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Debt Finance 2025

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Luxembourg: Law and Practice & Trends and Developments

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Loyens & Loeff

LUXEMBOURG

Law and Practice

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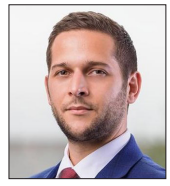

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1. Market

1.1 Debt Finance Market Performance

Located in the heart of Europe, Luxembourg remains an attractive location for international groups, investors and banks to establish their activities or investments. It remains a prime jurisdiction for debt, credit and opportunities funds and other major players in acquisition financing or development financing. Although the general context of inflation is not favourable for new real estate financing, sustainable financing (and the development of the green stock exchange) is still growing.

The emergence of debt funds as an alternative to regular third-party debt has kept the market busy during the last year, as have restructurings, whether by means of a consensual route or by enforcing Luxembourg security.

1.2 Market Players

Luxembourg is the second most popular financial jurisdiction for investment funds in the world, after the United States of America, and is the go-to place to establish new investment funds carrying on investments in Luxembourg and abroad. During the past two years in particular, debt funds have become an alternative to the usual European or international banks when looking for external financings.

Being an onshore, stable jurisdiction of good repute, Luxembourg is the go-to location to structure acquisitions, investment vehicles and financing in general. Luxembourg's attractiveness is further enhanced by the efficiency of the enforcement of collateral granted over Luxembourg companies.

Luxembourg is also recognised for its stock exchange, where debt securities are listed on regulated markets or the Euro MTF market, but the country is also known for its innovation as the world's first and leading platform dedicated exclusively to sustainable finance.

Based on the foregoing, Luxembourg is able to attract major local, European and international banks, investment funds and other lending or investment vehicles who choose to provide their services, make investments, attract clients or list their securities.

1.3 Geopolitical Considerations

The already fragile market is suffering from the geopolitical situation and the related crisis in Europe, with inflation, increases in interest rates and concerns about asset class pricing slowing it further.

Despite this turbulence, the Luxembourg market remains stable, although the regularity of deals has been impacted. The banking and finance industry and the cross-border market remain dynamic in terms of either pure financing or refinancing, as many credit agreements have been renegotiated to extend their term or amend the financial covenants. Furthermore, a number of restructurings were implemented in 2023 and 2024, either through a pure corporate or debt restructuring or by means of enforcement. These trends remain applicable for 2025, although market players predict an increase in transactions and new deals for the last quarter of the year.

2. Types of Transactions

2.1 Debt Finance Transactions

As the Grand Duchy of Luxembourg is a rather small country, few industrial players are present, and real estate assets are rarely located in Luxembourg. Nevertheless, Luxembourg vehicles

are often used to structure acquisition and related financing, irrespective of their location. Therefore, acquisition finance and debt restructurings are commonly structured via Luxembourg.

Bond issuances are more frequently used, including in the case of restructurings. Their terms and conditions are usually governed by US or English law, but Luxembourg law-governed terms and conditions are on the rise due to the appetite and flexibility of the Luxembourg markets.

In addition, Luxembourg law expressly allows the issue of bonds by a Luxembourg company under a foreign law and the possibility to disapply all provisions of the Luxembourg Law of 10 August 1915 on commercial companies, as amended, relating to bond issuances.

Finally, Luxembourg law has recently added more flexibility by extending the possibility to issue bonds (publicly or not) to additional forms of companies.

3. Structure

3.1 Debt Finance Transaction Structure

The main financing documents, such as bank facility agreements, are based on Loan Market Association (LMA) or Loan Syndication and Trading Association (LSTA) standard loan agreements.

Structures involving Luxembourg entities may differ depending on the aim of the financing transaction and the circumstances. For example, a specific holding company may be implemented at an upper level in order to allow the roll-over of management and key persons. Another example would be if there is an issuance of notes or bonds at the acquisition company level and a senior or mezzanine loan is granted at the holding company level (in order to separate the security package).

A typical structure would be to have a top or master Luxembourg holding company receiving the funds and acting as an umbrella company, with various Luxembourg or foreign law-governed subsidiaries holding the relevant *"silos"* structure. Another typical structure is to have a Luxembourg holding company acting as a joint venture company for investors, itself holding a Luxembourg company or a foreign subsidiary that will be the parent of the targeted company.

