The Insolvency Review

Tenth Edition

Editor
Donald S Bernstein

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THE INSOLVENCY REVIEW

TENTH EDITION

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Chapter 17

LUXEMBOURG

Clara Mara-Marhuenda, Sébastien Binard and Grégory Minne[1]

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

Insolvency proceedings in Luxembourg are governed by the following legislation.

General insolvency regime

a the Law of 14 April 1886 on composition with creditors, as amended;
b the Grand Ducal Regulation of 24 May 1935 on controlled management;
c the Code of Commerce, which deals more specifically with stays of payments and bankruptcy proceedings; and
d Council Regulation (EC) No. 848/2015 of 20 May 2015 on insolvency proceedings.[2]

Main special insolvency regimes

a banks and professionals of the financial sector: the Law of 18 December 2015 on resolution, recovery and liquidation measures of credit institutions and some investment firms, on deposit guarantee schemes and indemnification of investors;
b insurance and reinsurance companies and pension funds: the Law of 7 December 2015 on the insurance sector, as amended;
c regulated investment funds and fund managers:
- the Law of 17 December 2010 relating to undertakings for collective investment (UCIs), as amended;
- the Law of 13 February 2007 on specialised investment funds, as amended;
- the Law of 15 June 2004 on the investment company in risk capital (SICAR), as amended;
- the Law of 23 July 2016 on reserved alternative investment funds (RAIF); and
- the Law of 12 July 2013 on alternative investment fund managers; and

d regulated securitisation entities: Law of 22 March 2004 on securitisation, as amended.

1 Clara Mara-Marhuenda, Sébastien Binard and Grégory Minne are partners at Arendt & Medernach. They would like to take this opportunity to thank Kerem Guler, trainee in our Commercial & Insolvency and Corporate Law, M&A practice areas, for his valuable contribution when updating this chapter.

2 On 20 May 2015, the European Parliament adopted Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), which replaced Council Regulation (EC) 1346/2000 of 29 May 2000. Regulation 2015/848 applies to insolvency proceedings opened after 26 June 2017, whereas Regulation 1346/2000 remains applicable to insolvency proceedings opened prior to this date.

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The insolvency procedures provided for under Luxembourg law may be divided into those intended to preserve the business of the debtor (i.e., stay of payments, controlled management and composition with creditors) and procedures intended to wind up and realise the assets of the debtor (i.e., bankruptcy and compulsory liquidation).[3]

Each procedure is further analysed under Sections I.iii and III.vi, with the substantive provisions of Luxembourg insolvency law relating thereto.

ii Policy

Luxembourg insolvency law provides for three specific reorganisation procedures, which are essentially designed to keep failing businesses operating and to facilitate their restructuring into proper going concerns; however, in practice, there have been few cases of these procedures being opened. For instance, there have been 45 cases of controlled management in the past 20 years (2002–2022), 14 of which ended up in formal bankruptcy proceedings.[4] Neither have there been any cases of composition with creditors nor of stays of payments (relating to general commercial or holding companies)[5] during this time.

There are many reasons for this situation, although it may be more a case of inadequacy of the available instruments for restructuring distressed businesses than the authorities' willingness to favour bankruptcy and liquidation procedures over reorganisation measures. One of the obstacles to resorting to reorganisation procedures is the requirement generally expressed by the Luxembourg courts that, at the time of the opening of the reorganisation proceedings, the distressed business should still have sufficient assets to settle the estimated costs of the restructuring process, which is not always realistic. The formal conditions for allowing procedures such as compositions with creditors are also too restrictive, as – for example – the approval of a majority (in number) of the creditors representing at least three-quarters of the debts (i.e., a fairly high threshold) is mandatory.

Importantly, courts are also entitled to verify at any time during the processing of a request for controlled management proceedings, or during the course of the reorganisation itself, whether the conditions for opening formal bankruptcy proceedings are met and, under such circumstances, to declare the debtor bankrupt *ex officio*.[6] Finally, a business in whose name acts of gross negligence or fraud have been committed would typically be denied the benefit of reorganisation measures.[7]

The Luxembourg courts have so far dealt with more formal bankruptcy (i.e., liquidation) proceedings than reorganisation measures, but a change is due in short order.

A significant number of bankruptcies (which remained nearly identical between 2020 with 1,174 cases and 1,173 bankruptcies in 2021),[8] and the general public acknowledgement of a shortage of appropriate instruments to deal with companies experiencing financial

3 Article L-1200-1 of the Law on Commercial Companies dated 10 August 1915, as amended, provides for an additional compulsory liquidation procedure that may be opened by the district court at the initiative of the public prosecutor in the event of substantial breach of this law. This procedure, being unrelated to the solvency of the company in relation to which it is opened, is not analysed in this chapter.

4 Rapport des juridictions judiciaires, 2021, Rapport d'Activité 2021 du Ministère de la Justice, Rapport des juridictions judiciaires, 2017;Rapport d'Activités 2017 du Ministère de la Justice.

5 There have, however, been some cases with regard to regulated entities (see Section I.vi).

6 See Luxembourg Court of Appeal, 26 July 1982, *Moyse*.

7 See Luxembourg Court of Appeal, 17 February 1982, *Reding et Kunsch* and Luxembourg Court of Appeal, 10 February 1982, Paragraphs 25 and 301.

