# The Insolvency Review

Seventh Edition

**Editor**
Donald S Bernstein

The Law Reviews

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# THE INSOLVENCY REVIEW

SEVENTH EDITION

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Donald S Bernstein

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# PREFACE

This seventh edition of *The Insolvency Review* once again offers an in-depth review of market conditions and insolvency case developments in key countries. A debt of gratitude is owed to the outstanding professionals around the world who have dedicated their time and talents to this book. As always, their contributions reflect diverse viewpoints and approaches, which in turn reflect the diversity of their respective national commercial cultures and laws.

In a prior edition of this book, we examined the challenges faced by multinational enterprise groups attempting to restructure under diverse and potentially conflicting insolvency regimes. At that time, the European Parliament and Counsel had recently published the Recast Insolvency Regulation,[1] which included provisions relating to cooperation and communication across group restructuring proceedings in multiple jurisdictions, and UNCITRAL's Working Group V was in the process of developing its Enterprise Group Insolvency: Draft Model Law (the EGI Model Law).[2] This year's edition provides an occasion to revisit this topic in light of the Working Group's EGI Model Law and the EGI Model Law's Guide to Enactment (the Guide to Enactment).

The EGI Model Law is designed to provide states with a legislative framework to address the cross-border insolvency of enterprise groups, complementing the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) and part three of the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide, part three).[3] What distinguishes the EGI Model Law from the Model Law, which concerns itself with multiple proceedings of a single debtor, is the focus on multiple insolvency proceedings relating to multiple related debtors.[4]

The EGI Model Law defines 'enterprise group' as two or more entities, regardless of legal form, that are engaged in economic activities and may be governed by insolvency law, that are interconnected by control or significant ownership.[5] When members of an enterprise group are located in different jurisdictions, the EGI Model Law is intended to support cross-border cooperation and coordination with respect to their insolvency proceedings and establish new mechanisms that can be used to develop and implement a solution for the group (a

1 Regulation (EU) No. 2015/848 of 20 May 2015 on insolvency proceedings (recast), 2015 O.J. (L 141) <https://eur-lex.europa.edu/eli/reg/2015/848/oj>.

2 See UNCITRAL, Report of Working Group V (Insolvency Law) on the Work of its Forty-Fifth Session (New York, 21 to 25 April 2014), U.N. Doc. A/CN.9/803 (6 May 2014) <https://undocs.org/en/A/CN.9/803>.

3 UNCITRAL, Enterprise Group Insolvency: Guide to Enactment, Working Group V (28 to 31 May 2019) <https://undocs.org/en/A/CN.9/WG.V/WP.165>.

4 ibid., at I.A.3.

5 EGI Model Law, at Article 2.



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group insolvency solution) through one (or potentially more) insolvency proceedings (each a planning proceeding) taking place in a state where a group member has its centre of main interests (COMI).[6] A planning proceeding is a main proceeding commenced in respect of an enterprise group member provided (1) one or more other enterprise group members are participating in that main proceeding for the purpose of developing and implementing a group insolvency solution, (2) the enterprise group member subject to the main proceeding is likely to be a necessary and integral participant in that group insolvency solution, and (3) a group representative has been appointed. The group representative will be able to seek a wide range of relief in any group member's insolvency proceeding. Ultimately, a group insolvency solution can be a reorganisation, sale or liquidation of some or all of the assets and operations of one or more enterprise group members, with the goal of protecting, preserving, realising or enhancing the overall combined value of those enterprise group members.[7] The EGI Model Law does not address the procedure for seeking approval of the group insolvency solution, leaving that to the law of the approving jurisdiction.[8]

The court overseeing the planning proceeding may grant certain types of relief if necessary to preserve the possibility of developing or implementing a group insolvency solution.[9] These forms of relief include, among other things, staying execution against the assets of an enterprise group member, suspending the right to transfer, encumber, or otherwise dispose of any assets of an enterprise group member, staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations or liabilities of an enterprise group member, and approving arrangements concerning the funding of an enterprise group member and authorising the provision of finance under those funding arrangements.[10] With respect to approval of post-filing funding arrangements, the Guide to Enactment notes that the court might take into consideration various criteria, including whether the funding arrangement is necessary for the continued operation or survival of the business of that enterprise group member or for the preservation or enhancement of the value of its estate, whether any harm to creditors of that enterprise group member will be offset by the benefit to be derived from continuing that funding arrangement, whether the funding arrangement safeguards the development of a group insolvency solution, and whether the interests of local creditors are protected.[11]

