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Austria Czech Republic

Direct Lending in CEE/SEE

Direct Lending on the Rise

Direct lending in Central and Eastern Europe (CEE) is expected to change of available finance for a wide range of companies. Traditionally, lending in CEE was dominated by banks and balance sheets, but recent years have seen growth of alternative lenders and alternative ways to raise funds for lending purposes. This signal the need for a new approach to lending in CEE, which is more in line with Western European practices.

What are opening for direct lending in CEE? Lending is actually an old concept in CEE and the main reason why this concept is lasting over the European markets and as a offer for cash and financial innovations, is the fundamental need for liquidity and capital. Lending is a very flexible concept and can be used for many purposes, including for acquisition finance, refinancing, capital expenditure, working capital or as the end of lender to fully fund the entity or entities lending CEE/SEE or for a combination of the above. Lending is also a very flexible concept in terms of the parties involved, as it can be used for corporate lending or as alternative financing for real estate transactions, projects and financing of receivables. Lending is also a very flexible concept in terms of the form it can take, as it can be a simple loan or a very complex structure. Lending is also a very flexible concept in terms of the security it can offer, as it offers borrowers many benefits including, among others, more flexible terms and more favorable conditions.

Despite it appears to be obvious that lending is desirable, understanding the current legal framework and jurisdictions is critical to successfully implementing a lending transaction by unregulated lenders. Lending is a very regulated business in CEE and SEE and there are many pitfalls and traps for those who are using alternative lenders and lending. Lenders are also concerning about lending in CEE/SEE. Our direct lending guide offers insights into the legal aspects for direct lending in Austria, Bulgaria, Croatia, Czech Republic, Hungary, Romania, Slovakia, Slovenia, Serbia, Ukraine, Belarus, Russia, Kazakhstan, Turkey, Slovakia and Russia. Schönherr legal experts from Central and Eastern Europe are highlighting local jurisdictions, while covering topics in the form of Q&A's provide basic details in relevant jurisdictions.

If you want to discuss any of the issues we have addressed, please reach out to the contributors to the guide, or any of your usual contacts at Schönherr.

1. Regulatory aspects of direct lending

1.1 Is loan origination by funds permitted in your jurisdiction?

Austria

Loan originators by funds is permitted under the general scope of permitted investment activities for AIFs and UCITS funds. Loan originators by funds is also permitted for credit institutions, investment firms authorised for MiFID activity and other firms as part of their ancillary activities.

Pre-funds that are not licensed under the AIFMD, UCITS and/or MiFID will be required, since otherwise they will be considered as unauthorised deposit-taking or payment-taking business.

Czech Republic

Funds can be granted only to [illegible] companies, credit institutions, investment firms and non-credit institutions (as regulated and supervised entities) that are subject to licensing. The EBA Rulings and the EU Banking Act prescribe that no one but the bank can perform lending activities (incl. various forms of credit, guarantees, etc.). Lending is also a regulated activity in accordance with the Act on Supervision of Financial Institutions, Act on Banking Agency (Slovakia), unauthorized credit activities and provisions are considered as misdemeanour and it may be fined up to 5 million Czech Koruna (approx. EUR 200,000). For the sake of clarity, the Act on Supervision of Financial Institutions, Act on Banking Agency (Slovakia) and Act on Banking and the protection of consumer protection (supporting credit) are not clearly prescribed, but it is clear that the lending activities are subject to licensing. Lending is also a very flexible concept in terms of the form it can take, as it can be a simple loan or a very complex structure. Lending is also a very flexible concept in terms of the security it can offer, as it offers borrowers many benefits including, among others, more flexible terms and more favorable conditions.

Croatia

Loan originators by funds is allowed in Croatia, although there is no specific legal framework for the activity of loan origination by funds. Loan originators by funds is also permitted for credit institutions, investment firms authorised for MiFID activity and other companies that participate in lending as a part of a general business or ancillary.

Pre-funds that are not licensed under the AIFMD, UCITS and/or MiFID will be required, since otherwise lending or activity involved in financial or payment-or credit institution.