4. Documentation

4.1 Transaction Documentation

In almost every financing, a Luxembourg vehicle would be financed by its parent, either by means of equity (shares, premium or reserves) or by debt (loans or other debt instruments). The external debt portion can take various forms, such as senior loans, mezzanine loans, first and second lien and payment-in-kind (PIK) loans or a debt securities issuance. The form used varies depending on the financing needs, the market conditions and the availability of certain sources of financing or the needs of certain lenders.

International banks usually grant the senior loans but tend to mitigate their risk by syndicating the debt shortly after the first utilisation. Syndication occurs within six months to a year and allows other participants, such as securitisation vehicles or other debt funds, to hold a portion of the debt.

With the rise in interest rates and international banks being more cautious before granting

a loan, a new player has emerged: debt funds have seized the opportunity of the crisis to take a place in the debt market. Although they are more reactive and more adapted to the relevant market, their funding may be rather expensive, depending on the investors' appetite for financing risk.

4.2 Impact of Types of Investors

The terms of a bank loan facility agreement vary depending on whether or not the borrower/sponsor is in a strong position and the bank is keen to lend them funds. The provisions of the loan would then contain fewer representations and covenants and a less stringent loan-to-value ratio. However, change of control provisions and commitment fees would be more extensive.

4.3 Jurisdiction-Specific Terms

Usually, terms related to insolvency proceedings and local reorganisation procedures are included in the cross-border documentation when such proceedings are not governed by Luxembourg law, as Luxembourg may apply different criteria.

5. Guarantees and Security

5.1 Guarantee and Security Packages

Luxembourg companies in acquisition structures are commonly holding companies, whose main assets consist of the holding of participations, intercompany receivables and assets on bank accounts.

The most common forms of security are pledges, assignments and transfers by way of guarantee (and, with respect to real estate, mortgages). Sometimes, Luxembourg companies also hold intellectual property rights and real estate.

The Law of 5 August 2005 on financial collateral agreements, as amended (the *"Financial Collateral Law"*), provides for a strong framework where financial collateral arrangements are largely excluded from the scope of bankruptcy. The security governed by the Financial Collateral Law benefits from appealing features, such as:

- confidentiality – agreements are concluded under private seal and are not subject to registration with public authorities nor published on a national register;
- an extended scope of application, as financial collateral is defined very broadly in the Financial Collateral Law;
- the existence of different rankings of pledges;
- the flexibility to regulate the rights of the parties during the term of the agreement (use of the rights, use of collateral assets, distributions, etc);
- straightforward and cost-efficient perfection requirements;
- no requirement for prior notice in the case of enforcement; and
- remoteness against the bankruptcy or insolvency of the pledgor.

The Financial Collateral Law provides for three types of security:

- transfer of ownership by way of security interest (*transfert de propriété à titre de garantie*);
- a repurchase agreement (*mise en pension*); and
- a pledge over collateral (assets) (*gage sur avoirs*).

The latter is the most common collateral in acquisition finance and is usually materialised by:

- a pledge over the shares (or other type of equity securities) of the holding company located in Luxembourg;
- a pledge over its material accounts opened with a financial institution located in Luxembourg; and
- a pledge over the intragroup claims and over capital commitment (with respect to Luxembourg funds) owed to the Luxembourg company.

Shares

Pledges over shares (including future shares and related assets) and other equity instruments are a must. The pledge is entered into by the owner of the shares and the pledgee, who is usually the security agent acting for the various lenders. The agreement itself will reflect the commercial agreement related to the exercise of voting rights, the use of the pledged assets and distribution. The enforcement method shall also be specifically described (as required by law).

Bank Accounts

Pledges can be taken over cash or securities accounts located in Luxembourg. Accounts can be operated freely even when pledged, or can be blocked depending on the agreed commercial terms in the pledge agreement. To permit a first ranking pledge, the account bank will be asked to waive its general pledge over the account (during the term of the pledge created under the specific pledge agreement) and to acknowledge the pledge.

Receivables

Intragroup receivables are usually pledged. As fund financings are used more often in Luxembourg, the scope of receivable pledges has been widened and can now include capital commitments (as those are assimilated to claims). The perfection requirements depend on the type of asset.

Customarily, the security agreements will cover any additional and future collateral entering into the possession of the grantor of the security. If additional instruments are acquired by the pledgor, the inscription of the pledge will need to be updated.

