Luxembourg

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Section 1: PROCESSES AND PROCEDURES

1.1 What reorganisation and bankruptcy processes are available for financially troubled debtors?

Bankruptcy is regulated by articles 437 to 592 of the Commercial Code. Bankruptcy may be initiated by the debtor itself, by the public prosecutor or by a creditor. The procedure applies to a debtor who meets both of the following criteria: (i) not being able to pay due debts; and (ii) not being able to raise credit. The Commercial Chamber of the District Court (court) will appoint a bankruptcy trustee in charge of the bankruptcy and a judge to supervise the proceedings on granting the petition. Its aim is to realise the debtor's assets and pay the creditors through the recovered assets.

The suspension of payments is regulated under article 593 of the Commercial Code. It has to be initiated by the debtor. The suspension of payment applies if extraordinary and unprecedented events mean that a suspension of payment is necessary, if it appears that the creditor will be paid in full or that the debtor's insolvency is temporary, and if the suspension of payment is approved by a majority in number of the ordinary creditors holding 75% of the debtor's outstanding liability. The court decides whether or not to apply such suspension. The objective is to provide to the debtor breathing space to pay its current debts and safeguard its activity.

Controlled management is regulated by the Luxembourg Grand Ducal Decree of May 24 1935, as amended. It may only be initiated by the debtor. Controlled management may be granted if the credit of the debtor is undermined, the settlement in full of the debtor's liabilities is in jeopardy and 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. It is the court's decision whether to apply controlled management or not. The procedure aims at providing the debtor with the time to restructure its business or to sell its assets and pay its creditors.

Preventive composition is regulated by the Luxembourg Act of April 14 1886, as amended. The debtor should file an application before the courts with documents justifying its state and which show the consent of the majority of its creditors representing three-quarters of the claims. This process is not available where the debtor meets both of the two criteria for bankruptcy. It is up to the court to decide whether or not to apply preventive composition. The objective is to avoid the bankruptcy of a debtor that has become insolvent for reasons other than fraud or negligence.

Specific insolvency procedures, which are similar to the above procedures, exist for professionals in the financial sector and in the insurance sector (see 1.8).

1.2 Is a stay on creditor enforcement action available?

In a controlled management procedure, the court's decision to delegate a judge suspends the enforceability of judgments. The court's decision pronouncing the suspension of payments or, in the case of preventive composition, the court's official decision applying preventive composition both have the same effect. The court's decision pronouncing the bankruptcy will stop the civil proceedings against the debtor. In the case of preventive composition, the court's official decision applying preventive composition will also stop the civil proceedings against the debtor.

These rules do not apply to secured creditors holding securities benefiting from the law of August 5 2005 on financial collaterals, as amended. Such creditors are allowed to continue the enforcement of their actions.

1.3 What are the key features of a reorganisation plan and how is it approved?

Involuntary reorganisation plans do not exist in Luxembourg. A voluntary reorganisation plan may exist under a controlled management. The court delegates one of its judges to examine the debtor's financial situation and determine if any prospect of reorganisation exists. The court decides whether or not to grant the application for controlled management of the debtor and then appoints administrators to draft a plan and deliver this plan to the creditors and to the court. The plan must be approved by more than 50% in number of the creditors representing more than 50% in value of the debtor's liabilities and also by the court. The creditors are not divided into classes. Once approved, the plan becomes binding on all creditors and the debtor. If the debtor does not perform its obligation, any creditor may institute court proceedings for cancellation. As mentioned above, the assignment of the delegated judge prevents creditors from enforcing claims and court decisions against the debtor.

1.4 Can a creditor or a class of creditor be 'crammed-down'?

The rank of a debtor is established by law and is as follows for assets which are not subject to any specific security interest: (i) claims in relation to the expenses of the bankrupt estate; (ii) employee claims (last six months' wages amounting to a maximum of six times the minimum social salary or indemnification resulting from the termination of the employment agreement); (iii) employee contribution to social security claims; (iv) direct and indirect tax claims; (v) employer contribution to the social security claims; landlord claims, pledgor out of the Financial Collateral Law claims and vendor's privilege claims; and, (vi) ordinary unsecured claims.

This ranking may not be altered and constitutes the minimum legal framework. Specific agreements between debtors and creditors are allowed subject to such legal framework. There is no legal provision allowing the court or the bankruptcy trustee to change this rank, and no way to cram down a creditor without his prior consent.

Finally, creditors holding securities benefiting from the law of August 5 2005 on financial collateral, as amended, are 'out of the mass', which means that they may enforce their securities and that they need not compete with the other creditors.

1.5 Is there a process for facilitating the sale of a distressed debtor's assets or business?

No, there is no process for facilitating the sale of a distressed debtor's assets or business. The bankruptcy trustee is in charge of the organisation of the sale of real estate property, goods and movable property and may therefore engage his own liability in the process of sale.

The concept of stalking horse bids during the sale of assets does not exist under Luxembourg law. Credit bidding in sales is not foreseen as such but legal compensation could be applicable if the legal compensation is the best offer.

1.6 What are the duties of directors of a company in financial difficulty?

Directors of companies in financial difficulties have to be prudent and diligent.

In general, directors are not liable for the company's obligations, but they may be liable for the increase of a company's debt if they did not file a petition for bankruptcy within a month of the conditions of the bankruptcy having been met.