8 STATEC, press release No. 28/2022.

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difficulties, led the government to act and propose an ambitious reform of Luxembourg insolvency law as part of its programme for 2009 – under which 'efforts will be made to favour reorganisations over liquidation'.[9] It should also be noted that any commercial company that is in cessation of payments (i.e., unpaid debts of the debtor are certain, liquid, due and payable) must make bankruptcy filing within one month. This one-month period has, however, been suspended until 30 June 2022.[10] Therefore, the number of bankruptcies in 2020, a year heavily marked by the covid-19 pandemic, is likely affected by this measure. This same measure has continued to apply throughout 2021 and saw approximately 1,173 bankruptcies. The first five months of the 2022 statistics show approximately 450 bankruptcies.[11]

The proposed change of policy was debated by the Chamber of Deputies in February 2011, where it was expressed that 'in a period of crisis, the creation of appropriate instruments to deal with businesses facing financial difficulties became a matter of national priority that could not be overlooked'.[12]

To date, the government's work on this matter has resulted in Draft Bill No. 6539 on business preservation and modernisation of bankruptcy law, dated 26 February 2013. However, this project was later converted in the wake of the 2019 EU Directive on preventive restructuring frameworks.[13] The previous project No. 6539 has now been split into two draft bills No. 6539A and 6539B, the latter being an anti 'ghost company' toolbox and the former being the true successor in spirit and content of draft bill No. 6539, adapting the old project to the requirements of the EU directive 2019/1023. The legislative process is continuing; the latest amendments to project No. 6539A were published on 15 March 2022 (see Section V.iii for further discussion about this draft legislation).

The Directive on preventive restructuring frameworks entered into force on 16 July 2019, the main aim of which being the harmonisation of the laws and procedures of EU Member States concerning preventive restructuring, insolvency and the discharge of debt. The Member States had two years to adopt the proposed rescue tools into their own laws, but we understand that Luxembourg, pursuant to the terms of Article 34(2) of Directive (EU) 2019/1023,[14] obtained an extension of the implementation deadline of one year (i.e., Luxembourg is expected to have implemented Directive (EU) 2019/1023 by the second half of 2022).[15]

9 Luxembourg 2009 government programme, p. 108.

10 Law of 19 December 2020 on the temporary adaptation of certain procedural provisions in civil and commercial matters as amended.

11 *Supra* note 8.

12 Draft Bill on Business Preservation and Modernisation of Insolvency Law No. 6539, p. 1.

13 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on Restructuring and Insolvency).

14 '2. By way of derogation from paragraph 1, Member States that encounter particular difficulties in implementing this Directive shall be able to benefit from an extension of a maximum of one year of the implementation period provided for in paragraph 1. Member States shall notify to the Commission the need to make use of this option to extend the implementation period by 17 January 2021.'

15 Rapport d'activité 2021 du Ministère de la Justice, Gouvernement du Grand-Duché de Luxembourg, Partie II – Rapport d'activité des juridictions et des parquets, p. 36.

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iii Insolvency procedures

Main proceedings

The procedures available in Luxembourg under the general insolvency regime are as follows:

a compositions with creditors;
b controlled management proceedings;
c stays of payments (which all fall within the category of reorganisation procedures (i.e., with the aim of restructuring a business experiencing financial difficulties rather than winding it up)); and
d bankruptcy proceedings, which essentially involves a liquidation procedure (i.e., a procedure involving the realisation of the assets of the debtor with a view to settling the debtor's liabilities, either in full or, if there are insufficient assets, in part).

All the foregoing insolvency procedures are judicial procedures, which means that they are all subject to the control of the district court of competent jurisdiction.

Compositions with creditors

A company against which bankruptcy proceedings have been initiated may avoid a declaration of bankruptcy through the approval by the district court of a voluntary arrangement between the debtor and its creditors. Once approved, the voluntary arrangement is binding upon all creditors but will only be applied to the commitments made before the arrangement.

Controlled management

A company that is not bankrupt may request that a controlled management procedure be initiated, under which the management of the company is placed under the control of one or more commissioners designated by the court. The aim of an application for controlled management is to allow either a reorganisation or an orderly winding up of a company. Creditors are asked to vote on a reorganisation or liquidation plan, which, if approved, is enforceable against all creditors. Finally, creditors' enforcement rights are suspended for the duration of the controlled management.

Stay of payments

A stay of payments may be granted when a company is suffering temporary liquidity problems, preventing them from settling their due and payable liabilities.[16] As in the case of controlled management, the board of directors (or relevant management body) of the debtor stays in place during the proceedings but acts under the supervision of a commissioner. Creditors' rights are suspended for the duration of a stay of payments.

Bankruptcy

Bankruptcy proceedings are governed by Article 437 et seq. of the Luxembourg Code of Commerce and result in the winding up of a company in relation to which proceedings have been opened and the recovery of value from its underlying business or assets (if any).