Moreover, the EGI Model Law also seeks to minimise the need for commencement of non-main proceedings in a second state in which an enterprise group member has an establishment and facilitates the centralised treatment of claims in an enterprise group insolvency by including a mechanism under which such claims can be addressed.[12]

It remains to be seen how swiftly and extensively the EGI Model Law will be incorporated into national laws. There is reason to believe, however, that some of the 45 jurisdictions

6 UNCITRAL, Enterprise Group Insolvency: Guide to Enactment, Working Group V (28 to 31 May 2019) <https://undocs.org/en/A/CN.9/WG.V/WP.165>.
7 ibid., at Article 2(f).
8 ibid., at Article 26.
9 ibid., at Article 19.
10 ibid., at Article 20.
11 UNCITRAL, Enterprise Group Insolvency: Guide to Enactment, Working Group V (28 to 31 May 2019) <https://undocs.org/en/A/CN.9/WG.V/WP.165>.
12 ibid.



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that have adopted the existing Model Law may act relatively quickly, given the need for an enterprise group solution and the public nature of Working Group V's work.

Recent experiences in high-profile enterprise group restructurings further underscore the benefits promised by this new regime. The United States Bankruptcy Court for the Southern District of New York quoted from a working draft of the EGI Model Law in its opinion denying recognition of the Dutch insolvency proceeding of Oi Brasil Holdings Coöperatief UA (Coop).[13] There, the Dutch trustee of Coop sought such recognition notwithstanding that:

*a* the Oi Group was a Brazilian enterprise that maintained nearly all its operations, management, principal executive offices, customers, assets and employees in Brazil;
*b* many of the Oi debtors, including Coop, were already subject to restructuring proceedings in Brazil (*recuperação judicial* (RJ));
*c* an RJ had previously been recognised by the US Bankruptcy Court as foreign main proceedings;
*d* Coop was merely a special purpose vehicle (SPV) used to finance the Oi Group as a whole; and
*e* Brazil was the preferred venue of the Oi Group.

The Coop dispute was highly contentious and costly, but had the EGI Model Law existed, the effects of the dispute might have been mitigated. The group representative of a hypothetical Brazilian planning proceeding for the Oi Group could have, among other things, petitioned the Dutch court for (1) recognition of the planning proceeding and (2) relief to support the development and implementation of an insolvency solution for the Oi Group as a whole. The existence and recognition of a planning proceeding might have reduced the likelihood of the contested recognition hearing in the United States. The same may be true for the case of OAS SA and its debtor affiliates, which also involved a COMI determination regarding a European SPV that served as a financing vehicle for a Brazilian enterprise.[14]

As I do each year, I want to thank each of the contributors to this book for their efforts to make *The Insolvency Review* a valuable resource. As each of our authors knows, this book is a significant undertaking because of the current coverage of developments we seek to provide. As in previous years, my hope is that this year's volume will help all of us, authors and readers alike, to reflect on the larger picture, keeping our eye on likely, as well as necessary, developments, on both the near and distant horizons.

**Donald S Bernstein**
Davis Polk & Wardwell LLP
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September 2019

13 *In re Oi Brasil Holdings Coöperatief U.A.*, 578 B.R. 169, 243 (Bankr. S.D.N.Y. 2017) (noting that 'the promotion of cooperation between courts and other competent authorities among States involved in cases of cross-border insolvency affecting members of an enterprise group' is a key objective of both the Enterprise Group Insolvency Model Law and reflects current trends in international insolvency law).

14 *In re OAS S.A.*, 533 B.R. 83 (Bankr. S.D.N.Y. 2015).



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Chapter 18

# 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: 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: Law of 7 December 2015 on the insurance sector, as amended.
*c* Regulated investment funds and fund managers:
- Law of 17 December 2010 relating to undertakings for collective investment (UCIs), as amended;
- Law of 13 February 2007 on specialised investment funds, as amended;
- Law of 15 June 2004 on the investment company in risk capital (SICAR), as amended;
- Law of 23 July 2016 on reserved alternative investment funds (RAIF); and
- Law of 12 July 2013 on alternative investment fund managers.

*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.
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, below, with the substantive provisions of Luxembourg insolvency law relating thereto.