Shares and Other Forms of Securities (Equity or Debt)

The company whose securities are pledged should either be a party to the pledge agreement or be notified of the pledge.

For securities in registered form, perfection is made through registration in the relevant register of the relevant securities of the pledge. For securities in bearer form, perfection is made through registration in the relevant register held by the depositary agent.

Bank Accounts

To allow a first ranking pledge, the account bank will be requested to waive its general pledge to the pledged account(s) and to acknowledge and accept the pledge granted by the account holder to a third party.

Receivables

The debtor owing the pledge receivable to the pledgor should either be a party to the pledge agreement or be notified of the pledge.

A pledge over receivables due from third parties that is not perfected has an impact on enforceability and ranking, as the debtor is not aware of the pledge.

5.2 Key Considerations for Security and Guarantees

The Financial Collateral Law provides that financial collaterals may be held by a person designated by the beneficiaries (ie, security agents acting for the lender(s)) without owning any secured debt (so no parallel debt mechanism is needed). Security trustee arrangements are also recognised under the Financial Collateral Law.

Luxembourg law does not recognise the concept of trust per se, but foreign law trust arrangements are recognised in accordance with the Hague Convention of 1 July 1985 on the law applicable to trusts and on their recognition (Hague Trusts Convention), ratified by a Luxembourg law dated 27 July 2003 on trusts and fiduciary contracts, as amended from time to time. Luxembourg law has implemented the concept of the fiduciary (*fiducie*), which does not offer the same features as a trust.

Financial assistance is defined under Luxembourg law as advancing funds, making loans, granting security and providing guarantees by a Luxembourg company for the purpose of the acquisition of its shares by a third party. Financial assistance only applies to certain forms of companies, such as public limited liability companies (*société anonyme and société anonyme simplifiée*) and corporate partnerships limited by shares (*société en commandite par actions*). Transactions concluded by banks and other financial institutions in the normal course of business, and transactions effected with a view to the acquisition of shares by or for the employees of the Luxembourg company or certain group companies, are not subject to such conditions, with the exception of the net asset test condition.

Financial assistance may be provided under the responsibility of the board of directors under the following conditions (called the whitewash procedure):

- fair market conditions (particularly regarding interest received by, and security provided to, the company);
- the interest of the company;
- an investigation of the credit standing of the relevant third party;
- the submission to the general meeting of shareholders of a report by the board of directors covering, inter alia, the reasons for the transaction, the interests of the company, the conditions, the liquidity and solvency risks, and the price at which third parties are willing to acquire the shares – this report must also be filed with the register of commerce and companies, and will be published;
- the approval by the general meeting of shareholders at qualified majority; and
- the net assets test – the financial assistance provided is considered as if it were a distribution and therefore must not cause the net assets of the company to fall below the share capital and non-distributable reserves of the company. Among the liabilities in the balance sheet, the company shall include a reserve, unavailable for distribution, of the amount of the aggregate financial assistance.

The granting of guarantees and security shall be examined at the company level and is subject to corporate interest and power. The granting of upstream security or guarantees must therefore be expressly allowed or provided by the company's corporate object. The corporate interest analysis remains a matter of fact and shall be assessed by the relevant management body of the Luxembourg company.

To the extent the foregoing conditions are fulfilled, a Luxembourg company may only grant security or guarantee for its own benefit or the benefit of group companies or third parties (including upstream or cross-stream security), subject to certain conditions. The granting of security over its assets and the provision of guarantees are not considered to be in the normal course of business of companies, as they may result in the company being placed in distress in case of an enforcement. Whether such operation is allowed and benefits the company shall be assessed on a case-by-case basis. The conditions to be satisfied relate to corporate power, corporate authority and corporate benefit.

Corporate Power

Limits on corporate power can be imposed either by law or by the articles of incorporation of the company.

Limits on corporate power imposed by law

There have been discussions to assess the possibility for a Luxembourg company to grant a guarantee or a security without monetary consideration. However, this situation would contradict the core aim of a commercial company, which is to make profits.

The discussions then moved from the granting of guarantee or security without consideration to the form or type of consideration that can be received by the Luxembourg company, whether such consideration can be direct or indirect and if the notion of profit can be extended to an indirect profit (or foreseeable profit).