Once bankruptcy proceedings have been opened, the members of the board of directors (or relevant management body) are discharged from their duties and replaced by

16 Code of Commerce, Article 593.

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one or more court-appointed receivers, who administer and realise the debtor's assets and then distribute the proceeds to the creditors according to the order of priority provided for by law. All enforcement actions carried out by unsecured creditors are suspended. Beneficiaries of *in rem* security over assets of the bankrupt company, which are governed by the Law of 5 August 2005 on financial collateral arrangement,[17] may enforce their rights despite the existence of the bankruptcy proceedings.

Certain 'abnormal' transactions (e.g., payments of non-matured debts or transfers of assets for no actual consideration) entered into by the company will be declared null and void if they have been performed during the 'hardening period', which starts at the moment when the company is presumed to have ceased paying its creditors, or during the 10 days prior to the hardening period.[18] The starting point of the hardening period may at the earliest be set at a date six months prior to the bankruptcy judgment.[19]

Agreements entered into by the debtor are not automatically terminated, except those contracted *intuitu personae* with regard to the debtor and those including a clause of early termination upon insolvency.

Luxembourg law does not set out any mandatory timing in respect of the liquidation of a bankrupt company, which typically takes between several months and several years, depending on the size and complexity of the business.

Ancillary proceedings

Ancillary or secondary proceedings may be opened in Luxembourg in the event that main insolvency proceedings are pending in another EU Member State, subject to the provisions of Council Regulation (EC) No. 848/2015 on insolvency proceedings. These proceedings will be restricted to the assets of the debtor located in Luxembourg.[20]

In main insolvency proceedings opened in a foreign non-EU jurisdiction with respect to a Luxembourg company, Luxembourg courts would, in principle, not agree to open ancillary proceedings in Luxembourg based on the 'unity and universality of the bankruptcy' principle resulting from case law, according to which the main effects of the foreign bankruptcy will automatically apply to the debtor.[21] To give effect to the enforcement measures contained in the foreign judgment in relation to assets located in Luxembourg, however, recognition (exequatur) proceedings will be necessary in Luxembourg.[22]

iv Starting proceedings

Since composition proceedings and stays of payments (under the general insolvency regime) have hardly ever been used in Luxembourg, this section is limited to an analysis of controlled management and bankruptcy proceedings.

17 This law transposed into national law Directive 2002/47/EC of the European Parliament and of the Council on financial collateral arrangements.

18 Code of Commerce, Article 442.

19 Courts most often set the hardening period to six months, unless positive evidence is brought that payments ceased at a later time.

20 Council Regulation (EC) No. 848/2015 on insolvency proceedings, Article 34 et seq.

21 See Wiwinius, J-C, *Le droit international privé au grand-duché de Luxembourg*, 3rd ed, Luxembourg, 2011, No. 1858.

22 ibid.

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Controlled management

Controlled management may only be applied for by the debtor and will be granted if the district court of competent jurisdiction deems that:

a the credit of the debtor is undermined;

b the settlement in full of the debtor's liabilities is in jeopardy; and

c controlled management allows the recovery of the debtor's business or improves the position of the debtor in respect of the sale of its assets.[23]

Case law considers that a debtor must also act in good faith when making a request for an order of controlled management.[24]

Bankruptcy

A commercial company is considered bankrupt if:

a it can no longer pay its debts as they fall due; and

b it can no longer raise credit.[25]

These two conditions must be met cumulatively. A company may only be declared bankrupt by the district court of competent jurisdiction. The decision can be taken on the petition of the company itself, one or more creditors (with respect to a due and payable claim for which a judgment has been notified to the debtor) or the district court, on its own initiative.[26] Most bankruptcy decisions are taken upon petition of creditors, which, in 90 per cent of cases, are public authorities.[27]

Companies that meet the above-stated criteria must file for bankruptcy within one month of the cessation of payments.[28] However, this one-month period has been suspended until 31 December 2021 inclusive.[29] Failure to do so will create a criminal liability risk for the board of directors (or relevant management body). If the court deems that a bankruptcy situation exists, it will declare the company bankrupt and appoint a receiver who will, inter alia, manage the affairs of the company in bankruptcy and represent the interests of the creditors of the company, generally.

v Control of insolvency proceedings

This section is limited to an analysis of controlled management and bankruptcy proceedings, given the limited number of compositions with creditors and stays of payments.

23 Grand Ducal Regulation of 24 May 1935 on controlled management, Article 1.

24 See Luxembourg Court of Appeal, 17 February 1982, *Reding et Kunsch* and Luxembourg Court of Appeal, 10 February 1982, Paragraphs 25 and 301.

25 Code of Commerce, Article 437.

26 Code of Commerce, Article 442.

27 Draft Bill on Business Preservation and Modernisation of Insolvency Law, No. 6539, p. 5.

28 Code of Commerce, Article 440. However, Article 6 of the Grand Ducal Regulation of 25 March 2020, as amended by the Grand Ducal Regulation of 2 April 2020, suspended the application of the deadline related to the obligations pursuant to Article 440. The suspension of the said deadline was further extended by the Law of 20 July 2020. The reader will find additional information on the issue under Section V.i.

29 Law of 19 December 2020 on the temporary adaptation of certain procedural provisions in civil and commercial matters as amended.