Czech Republic

Funds can be granted only to [illegible] companies, credit institutions, investment firms, non-credit institutions (as regulated and supervised entities) that are subject to licensing. The EBA Rulings and the EU Banking Act prescribe that no one but the bank can perform lending activities (incl. various forms of credit, guarantees, etc.). Lending is also a regulated activity in accordance with the Act on Supervision of Financial Institutions, Act on Banking Agency (Slovakia), unauthorized credit activities and provisions are considered as misdemeanour and it may be fined up to 5 million Czech Koruna (approx. EUR 200,000). For the sake of clarity, the Act on Supervision of Financial Institutions, Act on Banking Agency (Slovakia) and Act on Banking and the protection of consumer protection (supporting credit) are not clearly prescribed, but it is clear that the lending activities are subject to licensing. Lending is also a very flexible concept in terms of the form it can take, as it can be a simple loan or a very complex structure. Lending is also a very flexible concept in terms of the security it can offer, as it offers borrowers many benefits including, among others, more flexible terms and more favorable conditions.

Hungary

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Pre-funds that are not licensed under the AIFMD, UCITS and/or MiFID will be required, since otherwise lending or activity involved in financial or payment-or credit institution.

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Romania

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1.2 Do you have a specific legal framework for direct lending in your jurisdiction?

Austria

There is no specific legal framework for direct lending in Austria other than in the financial services regulatory area, where lending is reserved to credit institutions and NFIs.

Czech Republic

There is no specific legal framework regarding direct lending transactions.

Croatia

There is no specific legal framework for direct lending in Croatia other than in the financial services regulatory area, where lending is reserved to credit institutions and NFIs.

Hungary

There is no specific legal framework for direct lending in Hungary other than in the financial services regulatory area, where lending is reserved to credit institutions.

Czech Republic

There is no specific legal framework for direct lending in the Czech Republic other than in the financial services regulatory area, where lending is reserved to credit institutions and NFIs.

Romania

There is no specific legal framework for direct lending in Romania other than in the financial services regulatory area, where lending is reserved to credit institutions and NFIs.

Slovakia

There is no specific legal framework for direct lending in Slovakia other than in the financial services regulatory area, where lending is reserved to credit institutions and NFIs.

Czech Republic

There is no specific legal framework for direct lending in Slovakia.

Slovenia

There is no specific legal framework for direct lending in Slovenia other than in the financial services regulatory area, where lending is reserved to credit institutions and NFIs.

Serbia

There is no specific legal framework for direct lending in Serbia.

Ukraine

There is no specific legal framework for direct lending in Ukraine other than in the financial services regulatory area, where lending is reserved to credit institutions and NFIs.

Belarus

There is no specific legal framework for direct lending in Belarus.

Russia

There is no specific legal framework for direct lending in Russia other than in the financial services regulatory area, where lending is reserved to credit institutions and NFIs.

Turkey

There is no specific legal framework for direct lending in Turkey.

Slovakia

There is no specific legal framework for direct lending in Slovakia.

Slovenia

There is no specific legal framework for direct lending in Slovenia.

2. Non-call features

2.1 Non-call: Are there limitations in your jurisdiction to agreeing on non-call provisions, i.e. a borrower's right to prepay a loan before the end of the agreed term (or schedule) (or only upon one paying interest according to a scheduled maturity in full)? Can such limitations (if any) be contractual (set by parties) or are they set by law? Are there exceptions or any (indirect) mandatory legal provisions?

Austria

Non-call limitations apply.

Czech Republic

According the EBA and EU contract law, borrower is entitled to prepay the loan. However, he is obliged to pay the fees and costs, which are in the contract specified and agreed upon. The fees are in the Czech Republic prescribed by prepayments fee (which covers the damage of borrower's prepayment) and the costs of the lender (which are in the Czech Republic prescribed by the Act on Consumer Credit). The main purpose of the prepayment clause is the loan agreement concluded between the banks and lending entities and the borrowers (consumers).

Furthermore, prepayment fee international decree states, that prepayment fee may apply upon request of the foreign law. However, Brussels Convention, by refuse to uphold such provisions in course of legislation, which would be in contradiction with the Czech Republic legislation, which is in the Czech Republic prescribed by the Act on Consumer Credit.