### ii Policy

Luxembourg insolvency law boasts 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 just over 100 cases of controlled management in the past 25 years, roughly half 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, the 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 appears to be imminent.

A significant number of bankruptcies (which rose from the 935 in 2017 by more than 27 per cent in 2018 to a record 1,195),[8] and the general public acknowledgement of a shortage of appropriate instruments to deal with companies experiencing financial difficulties, led the

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 Source: Rapport des juridictions judiciaires, 2018; Rapport d'activité 2018 du Ministère de la Justice.

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

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, 301.

8 Source: Creditreform Luxembourg, communiqué de presse: 'Analyse de Creditreform sur l'évolution des faillites en 2018 au Luxembourg', 9 January 2019.



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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] This 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'.[10]

So far, 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. The legislative process is continuing; the latest amendments to the project were published on 6 March 2018 (see Section V.iii for further discussion about this draft legislation).

Finally, during the period from the financial crisis of 2008 to date, Luxembourg courts have resorted more to stay of payments proceedings in the form applicable to regulated entities, which were opened in some notable cases.[11]

### iii Insolvency procedures

#### *Main proceedings*

The procedures available in Luxembourg under the general insolvency regime are (1) compositions with creditors, (2) controlled management proceedings, (3) 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 (4) 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 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.

9 Luxembourg 2009 government programme, p. 108.

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

11 See, for example, failed banking institutions Lehman Brothers (Luxembourg) SA, Landsbanki Luxembourg SA, Glitnir Luxembourg SA and Kaupthing Bank Luxembourg SA in 2008–2009, and more recently ABLV Bank.



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### *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.[12] 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 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,[13] 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.[14] The starting point of the hardening period may at the earliest be set at a date six months prior to the bankruptcy judgment.[15]

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.[16]

---

12 Code of Commerce, Article 593.

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

14 Code of Commerce, Article 442.

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

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



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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 on the basis of the 'unity of the bankruptcy' principle resulting from case law, according to which the main effects of the foreign bankruptcy will automatically apply to the debtor.[17] 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.[18]

### 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.

#### *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 (1) the credit of the debtor is undermined, (2) the settlement in full of the debtor's liabilities is in jeopardy, and (3) 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.[19] Case law considers that a debtor must also act in good faith when making a request for an order of controlled management.[20]

#### *Bankruptcy*

A commercial company is considered bankrupt if (1) it can no longer pay its debts as they fall due, and (2) it can no longer raise credit.[21] 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.[22] Most bankruptcy decisions are taken upon petition of creditors, which, in 90 per cent of cases, are public authorities.[23]

Companies that meet the above-stated criteria must file for bankruptcy within one month of the cessation of payments.[24] Failure to do so will create a 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.

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

18 ibid.

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

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

21 Code of Commerce, Article 437.

22 Code of Commerce, Article 442.

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

24 Code of Commerce, Article 440.



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### 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.

#### *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.[25]

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, 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.[26] 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.

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

26 Code of Commerce, Article 477.



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### 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.[27]

***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.[28]

***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,[29] 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),[30] 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.

27 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.

28 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).

29 Commission de Surveillance du Secteur Financier.

30 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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***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.

***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,[31] 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.[32]

**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.[33]

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

31 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).

32 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.

33 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.



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for a regulation amending Regulation (EC) No. 1346/2000,[34] 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.[35] It applies to insolvency proceedings opened after 26 June 2017.

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

*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 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.[36] 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

Luxembourg's economy has coped relatively well with the economic crisis and even shows moderate growth prospects. However, the levels or unemployment and insolvencies are high.

### i General economic climate

According to the International Monetary Fund, the projected growth of Luxembourg's gross domestic product (GDP) for 2019 and 2020 is estimated to be 2.7 per cent and 2.8 per cent, respectively,[37] whereas according to the Luxembourg Institute of Statistics and Economics,

34 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.

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

36 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.

37 International Monetary Fund, 'World Economic Outlook, April 2019: Growth Slowdown, Precarious Recovery', April 2019, p. 157.



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GDP growth is predicted to be 3.4 per cent in 2019 and 3.3 per cent in 2020.[38] This is fairly consistent with the known growth between 1995 and 2018, which is an average of 3.5 per cent per year.[39]

The unemployment rate is estimated to remain at 5 per cent for 2019 and 2020.[40] The balance of public finances is likely to fall from 2.4 per cent of GDP in 2018[41] to approximately 1 per cent in 2019,[42] in line with a forecast decline in tax income.