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Controlled management

As with composition proceedings, the court will delegate one of its judges to examine a debtor's affairs and determine whether there are realistic prospects for a reorganisation. If, after having reviewed the delegated judge's report, the court comes to the conclusion that reorganisation is possible, it will grant the application for controlled management.[30]

The court will then appoint one or more commissioners, who do not replace the company's management body but supervise its actions. The members of such a body therefore continue to manage the company with a view to reorganising its affairs, subject to certain acts that may not be undertaken without the consent of the commissioners. After having heard the creditors and reviewed the debtor's situation, the commissioners will draw up their report, which will contain either a reorganisation plan or a liquidation plan. Creditors will then be convened to vote on the proposal, with the majority (in number) of creditors representing more than half of the debtor's aggregate debts. The approved plan will finally need to be sanctioned by the district court.

Bankruptcy

The receiver appointed by the district court, having opened the bankruptcy proceedings, must manage the company in good faith during the proceedings under the supervision of a supervisory judge designated by the same court. The board of directors (or relevant management body) may no longer act on behalf of the bankrupt company as of the date of the bankruptcy judgment and it therefore plays no active role in the administration of the bankruptcy, but the members of the management body are still obliged to assist the receiver whenever necessary.

Certain actions taken by the receiver will be subject to the approval of either the supervisory judge or the district court. The receiver may, for instance, proceed to the sale of movable or perishable assets of the debtor only with the prior authorisation of the supervisory judge in charge of the bankruptcy. The sale of other assets (non-perishable and immovable) require the approval of the district court, which will determine the conditions for such a sale following a report by the supervisory judge and a hearing with the debtor.[31] Finally, after all proceeds of the assets of the bankrupt company have been distributed among the creditors, the receiver will submit a detailed report about the bankruptcy proceedings to the district court.

vi Special regimes

The main special insolvency regimes under Luxembourg law are listed in Section I. The key differences between the general and special insolvency regimes are that creditworthiness issues are sufficient for opening proceedings under the special regimes and the courts have more freedom under the special regime than the general regime to determine the terms of the reorganisation or liquidation.

No special insolvency rules apply to corporate groups.[32]

30 If reorganisation is deemed not to be possible, a bankruptcy order would usually be made shortly thereafter.

31 Code of Commerce, Article 477.

32 Parent companies and subsidiaries are separate entities to which independent insolvency proceedings apply. However, Luxembourg courts may consolidate the assets of two companies in the event that those companies are actually managed as a single entity, and consider that these companies represent a single legal entity for the purposes of the insolvency proceedings.

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Banks and financial sector professionals

Two separate insolvency procedures are provided for under the Law of 18 December 2015, which may apply to credit institutions and professionals within the financial sector:

a the stay of payments procedure, which will apply in the event that the creditworthiness of the relevant entity is impaired (whether or not it has ceased its payments) and has the aim of helping the entity to restore its financial situation by suspending all the payments due to its creditors; and

b the judicial liquidation procedure, which will be applied in the event it becomes apparent that the stay of payments procedure did not restore the relevant entity's financial situation or when the entity is undermined to such an extent that it may no longer meet its commitments.[33]

Stay of payments

A stay of payments, which may be viewed as an observation phase prior to the commencement of formal liquidation proceedings, may only be applied for by the national financial sector regulator, the CSSF,[34] or by the relevant entity itself. This request will automatically result in the suspension of all payments by the entity and a prohibition on the entity taking any action without CSSF consent, with the exception of safeguarding measures.

If the district court considers the conditions for a stay of payments to be fulfilled, it will rule accordingly and determine the period for which the stay of payments will be granted (a maximum of six months),[35] as well as the terms of the stay. The court will also appoint one or more provisional administrators, who will monitor the entity's estate and will need to approve any action in respect of the distressed entity, failing which any such actions will be deemed null and void.

Judicial liquidation

If the conditions for a judicial liquidation procedure to be opened are met, a request may be made for such purposes by the CSSF or the public prosecutor.

In the event that the district court orders a judicial liquidation, it will appoint a supervisory judge and one or more liquidators. It will then determine the terms of the liquidation, in particular, whether the extent to which the rules governing general insolvency proceedings should apply (which make judicial liquidation proceedings a flexible instrument). Finally, the liquidation decision will automatically result in the withdrawal of any licence to operate granted to the relevant entity by the CSSF.

33 Professionals of the financial sector (PFS) are all entities regulated by the Commission for the Supervision of the Financial Sector that are not banks (investment firms such as investment advisers, brokers in financial instruments or wealth managers), specialised PFS (e.g., registrars, custodians, regulated markets operators or debt-recovery professionals) and support PFS pursuing an activity related to a financial sector activity (e.g., domiciliation agent or IT operator for the financial sector).

34 Commission de Surveillance du Secteur Financier.

35 Law of 18 December 2015, Article 122(10). Note, however, that in a more recent case involving Kaupthing Bank Luxembourg SA, the district court agreed to extend the initial stay of six months by a further two months.

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Other regulated entities

Insurance companies

The insolvency regime applicable to insurance companies, reinsurance companies and pension funds, as provided for by the amended Law of 7 December 2015 on the insurance sector, substantially mirrors the regime applicable to banks and professionals of the financial sector (PFS).

