and court action may be required to repossess the asset, even where English law governs the lease agreement. Additionally, lenders and owners should consider the insolvency laws applicable to the operator which might restrict their repossession rights.

SPV share charge

The lenders will frequently not own the shares in the SPV in a combined secured lending and leasing transaction, but they will want to have the right to control the SPV in certain circumstances, such as upon its default. A share charge over the shares in the SPV may therefore be granted to the lenders by the SPV’s parent company.

Further quasi or commercial security may also be granted to the lenders by the parent of the SPV by way of a guarantee. The guarantee will be either of all the SPV’s obligations under the loan agreement, or alternatively, only those that are not directly matched by obligations imposed upon the operator under the lease agreement. For more information on guarantees, see [Practice note, Guarantees and indemnities](#).

Further security may also be taken by way of [letters of credit](#) or security deposits. For more information on letters of credit, see [Practice note, Letters of credit: overview](#).

International aspects

In any transaction that is not wholly domestic, the parties will need to consider the international aspects carefully, as the laws of various jurisdictions could impact upon the transaction. The parties will need to consider the requirements not just of the country whose law expressly governs the contract, but also the laws of the jurisdictions where:

The asset is located.

The asset is registered or flagged (if applicable).

The parties are incorporated and where they have their principal place of business or centre of main interests.

The transaction documents are executed.

The transaction documents specify that disputes may be settled.

The parties will need to assess carefully how the relevant laws impact upon the rights and obligations which the parties wish to assume.

In any transaction involving an international element, it is essential to seek local advice at an early stage.

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