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 and, to a lesser extent, the steel industry may be seen as weaknesses.[43]

Inflation is predicted to be 1.7 per cent in 2019 and 2020.[44]

The total net assets of undertakings for UCIs were estimated at €4,404.936 trillion as at April 2019 against €4,350.4 trillion as at March 2019, which represents an increase of 1.3 per cent over one month. Considering the period from April 2018 until March 2019, the volume of net assets was generally increased by 4.85 per cent.[45]

The aftermath of the Brexit referendum in the United Kingdom also raises questions, with certain studies predicting that its consequences for the United Kingdom and the European Union will be considerable.

### 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 – and rose to 1,195 in 2018.[46]

## III PLENARY INSOLVENCY PROCEEDINGS

The past eight or nine 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,[47] and certain investment funds that had invested in Bernard Madoff's funds.[48] There are nevertheless a few notable

38 Statec, Macroeconomic Forecast 1995–2020, Note de conjuncture, 6 June 2019.

39 ibid.

40 International Monetary Fund, 'World Economic Outlook, April 2019: Growth Slowdown, Precarious Recovery', April 2019, p. 45.

41 Statec, 'Déficit et dette publique des administrations publique et provision de données associées 2000–2018'.

42 Conseil national des finances publiques, 'Assessment of Public Finances – March 2019'.

43 Source: Coface.

44 Statec, Conjoncture Flash, 26 February 2019.

45 Commission de Surveillance du Secteur Financier [CSSF], 'Development of net assets and number of UCIs', 31 March 2019.

46 Creditreform Luxembourg, communiqué de presse: 'Analyse de Creditreform sur l'évolution des faillites en 2018 au Luxembourg, Baisse des faillites au Luxembourg', 9 January 2019.

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

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



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cases during the past 10 years 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[49] 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.[50]

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.[51] As a result of this statement, the shareholders of ABLV Bank in Latvia decided to go through a voluntary liquidation process.[52]

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.[53] 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.[54] On 9 March 2018, the CSSF request was rejected by the Luxembourg Commercial Court,[55] 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.[56]

### 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

49 Source: ABLV Bank official website.
50 Source: *Luxemburger Wort*, 24 February 2018.
51 Source: *Luxemburger Wort*, 24 July 2018.
52 Source: ABLV Bank official website.
53 Source: CSSF, press release, 19 February 2018.
54 Source: ECB, press release, 19 February 2018.
55 Source: *Paperjam*, 9 March 2018.
56 ABLV Bank Luxembourg, press release, 26 June 2019.



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(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.

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

### iii Telecom Luxembourg Private Operator

Telecom Luxembourg Private Operator SA (TLPO), a major network operator, submitted an application on 26 September 2016 to be placed under controlled management.[57]

In 2015, despite having a turnover of more than €10 million, TLPO recorded a loss of €2.9 million, bringing its cumulative losses to €12.1 million.[58] While acknowledging the situation in its annual report and keeping a close eye on a potential bankruptcy, the board of directors of TLPO approved the continuation of the company. This survival was sustainable thanks to the support of the main shareholder, BIP Investment Partners SA (BIP); however, BIP's later withdrawal led TLPO to insolvency. At the same time, negotiations were undertaken with interested investors (including Nomotech, a French network operator) and the controlled management submission was filed in parallel to enable TLPO to carry out its essential business in the meantime. This was deemed to be of significant importance since an interruption to internet access for TLPO's customers, which included certain large financial institutions, could have been dramatic for the Luxembourg financial sector.[59]

On 16 November 2016, the Tribunal d'arrondissement de Luxembourg delivered a judgment declaring the insolvency of TLPO following a bankruptcy petition submitted by the company.[60] Nevertheless, TLPO's activity was first taken over by Nomotech through its Luxembourg subsidiary, Luxnetwork SA.[61]

57 Jean-Michel Gaudron, 'Gestion contrôlée demandée pour Telecom Luxembourg', *Paperjam*, 26 September 2016.

58 ibid.

59 Alexandra Parachini, 'La place financière luxembourgeoise a évité une crise majeure', *Le Quotidien*, 17 November 2016.