Regulated investment funds, fund managers and securitisation entities

The insolvency procedures applicable to regulated investment funds,[36] management companies and securitisation entities essentially take the same form as those applicable to banks and PFS: stays of payments and judicial liquidation proceedings. The main difference from the regime described above is that the stay of payments is automatically triggered by the withdrawal of the licence of the relevant entity by the CSSF. Judicial liquidation proceedings may be opened at the request of the CSSF or the public prosecutor following the withdrawal. Investors have no rights to request the opening of insolvency proceedings from Luxembourg courts.[37]

vii Cross-border issues

Formal insolvency proceedings opened in an EU jurisdiction prior to 26 June 2017 were subject to Regulation (EC) No. 1346/2000 on insolvency proceedings. This Regulation generally consisted in a good and proven instrument, but there were some uncertainties, and constantly evolving case law in particular, around the key concept of the centre of main interests (COMI) of a debtor, which is used to determine which EU jurisdiction is entitled to open the main insolvency proceedings against such a debtor.[38]

It could also be difficult to identify a debtor's COMI in certain cases, which called for a more precise definition of the concept to be adopted, notably to avoid undesirable forum shopping. The European Commission tackled this issue in the form of a proposal for a regulation amending Regulation (EC) No. 1346/2000,[39] followed by the adoption on 20 May 2015 by the European Parliament of Regulation (EU) No. 848/2015 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), which replaced Council Regulation (EC) No. 1346/2000. In general, the Insolvency Regulation (recast) reflects the lessons learned from the complex procedures that have occurred since the financial crisis.[40] It applies to insolvency proceedings opened after 26 June 2017.

36 Undertakings for collective investment operating as SICAVs (open-ended investment companies), SICAFs (closed-ended investment companies) or FCPs (mutual funds), SICARs (investment companies in risk capital) or SIFs (specialised investment funds).

37 They may, however, refer the situation to the CSSF, which may in turn withdraw an entity's licence if it deems that the conditions for such withdrawal have been met.

38 G Minne, 'Arrêt Interedil: La Cour de Justice de L'Union Européenne Clarifie le Contenu des Notions de 'Centre des Intérêts Principaux' et d'Établissement du Règlement 1346/2000 Relatif aux Procédures d'Insolvabilité', *Bulletin Droit et Banque*, No. 50, 2012, p. 59 et seq.

39 Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 1346/2000 on insolvency proceedings, 12 December 2012.

40 G Minne/F Fayot, 'Les principales innovations du nouveau règlement relatif aux procédures d'insolvabilité', *Journal de droit européen*, January 2016, p. 2 s.

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The main issues addressed by the Insolvency Regulation (recast) are as follows:

a extension of the scope of the Regulation to pre-insolvency and hybrid proceedings;

b the amendment of the definition of the COMI and clarification of the circumstances in which the presumption that the COMI is located at the registered office of the debtor may be rebutted;

c the ability of the courts to refuse the opening of secondary proceedings (which may cause practical difficulties and inefficiencies) if they are not necessary to protect the interests of local creditors;

d the obligation on Member States to organise the publication of cross-border insolvency decisions in a publicly accessible national register and to provide for the interconnection of national insolvency registers; and

e strict cooperation obligations bearing on courts and insolvency practitioners involved in the insolvency of a corporate group.

Concerning insolvency proceedings opened in a non-EU jurisdiction, the 'unity and universality of the bankruptcy' principle applicable in Luxembourg would result in the main aspects of those proceedings automatically applying to the debtor, with no possibility of opening ancillary proceedings in Luxembourg.[41] This has the advantage of resolving most conflicts of jurisdiction between Luxembourg and foreign jurisdictions, but there could be instances when the rights of creditors (e.g., employees) would be better protected if the Luxembourg courts were entitled to open territorial proceedings.

II INSOLVENCY METRICS

As in most countries, the covid-19 pandemic since 2020, the war in Ukraine and the ensuing inflation surge have caused significant economic disruption in Luxembourg.[42]

i General economic climate

The Luxembourg Institute of Statistics and Economics (STATEC) acknowledged a slowdown for the beginning of 2022 in the Euro Area due to inflation caused by global supply chain shortages and the war in Ukraine, despite numbers showing growth in the Euro Area with serious consequences for the employment market.[43] The STATEC press release explains that the beginning of 2022 has been positive for Luxembourg. The International Monetary Fund estimated the growth rate of Luxembourg's GDP for 2022 to be at 1.8 per cent.[44] However, the impact of the inflation surge on GDP growth in 2022 has not yet fully materialised as unemployment was still decreasing in May 2022, where a decrease of 19.6 per cent was

41 That is, to the extent the foreign jurisdiction applies the same conflict of jurisdiction principle. It is otherwise conceivable that main insolvency proceedings be opened in both jurisdictions.