Croatia

Yes, the right and fulfilment of the debtor ones only with regard to borrowers who are consumers in cases where using credit the scope of the professional or commercial activity. A borrower is an payment prior to the maturity date can be agreed, but only if a partial not exceeding one year from the date of the conclusion of the contract, or a full payment exceeding one year.

The provisions such as increasing interest rate for the prepayment or restrict the right of borrower to exercise their legal or legal entities or natural persons who do not qualify as consumers which are the subject of the contract, or the provisions which impose on the consumer the burden of proof, which should be borne by the creditor, including through large or grant the Notary documents.

Hungary

Non-call provisions limiting the borrower's ability to monetary debt before scheduled maturity are null and void under Civilian Law Decree. The borrower may return its debt for interest accruing up to the date of the actual payment, plus any ancillary costs.

Under public law, the creditor has the lender must accept the prepayment if it does not harm its creditors and the borrower reimburses the costs incurred by the prepayment. However, the parties may deviate from the above provisions.

Czech Republic

Upon providing prepayment, we will wait and look for the other hand. Repayment has provides that the borrower must compensate the lender for the delayed payment of the loan, which is specified in the contract. The amount of compensation is determined by the lender and the borrower. Under Civil Code, the borrower has limitations to renounce other governing law, it should be noted that the borrower can renounce the right to prepay the loan before the end of the agreed term, but this can only be renounced for a mandatory. Where one of the surrounding parties is a consumer, the borrower can choose a foreign law that does not provide civil law features, however, Mandatory consumer protection laws of the country where the consumer has his permanent residence, and the consumer is not disadvantaged by the choice of foreign law. Mandatory consumer protection laws are based on the Czech Republic.

Slovakia

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Slovenia

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Under public law, the creditor has the lender must accept the prepayment if it does not harm its creditors and the borrower reimburses the costs incurred by the prepayment. However, the parties may deviate from the above provisions.

Serbia

Non-call provisions allowing the borrower avoid under the right to repay the debt prior to a short-dated security would be considered null and void under Civilian Law. The provisions such as increasing interest rate for the same. Prepayment fees (beyond market standard) would be considered null and void under Civil Code. Prepayment fees are prohibited by the Consumer Protection Act.

Ukraine

Non-call provisions limiting the borrower's ability to monetary debt before scheduled maturity are null and void under Civilian Law. The borrower may return its debt for interest accruing up to the date of the actual payment, plus any ancillary costs.

Under public law, the creditor has the lender must accept the prepayment if it does not harm its creditors and the borrower reimburses the costs incurred by the prepayment. However, the parties may deviate from the above provisions.

Belarus

Non-call provisions limiting the borrower's ability to monetary debt before scheduled maturity are null and void under Civilian Law. The borrower may return its debt for interest accruing up to the date of the actual payment, plus any ancillary costs.

Under public law, the creditor has the lender must accept the prepayment if it does not harm its creditors and the borrower reimburses the costs incurred by the prepayment. However, the parties may deviate from the above provisions.

Russia

Non-call provisions limiting the borrower's ability to monetary debt before scheduled maturity are null and void under Civilian Law. The borrower may return its debt for interest accruing up to the date of the actual payment, plus any ancillary costs.

Under public law, the creditor has the lender must accept the prepayment if it does not harm its creditors and the borrower reimburses the costs incurred by the prepayment. However, the parties may deviate from the above provisions.

Turkey

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3. Pay-in-full features

2.2 Pay-in-full: Are there any limitations in your jurisdiction to agreeing on PIF clauses, i.e. interest not paid in cash but by increasing the principal (loan) compounded or outstanding principal with interest accruing on that compounded principal? Can such limitations (if any) be contractual (set by parties) or are they set by law? Are there exceptions or any (indirect) mandatory legal provisions?

Austria

Pay-in-full limitations apply in general, in consumer scenarios, usury laws could come into play.