60 Tribunal d'Arrondissement de Luxembourg, Extrait, Inscription d'une décision judiciaire au RCS, 17 November 2016.

61 Thierry Labro, 'NomoTech reprend Luxembourg Telecom', *Luxemburger Wort*, 17 November 2016.



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## IV ANCILLARY INSOLVENCY PROCEEDINGS

No secondary insolvency proceedings were initiated in Luxembourg during the period of review.[62] 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.[63]

## V TRENDS

### i Predicted level of insolvency activity in the coming year

The first results for 2018 show an upsurge in the number of bankruptcies, with 611 insolvencies during just the first six months of the year,[64] following a fall in numbers to 983 insolvencies in 2016 and 935 insolvencies in 2017.[65]

### 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.[66]

Cases of criminal liability opened against directors (or members of the relevant management body) have remained low.[67]

### iii Expected legislative developments

Expected changes in insolvency law result from Draft Bill No. 6539 on business preservation and modernisation of bankruptcy law, dated 26 February 2013 (the Draft Bill). This is currently under analysis by several commissions within Parliament.

As discussed in Section II, on 6 March 2018 the government published a modified version of the Draft Bill, in response to opinions from various bodies, including the Council of State, which is intended to provide new and tailored tools to distressed companies, and

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

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

64 Source: 'Poussée « inquiétante » des faillites', *Paperjam*, 12 July 2018.

65 Registre de Commerce et des Sociétés de Luxembourg, 'Relevé des décisions judiciaires déposées au RCS', 2018.

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

67 Rapport des juridictions judiciaires, 2009 and 2012.



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the main objectives of which are the preservation of distressed companies' activities and the protection of stakeholders (e.g., employees), notably by favouring reorganisations over liquidations.[68]

The Draft Bill, strongly inspired by the Belgian law on business preservation dated 31 January 2009, is built around four guiding principles: a preventive aspect, a restorative aspect, a repressive aspect and a social aspect.

***Preventive aspect***

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 Secretariat of the Economic Committee (SEC), which has a central role concerning non-judicial reorganisation proceedings, and the Evaluation Committee for Businesses in Difficulties, which analyses on behalf of its members – the public authorities – whether a bankruptcy petition is appropriate.

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 the SEC the appointment of a business arbitrator, 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 arbitrator.

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 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.

68 Luxembourg 2009 government programme, p. 108.



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***Restorative aspect***

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.

***Repressive aspect***

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. 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***

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, authors have already highlighted some difficulties that could arise in term of material resources allocated to the undertakings involved.[69] 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.[70]

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

70 Avis de la Chambre du Commerce, 2 December 2013.



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**Appendix 1**

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Clara worked as an in-house counsel in Paris from 1999 to 2002. She became a member of the Luxembourg Bar in 2003.

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Clara holds a master's degree in business law and a diploma of specialised study in industrial property law from the University of Paris II Panthéon-Assas (France), and a master of laws degree (LLM) from the Ludwig Maximilian University of Munich (Germany).

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He advises major private equity firms and alternative fund managers on the structuring and financing of cross-border buy-out transactions and private investments, the formation of joint venture companies and private investment vehicles, corporate restructurings, exit strategies, corporate governance matters and shareholder relations.

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).

He was seconded to the New York office of Arendt & Medernach in 2008–2009, during which time he advised US clients on Luxembourg corporate law matters.



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He has been a member of the Luxembourg Bar since 2005. Prior to joining Arendt & Medernach, Grégory worked in Switzerland within the legal department of a leading French investment bank.

He is a conferee of the Conference of European Restructuring and Insolvency Law, and a member of INSOL Europe and the European Law Institute.

He is a lecturer at the University of Luxembourg and a visiting lecturer at the Catholic University of Louvain (Belgium), the University of Paris-Est Créteil Val de Marne (formerly Paris XII) (France) and the University of Strasbourg (France), and is a frequent speaker at conferences and seminars. Grégory is the author of numerous articles on issues related to his areas of expertise. He is also a recipient of the prize awarded by the Luxembourg Association of Banking Law Lawyers (ALJB) for his study on the conflict of laws rules concerning set-off and netting in the financial sector.

Grégory holds a master's degree in law from the Catholic University of Louvain (Belgium) and a master's degree in business law from the Universities of Geneva and Lausanne (Switzerland). He also holds degrees in philosophy and in economics and social ethics from the Catholic University of Louvain (Belgium).

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