42 STATEC, Press release 'Conjoncture Flash Mai 2022: la degradation conjoncturelle se confirme'.

43 STATEC, Press release 'Conjoncture Flash Juillet 2022: la bonne tenue de l'emploi en sursis'.

44 International Monetary Fund website, country profile on Luxembourg : https://www.imf.org/en/Countries/LUX.

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observed.[45] The macroeconomic outlook is expected to deteriorate with the US dollar reaching parity with the euro in July 2022 for the first time in 20 years.[46] The level of inflation in the Euro Area is still expected to increase[47] and the supply chain issues remain unresolved.[48]

Among the country's strengths are its limited public debt, highly skilled workforce and high standard of living, whereas the dependence on the financial services industry, the fiscal impact of an ageing population, the rising housing prices[49] and, to a lesser extent, the steel industry may be seen as weaknesses.[50]

Inflation in 2022 should reach 5.8 per cent or 6 per cent if the war in Ukraine continues;[51] it is predicted to be around 2.8 per cent in 2023 if the war ends and 4 per cent if the war continues.

The total net assets of undertakings for collective investment, comprising UCIs subject to the 2010 Law, specialised investment funds and SICARs amounted to almost €5.9 trillion as at December 2022 compared to almost €4.9 trillion as at December 2019, which represents an increase of 24 per cent per cent over three years.

ii Insolvencies

The annual number of Luxembourg companies declared bankrupt increased steadily between the 1990s and 2013 – the figure was around 100 in 1990, but by 2000 was in excess of 500, passed 1,000 in 2012 and 2013,[52] and rose to 1,232[53] in 2019. In 2020, 1,173 bankruptcies were counted.[54] Regarding the first five months of 2022, approximately 450 bankruptcies have been recorded so far.[55] Both the figures from 2021 and 2022 have been influenced by the suspension of the one-month period within which commercial entities need to file for bankruptcy after cessation of payments has been established.[56]

III PLENARY INSOLVENCY PROCEEDINGS

The past 10 years have been substantially quieter on the insolvency front than 2008–2010, when there were dramatic cases, such as those involving the Luxembourg subsidiaries of the failed Icelandic banks and Lehman Brothers Inc,[57] and certain investment funds that had

45 Agency for the development of employment, *Statec*, P. Gramme, Press release 'Le nombre de demandeur d'emploi continue de baisser', 20/06/2022.

46 *New York Times*, E. Nelson, 'Euro falls to equal the US Dollar for the first time in 20 years', 13 July 2022.

47 STATEC, Press release 'Conjoncture Flash Juin 2022: L'inflation toujours sous forte tension'.

48 *Bloomberg*, B. Murray 'Supply Chains Inching Back to Normal Brace for Headwinds of Softer Demand', 17 July2022.

49 *Luxembourg Times*, H Pritchard, Luxembourg housing prices take biggest leap in EU, 8 July 2021.

50 Source: Coface.

51 *Supra* note 50.

52 *Trading Economics*, Luxembourg Bankruptcies 1987–2019 (tradingeconomics.com/luxembourg/bankruptcies).

53 STATEC, press release No. 28, 16 June 2022.

54 Ibid.

55 Ibid.

56 Registre de Commerce et des Sociétés de Luxembourg (RCS), Statement of court rulings filed with the RCS, 2020.

57 Landsbanki Luxembourg SA, Glitnir Luxembourg SA and Kaupthing Bank Luxembourg SA and Lehman Brothers (Luxembourg) SA.

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invested in Bernard Madoff's funds.[58] There are nevertheless a few notable cases that have remained active during the period of review; however, there is limited public information available about insolvencies in Luxembourg compared with some larger jurisdictions.

i ABLV Bank

ABLV Bank, the largest independent private bank in Latvia[59] and its Luxembourg subsidiary, ABLV Bank Luxembourg SA (ABLV Lux), were considered as 'failing or likely to fail' by the European Central Bank (ECB) on 24 February 2018. This follows a suspicion of involvement in money laundering linked to one of the illegal arms development programmes in North Korea as alleged by the US Treasury.[60]

The ECB then forced the two entities to liquidate in accordance with local legislation. The ECB justified its decision, alleging that ABLV Bank was probably no longer in a position to honour its creditors and to resist massive withdrawals of deposits, and that ABLV Lux presented a foreseeable failure.[61] As a result of this statement, the shareholders of ABLV Bank in Latvia decided to go through a voluntary liquidation process.[62]

Meanwhile in Luxembourg, on 19 February 2018, the CSSF filed an application with the Luxembourg District Court dealing with commercial matters for stay of payments by ABLV Lux in accordance with Article 122(6) of the Law of 18 December 2015 on resolution, recovery and liquidation measures of credit institutions and some investment firms, on deposit guarantee schemes and indemnification of investors.[63] The CSSF alleged that this decision followed that of the ECB to impose a moratorium on ABLV Bank for cause of deterioration of the bank's financial position.[64] On 9 March 2018, the CSSF request was rejected by the Luxembourg Commercial Court,[65] which nevertheless decided to grant ABLV Lux the benefit of the stay of payments process but only for a 'protective' purpose and for an initial period of six months. Although this period was extended to 26 July 2019 and negotiations with Duet Group about a potential takeover have failed, ABLV Lux declared in June 2019 that it agreed to the commencement of the judicial liquidation process to minimise further losses.[66]

On 27 March 2020, ALEBA, the bank and insurance employees' trade union, announced the start of negotiations for a social plan for the employees of ABLV Lux.[67] A social plan in line with the banking collective agreement was signed in July 2020, including, notably, terminal payments for the employees.

The liquidation process is still ongoing.