Czech Republic

PIF clauses are based on contract in accordance with Czech Civil Code. However, there are limitations, which are in the contract specified. The parties are allowed to agree on the amount of the principal and interest. The parties are in accordance with Czech Civil Code

Yes

Loss extended to a harbour company by shareholders will in principle be subordinated to the main creditors (including operational creditors and guarantees) in insolvency proceedings. However, in a mandatory winding-up scenario of Lotus Bio (or a prior sale of Lotus Bio's vessel and/or Lotus Bio's assets), it is an established settled law (see, inter alia, the leading judgment of the Supreme Court of Cyprus in Cyprus Development Bank v. Marfin Popular Bank Public Co Ltd, Civil Appeal No. 53/2013, dated 29 April 2014) that shareholders are treated as creditors in respect of their claims against the company, and, in the absence of any contractual provisions to the contrary, they are treated as creditors in respect of their claims against the company in the same manner as other creditors, and, in the absence of any contractual provisions and as such are subject to Section 148 of the Companies Law, Cap. 113 (as amended) and Section 167 of the Bankruptcy Law, Cap. 5 (as amended).

In a general context of the insolvency debtor, is considered to be, inter alia, (i) shareholder with capital shareholding in the insolvency debtor; (ii) a legal entity controlled by the insolvency debtor; (iii) a legal entity which is a parent company of the insolvency debtor; (iv) a legal entity which is a subsidiary company of the insolvency debtor; (v) a legal entity which is a subsidiary company of the parent company of the insolvency debtor; (vi) a legal entity which is a parent company of the insolvency debtor's shareholder; (vii) a legal entity which is a subsidiary company of the insolvency debtor's shareholder; (viii) a legal entity which is a subsidiary company of a controlling company of the insolvency debtor; (ix) a legal entity which is a parent company of a controlling company of the insolvency debtor.

Yes, in a mandatory winding-up scenario of Lotus Bio (or a prior sale of Lotus Bio's vessel and/or Lotus Bio's assets), the shareholders will be treated as creditors in respect of their claims against the company, and, in the absence of any contractual provisions to the contrary, they are treated as creditors in respect of their claims against the company in the same manner as other creditors, and, in the absence of any contractual provisions and as such are subject to Section 148 of the Companies Law, Cap. 113 (as amended) and Section 167 of the Bankruptcy Law, Cap. 5 (as amended).

Creditors

Yes

A private shareholder loans granted by shareholders are treated differently to loans from unrelated creditors in insolvency proceedings. Shareholder loans are treated as equity in insolvency proceedings and are treated as subordinated claims. If a company in crisis is granted a loan by a related party (a shareholder) instead of an unrelated third party, the loan is treated as equity and the creditor is not legally entitled the company to a return on investment and/or interest on the loan repayment.

Should case law is developed (or does not develop) when it comes to assessing shareholder loans, the shareholder loans may be treated differently than the current treatment of shareholder loans. Yes, there has case law (e.g. Marfin v. Cyprus Development Bank) where the court has ruled that the treatment of shareholder loans depends on the circumstances of the case, and that the court may treat shareholder loans as equity in certain circumstances, such as when the company is in crisis and the shareholder is a controlling creditor or creditor directly or indirectly, or a creditor who acts as a controlling creditor.

No, in a mandatory winding-up scenario of Lotus Bio (or a prior sale of Lotus Bio's vessel and/or Lotus Bio's assets), the shareholder loans will be treated as equity in the same manner as other creditors, and, in the absence of any contractual provisions to the contrary, and as such are subject to Section 148 of the Companies Law, Cap. 113 (as amended) and Section 167 of the Bankruptcy Law, Cap. 5 (as amended).

Yes

Shareholder loans granted to a company in crisis, or to a company that is in crisis, are treated as equity in insolvency proceedings. Shareholder loans are treated as equity in insolvency proceedings and are treated as subordinated claims. If a company in crisis is granted a loan by a related party (a shareholder) instead of an unrelated third party, the loan is treated as equity and the creditor is not legally entitled the company to a return on investment and/or interest on the loan repayment.

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Creditors

Yes

Shareholder loans granted to a company in crisis, or to a company that is in crisis, are treated as equity

Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010
Brussels Regulation Recast: Regulation (EU) No 1215/2012 of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters
PIK interest: Pay in kind – interest

Slovakia

AIF: Alternative Investment Fund under the AIFMD
AIFMD: Directive 2011/61/EU of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010
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Slovenia

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