Directors of a *société anonyme* also have the obligation to convene a general meeting so that it can be held within two months of the time when the loss of half the corporate capital was or should have been ascertained.

Directors may also be liable for not having paid the taxes. Articles 108 and 109 of the General Tax Act state the responsibility of the directors in the case of non-payment of taxes is a personal fault of these directors and they may be asked for payment in place of the company.

Directors have a duty to cooperate with the bankruptcy trustee, especially at the beginning of the insolvency proceedings.

From a criminal perspective, directors can de subject to wrongful or fraudulent bankruptcy.

1.7 What priority claims are there and is protection available for post-petition credit?

(See 1.4 for the ranking of claims).

There is no special provision on post-filing credit. Nevertheless, in such a case a creditor providing a post-filing credit will be a creditor of the mass.

The law of August 5 2005 on the collateral, as amended, does not allow for taking security after the beginning of an insolvency procedure (the bankruptcy judgment for a bankruptcy, the first judgment appointing the delegated judge for a controlled management).

1.8 Is there a different regime for banks and other financial institutions?

Professionals of the financial sector and insurance companies are subject to specific insolvency procedures.

Two separate insolvency procedures are provided by the law of April 5 1993 on the financial sector, as amended. These procedures may apply to credit institutions and professionals of the financial sector:

- stay of payments: this may be applied by the entity itself or by the CSSF (the supervisory authority of the financial sector). The result of such a request is the suspension of all the payments by the entity and the prohibition of the entity from taking any action without the prior consent of the CSSF;

- judicial liquidation: this applies if the stay of payment procedure did not restore the financial situation of the entity or when the entity can no longer meet its commitments. The judicial liquidation is ordered by the district court following a request from the public prosecutor or from the CSSF.

The law of December 6 1991 on the insurance sector as amended states equivalent provisions for insurance companies.

Section 2: INTERNATIONAL/CROSS BORDER ISSUES

2.1 Can bankruptcy or reorganisation proceedings be opened in respect of a foreign debtor?

Entities that do not fall within the territorial jurisdiction of the Luxembourg court are excluded from Luxembourg's customary insolvency proceedings.

Luxembourg courts will not exercise jurisdiction over proceedings aimed at companies domiciled outside of Luxembourg except in the following situations: (i) urgent or protective measures; (ii) no other competent jurisdiction; (iii) as secondary proceedings as part of the EU cross border insolvency system.

2.2 Can recognition and assistance be given to foreign bankruptcy or reorganisation proceedings?

There is no specific duty for the court and the bankruptcy trustee to cooperate with foreign courts and officers in the case of cross-border insolvency proceedings.

Luxembourg law is based on the universality of insolvency proceedings.

Luxembourg courts may recognise foreign proceedings when the conditions for recognition of foreign judgments are met and provided that such foreign proceedings do not conflict with domestic insolvency proceedings.

With regard to proceedings opened in another EU member state, the court of the member state in which the debtor's centre of main interest (COMI) is situated has jurisdiction over the insolvency proceedings. The registered office is presumed to be the COMI of the company.

Section 3: OTHER MATERIAL CONSIDERATIONS

3.1 What other major stakeholders (eg governmental or regulatory institutions) could have a material impact on the outcome of the reorganisation?

The main impact on employees could be under a reorganisation. All default protections provided by the Luxembourg labour law (which are public order provisions) will apply.

As regards banks and professionals of the financial sector, the CSSF will be involved in the proceedings (see above 1.8).

Section 4: CURRENT TRENDS

4.1 In no more than 200 words, outline any current bankruptcy and reorganisation trends specific to your jurisdiction.

Major cases

Four of Banco Espirito Santo related holding companies filed an application for controlled management and were admitted to the preliminary phase of the procedure. Later, these applications for controlled management were turned down and all five companies were declared bankrupt.

The bankruptcy trustee of one of the companies filed lawsuits with the Lisbon Administrative Court on November 30 2014 by challenging the hive-off of Novo Banco and the resolution of BES by Bank of Portugal.

In the bankruptcy judgments of Rio Forte and Espirito Santo International, the Luxembourg court made use of the option given to it by law to set, as a precautionary measure, the starting point of the claw-back period. The claw-back period is a fictional period during which the company will be deemed to have been insolvent and during which certain transactions may be subject to automatic or conditional nullity, six months prior to the date of admission to the procedure of controlled management.

Insolvency law changes

Changes in insolvency law are expected to be introduced by Draft Law No. 6539. The Draft Law proposes the introduction of certain preventive measures: (i) a conciliation process, which will allow an undertaking in difficulty to request the appointment of a business mediator to the secretariat of the Economic Committee; (ii) a reorganisation procedure by arrangement in order to facilitate an agreement; and, (iii) a court protection by a judicial reorganisation procedure. A company may request the grant of a stay by the court.

The Draft Law introduces a second chance for the unfortunate trader under the condition that this trader is deemed to have acted in good faith and assuming this person has not been held personally liable for the outstanding debts of the failed business.

The Draft Law also introduces an administrative dissolution without liquidation for the 'empty shells', which will enable the liquidation of a business which has no assets without opening bankruptcy proceedings.

Finally, a simple management fault instead of a serious misconduct will be the standard of proof for debt contribution actions or prohibition on carrying out commercial activities.

A new EU regulation on insolvency proceedings has been in preparation and will be enacted by 2017. It will contain new provisions, among others, regarding the cooperation between jurisdictions of the member states.

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