58 Luxalpha SICAV, Luxembourg Investment Fund SICAV and Herald (Lux) SICAV.

59 Source: ABLV Bank official website.

60 Source: *Luxemburger Wort*, 24 February 2018.

61 Source: *Luxemburger Wort*, 24 July 2018.

62 Source: ABLV Bank official website.

63 Source: CSSF, press release, 19 February 2018.

64 Source: ECB, press release, 19 February 2018.

65 Source: *Paperjam*, 9 March 2018.

66 ABLV Bank Luxembourg, press release, 26 June 2019.

67 ALEBA, press release, 27 March 2020.

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ii Espirito Santo Group

Banco Espirito Santo SA (BES), whose main shareholders are based in Luxembourg, has reportedly been in financial distress since May 2014. On 20 June 2014, the CSSF requested the Luxembourg Stock Exchange to suspend the shares of Espirito Santo Financial Group SA (ESFG), which at that moment held 25.1 per cent of BES, since the ESFG shares had lost 51 per cent of their value.

Irregularities in the financial statements of Espirito Santo International SA (ESI), one of the shareholders of ESFG through its wholly owned subsidiary Rio Forte Investments SA (RF), appear to be the main source of the group's difficulties. The amount of the financial manipulation is thought to be around €1.3 billion. ESFG was accused of a loss of €1.549 billion in 2013 as compared with a profit of €775 million in 2012.

ESI asked the District Court to be put under controlled management, a request to which the court promptly acceded. ESI had to present a restructuring plan to sell its assets and raise funds to pay its creditors. RF in turn announced on 23 July 2014 that it was not able to honour a €897 million debt owed to Portugal Telecom, and asked the district court to place it under controlled management.

Following the submission of reports by the delegate judge and experts, the District Court rejected the controlled management requests of ESI and RF by two judgments of 17 October 2014, since the restructuring plans did not convince the Luxembourg judges that ESI and RF would be able to reorganise themselves successfully.

BES was transformed into a bad bank to liquidate toxic assets, in particular the debt securities of the rest of the group. At the same time, the Portuguese authorities regrouped the healthy assets into a new bank called Novo Banco, which benefited from an equity injection of €4.9 billion financed through a loan of €3.9 billion by the Portuguese government.

The creditors were asked by bankruptcy receivers to file their claims until 30 June 2019 at the latest.[68]

At present, the bankruptcy proceedings relating to the Luxembourg-based Espirito Santo companies are ongoing.

IV ANCILLARY INSOLVENCY PROCEEDINGS

No secondary insolvency proceedings were initiated in Luxembourg during the period of review.[69] The only apparent case relates to a German company called Schuring Beton GmbH, which had nine employees at its Luxembourg branch. After Schuring Beton GmbH was declared bankrupt in Germany, those employees successfully requested the opening of secondary proceedings in Luxembourg, at which the District Court deemed that Schuring Beton GmbH operated an establishment there.[70]

68 www.espiritosantoinsolvencies.lu.

69 Based on an oral exchange with a clerk of the bankruptcy chamber of the District Court of Luxembourg.

70 Heidelberg–Vienna external evaluation of Regulation No. 1346/2000/EC on insolvency proceedings, 19 January 2013, p. 157.

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V TRENDS

i Predicted level of insolvency activity in the coming year

The Luxembourg economy has been being greatly impacted by the covid-19 pandemic. According to STATEC, economic activity in Luxembourg declined by 25 per cent from March 2020 onwards. This will no doubt have an impact on the level of insolvency activity. This impact is, however, not yet fully revealed due to the suspension of the one-month period until 31 December 2021 during which commercial companies need to file for bankruptcy upon cessation of payments.[71] The figures for the years 2020 and 2021, therefore, do not necessarily reflect how many Luxembourg companies are actually in a state of cessation of payments. The creditors' rights to petition for insolvency remained, however, unaffected.

Another measure taken by the Luxembourg government was to offer each resident a €50 voucher to spend in the hospitality sector. As of 18 December 2020, 94,413 accommodation vouchers have been used, corresponding to a payment of €4,720,650 for this sector.[72]

Luxembourg's finance minister recently stated that the figures confirm that a 'normalisation' of Luxembourg's economic life is well underway, despite the uncertainties surrounding the evolution of the covid-19 pandemic. As of 30 June 2021, revenues collected by the Luxembourg state amount to €11 billion (i.e., 24.8 per cent more than in the first half of 2020).[73]

ii Practical trends

In the past 10 years, courts have resorted more often to stay of payment proceedings, when deemed necessary, to allow failed banks to reorganise themselves under reduced creditor pressure. This was seen as a positive thing by practitioners as it resulted in useful case law, clarifying the practical conditions under which such proceedings could take place.

The status quo was maintained under the general insolvency regime, with the courts agreeing to the opening of only a few reorganisation proceedings, preferring straightforward bankruptcy declarations. However, there is a political willingness to promote restructurings over liquidations and appropriate draft legislation is in circulation to that effect.[74]

Cases of criminal liability opened against directors (or members of the relevant management body) have remained low.[75]

iii Expected legislative developments

The Draft Bill 6539A was amended for the last time in March of 2022 and is expected to take effect towards the end of 2022 or the beginning of 2023. As previously explained, this Draft Bill is the result of, and incorporates the contents of, the 2019 directive on preventive restructuring frameworks and the reform bill that has been discussed since 2013 but never adopted.

