



## CAYLUX – fund finance market update October 2021

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#### Cayman Islands and Luxembourg

The Cayman Islands is a leading jurisdiction for the formation of alternative investment funds, with around 12,000 regulated open-ended funds and 12,000 regulated closed-ended funds. Cayman's popularity stems from its tax neutrality, its proximity to the US and its evolving legal and regulatory regime adapted to market demands. The Cayman Islands is a British Overseas Territory with a stable government and a judicial system based on English common law. [Cayman Islands](#)

Luxembourg is considered to be the world's second-largest fund domicile after the United States with assets under management of Luxembourg-domiciled funds standing at almost of EUR4.7 trillion end 2020. In addition to being the largest fund domicile in Europe, Luxembourg is also a worldwide leader in cross-border distribution of funds. Luxembourg domiciled investment funds are distributed in more than 70 countries around the world. [Luxembourg](#)

#### Ogier CAYLUX

The Ogier CAYLUX fund finance service was launched over two years ago in response to market demand and specializes in advising lenders on all types of fund finance transactions. With increasing numbers of fund structures involving either or both Cayman and Luxembourg funds, the Ogier CAYLUX fund finance team provides expert dual jurisdictional legal advice from one core team based in European and US time zones to best serve our clients. [CAYLUX](#)

Ogier has large offices in the Cayman Islands and Luxembourg, and well established teams within each office specializing in fund finance transactions. The Cayman office has been operating since 1991 with 58 lawyers today, and the Luxembourg office since 2012 with 38

lawyers, placing Ogier amongst the top law firms in both Cayman and Luxembourg.

With fund structures increasingly including both Cayman and Luxembourg funds, the CAYLUX fund finance service line works perfectly for clients involved in subscription financing transactions requiring both Cayman and Luxembourg legal advice. [CAYLUX team](#)

## Fund finance market update

Appetite for subscription finance facilities did not slow down during the global pandemic. The industry saw more amendments and joinders to existing facilities early to mid-2020 as funds initially sought to secure liquidity. Into Q2 of 2021 this trend continued, but with a number of new facilities and as a result, the market grew beyond expectations and continues to do so into Q4 of 2021. The key players remain strong and we are seeing more and more new lending institutions stepping into the market, including insurance companies and other alternative lenders. The fund finance product has evolved beyond just subscription line facilities to include NAV and hybrid facilities. As the demands and needs of sponsors and funds has diversified, lenders have become more innovative and specialised in their approach. Our clients include major global banks and lending institutions, and with our growing team, we have capacity to cover work on all continents and an ability to service clients in multiple languages. [Fund finance lending: a practical checklist](#)

## CAYLUX fund finance

Cayman and Luxembourg both allow user friendly documentation. In both jurisdictions, it is possible to use a set of fund contractual documentation that is very much in line with NY law documentation, (subject only to minor tweaks). Some of the main points to note on fund financing transactions, whether it be from a Cayman law or a Luxembourg law perspective, are as follows:

### **a. Security**

*On fund finance transactions, the security granted by the funds include the fund's right to call capital from its investors and the uncalled capital commitment of such investors. Where the funds are Cayman or Luxembourg entities, the question is whether local law governed security is required.*

- i. Cayman: generally the security over investor commitments is covered under a security agreement governed by the law which also governs the main transaction documents. If the main transaction documents are governed by US law, the security interest granted over the capital commitments of the investors in the Cayman entity will also be governed by US law, however if the main transaction documents are governed by English law, the security interest granted over the capital commitments of the investors in the Cayman entity may either be governed by English law or by Cayman law depending on

parties' preference.

- ii. Luxembourg: the standard approach is to have Luxembourg law governed security agreement in place whether this be standalone or in addition and in parallel to the US or English law governed main transaction documents.

## **b. Legal opinions**

*The lender(s) on fund financing facilities will require legal opinions as to (A) the capacity and authority of the fund to enter into the transaction and transaction documents, as well as (B) the enforceability of the transaction documents against such fund. The requirement of legal opinions applies both in Cayman and Luxembourg, however the way in which these are given differs slightly.*

- i. Cayman: in US deals fund counsel prepares the Cayman capacity, authority and enforceability legal opinion, whereas in European deals it is often lender's counsel that provides an enforceability legal opinion.
- ii. Luxembourg: market practice in Luxembourg is that fund counsel provides the capacity and authority legal opinion and lender counsel provides the enforceability legal opinion.

## **c. Investor notice**

*Where the fund is a partnership, it is market practice to require that each of its investors be notified of the security interests granted over their uncalled capital commitment and the right to make capital calls. It is important to note that the investor notice is not required to perfect the security interest in either Cayman or Luxembourg.*

- i. Cayman: the investor notice should be delivered as soon as possible following closing of the fund financing to ensure the ranking of priority of the security interests. If the ultimate general partner of the Cayman fund is a company, then it would also be usual to require entry of the security interest into its register of mortgages and charges.
- ii. Luxembourg: the security interest is perfected by execution of the security agreement. Delivery of the investor notice to each of the fund's investors ensures that no investor may discharge its obligations to commit capital other than as provided in the investor notice on the basis that it had no knowledge of the security.

## **d. Environmental, Social, and Corporate Governance (ESG)**

Ogier's ESG experience spans across our finance teams, including those focused on capital markets, listings, fund finance and real estate finance. We have seen first-hand how ESG is affecting policy and attitudes towards lending, borrowing, capital raising and investing, with banks increasingly issuing ESG focused bonds and green loans amid pressures for the private sector to do more to address ESG issues. We recognise several global megatrends

are shaping the ESG agenda today, including – the climate crisis, evolving regulation, growing investor demand and increased awareness that accounting for ESG factors may lead to better risk-adjusted financial return in the long-run. [Ogier ESG](#)

## About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

## Disclaimer

This client briefing has been prepared for clients and professional associates of Ogier. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found under [Legal Notice](#)

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