
# NEW LAW INTRODUCING A PROFESSIONAL PAYMENT GUARANTEE UNDER LUXEMBOURG LAW

The Law on professional payment guarantees dated 10 July 2020 (the "**PPG Law**") creates a new type of guarantee under Luxembourg law, in addition to existing instruments, such as accessory guarantees (*cautionnements*) and autonomous guarantees (*guaranties autonomes*). The new framework is intended to provide the parties with greater contractual freedom, while preserving legal certainty and protecting against re-characterisation. Parties must expressly agree that their guarantee instrument is subject to the PPG Law for the regime to apply. This briefing describes key features of the new instrument.

**Key aspects:**

- New type of guarantee under Luxembourg law in addition to existing instruments.
- Law will apply upon express election of the parties
- Provides contractual flexibility to professionals without the risk of re-characterisation into an accessory guarantee.
- Protection in case the principal obligation is affected by insolvency or other measures affecting creditors' rights.

*This briefing speaks as of 14 July 2020*

## WHAT IS A PROFESSIONAL PAYMENT GUARANTEE?

A professional payment guarantee consists in an undertaking by which the guarantor undertakes towards a beneficiary to pay, at the request of the beneficiary or of an agreed third party, a sum determined according to the terms agreed, in relation to one or more claims or the risks related to such claims. In order to benefit from this law, the parties will need to expressly submit the guarantee to the PPG Law and the guarantee will need to be evidenced in writing (which can be in electronic form or any other durable medium).

The guarantee can be issued at the request of a third party or the beneficiary.

There is no limitation as to the personal scope of the PPG Law: the guarantee can be granted by any type of legal entity or institution, including a.o. companies or structures without legal personality (such as SCSp's or FCP's), national or international public institutions and States, as well as by natural persons. As shown by the title of the law and the instrument, it is however intended for use in a professional context, as was stated in the parliamentary documents.

While in the parliamentary discussions reference has been made to the Covid-19 crisis, and the usefulness of this instrument in the context of the public measures in support of the economy, the PPG Law is not limited in time or application to such crisis measures, but is now part of general Luxembourg law.

## FEATURES OF THE NEW INSTRUMENT

The PPG Law outlines certain specific areas where the parties can freely agree the terms of the guarantee and contains certain default provisions applicable unless otherwise agreed by the parties.

### Legal certainty for contractual terms

The PPG Law creates legal certainty for the contractual terms agreed by the parties, in particular in relation to the modulation of the accessory nature of their guarantee, without risk of re-characterisation into an accessory guarantee (*cautionnement*).

As a result, parties can:

- contractually determine the object and terms of the guarantee, including the terms and conditions of the guarantor's payment obligation; and
- expressly refer to the claims or risks guaranteed for the determination of the amount, terms and duration of the guarantee; and
- contractually determine the call events, including in absence of defaults in the discharge of claims or realisation of risks.

The guarantee can be granted in favour of (i) a person acting on behalf of the beneficiary/ies, (ii) a fiduciary or (iii) a trustee, to guarantee claims of an existing or future third-party beneficiary, provided that the latter is determined or determinable. Such persons will enjoy the same rights as those belonging to a direct beneficiary, without prejudice to their obligations towards the third-party beneficiary.

### Features by default

The PPG Law further provides that unless stated otherwise in the guarantee instrument:

- the guarantor may not raise any defences arising from the guaranteed claims or risks;
- after the payment, the guarantor has a personal recourse against the person having requested the issuance of the guarantee (*donneur d'ordre*) and is subrogated in the rights of the beneficiary in respect of the concerned claims and up to the paid amount; and
- the guarantor remains liable to the beneficiary for all its obligations under the guarantee, even where the debtor of the claims is subject to a reorganisation measure, insolvency or any other measures affecting the rights of creditors (e.g. rescheduling, reduction or conversion), except in case of application of the regime for over-indebtedness of individuals.

## KEY BENEFITS OF THE NEW REGIME

The main benefits of the new regime are the following:

- **Flexibility without risk of re-characterisation**. Traditional personal guarantees did not always align with the needs of professional operators, as they required an unambiguous choice between an accessory and autonomous guarantee. This instrument provides parties with flexibility to achieve the intended objective, by modulating the accessory nature of the professional payment guarantee and its drafting, without the risk of re-characterisation by the judge into a fully accessory instrument (*cautionnement*).
- **Guarantees can be granted in favour of an intermediary acting for the beneficiaries**. Similarly to financial collateral arrangements under the 2005 Financial Collateral Law, the professional payment guarantee can be granted to a third-party acting on behalf of the beneficiaries, such as a security agent, trustee or fiduciary agent.
- **Protection in the event of insolvency or any other measures affecting creditors' rights**. The PPG Law confirms that the guarantor's obligation will not be impacted where the principal obligation is affected by insolvency or other measures affecting the rights of creditors, such as mandatory reduction/conversion of debt.

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