71 Law of 19 December 2020 on the temporary adaptation of certain procedural provisions in civil and commercial matters as amended.

72 Le gouvernement luxembourgeois, Prolongation de la validité des bons d'hébergement de 50 euros et du fonds du tourisme, communiqué, 18 December 2020.

73 Le gouvernement luxembourgeois, 'Une normalisation de la vie économique au Luxembourg en cours' – Pierre Gramegna présente la situation financière de l'État au premier semestre 2021, communiqué, 16 July 2021.

74 The reader will find additional information on these issues under Sections II and V.iii.

75 Rapport des juridictions judiciaires, 2009 and 2012.

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Preventive aspect of the Draft Bill

The preventive measures contained in the Draft Bill essentially allow for the gathering of information from businesses to identify those experiencing financial difficulties at a stage when they may still benefit from efficient reorganisation procedures, and provide for instruments designed to preserve and reorganise business activities while taking the rights of creditors into account, which entrepreneurs will be able to request on their own initiative.

The information to be gathered on Luxembourg businesses and to be used to determine whether a given business experiences financial difficulties relies on various indicators (e.g., a list of debts required by tax and social security authorities), to be collected by two separate public entities: the Ministry of Economy, which can convene a debtor, inform them about the necessity or relevance of a preventive reorganisation and ask for additional information; and the Ministry for the middle classes, both of which have a central role in out-of-court procedures.

The reorganisation measures to be made available to distressed businesses under the Draft Bill encompass out-of-court procedures and judicial procedures, which are adapted to the size of the relevant business, and are largely voluntary (i.e., upon request of the business in financial distress).

The first out-of-court procedure available is the conciliation process, whereby the company in financial distress may require from either the Ministry for the middle classes or the Ministry of Economy according to their jurisdictions the appointment of a business conciliator, whose task may be defined by the interested parties. The second is a mutual agreement under which the debtor tries to reach an agreement with two or more of its creditors, possibly with the assistance of a business conciliator.

If the viability of a company's activities is threatened, the debtor also has the right to apply for a judicial reorganisation procedure with the relevant district court, which is appropriate when there is a need for measures that may be enforced against third parties. The procedure has three possible outcomes:

a a stay of payments in respect of measures that are aimed at collecting outstanding debts from a distressed business;

b a collective agreement, which is enforceable against all creditors, including those that have opposed such an agreement, if, in each class of creditors, a certain number of creditors representing at least half of the aggregate amount of liabilities of the debtor have given their consent; or

c a transfer under judicial control, whereby a court-appointed agent will organise the transfer of all or part of the assets of the relevant company to ensure the continuity of its activities.

Restorative aspect of the Draft Bill

The entrepreneur exercising its activity as a natural person (i.e., without limitation of liability) and whose venture has failed may be given a 'second chance' under the Draft Bill if he or she is deemed to have acted in good faith, and accordingly not be held personally liable for the outstanding debts of the failed business.

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Repressive aspect of the Draft Bill

The object of the repressive part of the Draft Bill is to prevent entrepreneurs who act in bad faith from abandoning their business and starting a new one with impunity. Nevertheless, the aggravation of the potential responsibility of managers is being criticised by both the Chamber of Commerce[76] and the Council of State.[77]

The Draft Bill also introduces an administrative dissolution procedure without liquidation inspired by Swiss law and with the aim of eliminating 'empty shells' in a timely and cost-efficient manner by avoiding formal bankruptcy proceedings.

Social aspect of the Draft Bill

Under the Draft Bill, as a matter of principle, all the rights and obligations resulting from employment contracts are transferred to the purchaser of the assets of the relevant distressed company. However, the Draft Bill also allows the purchaser to choose the employees that it wants to take over, as long as its choice is supported by technical, economic and organisational reasons.

Although this project is ambitious, the authors have already highlighted some difficulties that could arise in term of material resources allocated to the undertakings involved.[78] Additionally, according to the Chamber of Commerce, the Draft Bill is not going far enough and should implement a prevention comity, the purpose of which would be to help companies before they get into difficulty.[79]

76 Chamber of Commerce, Opinion regarding project of bill 6539, 6 March 2019, pp. 2 and 3.

77 The Council of State, Opinion No 50.091, 20 December 2019, pp. 39 and 40.

78 Yann Payen, 'Nouveautés législatives attendues pour 2016 en droit des sociétés luxembourgeois', *Legitech*, February 2016.

79 Chamber of Commerce, opinion of 6 March 2019.

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Appendix 1

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He also represents institutional investors acting as shareholders or creditors of companies experiencing financial difficulties (whether solvent or insolvent) as well as such companies, including in relation to financial restructurings, centre of main interests shifts, distressed business transactions, cross-border reorganisations and insolvency proceedings.

Sébastien regularly speaks at seminars and conferences on his areas of expertise. He is a member of the legal committee and of the market intelligence committee of the Luxembourg Private Equity and Venture Capital Association and a member of the Business Law Commission of the Board of the Luxembourg Bar (Conseil de l'Ordre).

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