Non-monetary consideration, indirect profit or expected future outcomes may now be considered as a cause to grant a guarantee or security. Therefore, the validity of a proposed guarantee or security for a company can be challenged in exceptional cases when the circumstances do not reasonably allow justification, even indirectly, of a potential benefit thereof or a motivated interest therefor.

Limits on corporate power imposed by the articles of incorporation

The articles of incorporation of the company set forth the corporate governance and the limits of decision making. The object clause, in turn, sets forth the limits within which the management is entitled to develop and carry out the company's activity.

Luxembourg companies that are party to an acquisition structure will have a financial participation company object – ie, an object limited to holding and managing participations in other companies in Luxembourg or abroad. The granting of security or guarantees (including cross and upstream guarantees) shall be expressly provided in the corporate object.

If the provision of a guarantee or security by a Luxembourg company would be considered to exceed the corporate object provided under the articles of incorporation, it can be considered as ultra vires. In such case, if the guarantee or security has been signed in accordance with the articles of association, the company shall be considered to be bound by the relevant transaction; however, its management may be held liable.

Corporate Authority

Decisions on the granting of guarantees or security fall within the competence (and under the responsibility) of the board of directors/managers, unless otherwise provided by the articles of association of the Luxembourg company. The members of the board shall take their decision based on all factual matters available to them,

draft documentation and usually the financial and commercial elements of the transaction. Particular attention should be paid to:

- the interest rate applicable to the guaranteed obligation;
- the interest payment date, reimbursement, termination dates and options;
- specific representations and warranties;
- negative pledges;
- covenants; and
- the effect of their decision on the financial capacity of the company.

The minutes of the meeting of the board of managers/directors shall reflect the discussion accordingly and the assertions made by the members in order to justify the corporate benefit. Usually, the transaction is approved together with all related transaction documents. A specific power of attorney is generally granted to any manager/director to finalise and execute the documentation.

Corporate Benefit

A Luxembourg company must always act in its corporate interest, which can be linked to the French concept of *intérêt social*.

The corporate interest is not defined by law as such, but has been developed by doctrine and court precedents. Different interpretations have been made, but the broad interpretation that prevails is based on the institutional theory of the company and concludes that the interest of the company is more than the interest of the shareholders but is the interest of the company in itself as a legal entity and for its own benefit.

Whether an action is in the corporate interest of a company is a matter of fact rather than a legal issue. The board of managers is responsible for this determination, which is made on a case-by-case basis in light of all prevailing circumstances. The assessment shall be made by the management body, and the members of the management board are solely responsible for this assessment at the level of the Luxembourg company.

The test for determining whether a Luxembourg company has acted in its corporate interest when entering into a transaction is first applied on a standalone basis. If a company is to receive appropriate remuneration in relation to the transaction it is entering into, it is generally considered that the transaction is in its corporate interest.

A company will usually be able to evidence its corporate interest simply by looking at its own situation in isolation. This is typically the case where a guarantee is issued or a security granted as a downstream guarantee or security in favour of the debts of a direct or indirect subsidiary, or if returns are anticipated in the future. This can also be the case if the company is to guarantee or secure a debt that is ultimately on-lent to it or its subsidiaries.

In acquisition financing transactions, all group members will usually be asked to give guarantees and provide security to secure the borrowers' obligations. Guarantees and security may be downstream, upstream and/or cross-stream.

There is no Luxembourg legislation governing group companies that specifically regulates the establishment, organisation and liability of groups of companies, so the concept of *"group interest"* as opposed to the interest of the individual corporate entity is not expressly recognised. However, based on current French and Belgian case law, and provided that the corporate object allows the granting of guarantees to

group companies, a Luxembourg company is legitimately following its corporate interest if (i) there is a group of companies (to which the company belongs), (ii) it can be evidenced that the company derives a benefit from granting such assistance (eg, if more advantageous credit terms can be obtained both at the group level and at the level of the Luxembourg company), and (iii) the assistance is not disproportionate to the company's financial means and the benefits derived from granting such assistance in terms of the amounts involved.

Although the notion of a group interest is not recognised in Luxembourg, it can be evidenced by means of the equity participation in the various entities. The interest and benefit shall be common and is usually financial or social. It is also evidenced in the due diligence made on the targeted group or asset, and in the aim and strategy to be implemented by the newly formed group (refinancing indebtedness, integrating an international component related to the targeted clients or markets, or expansion).

The guarantee granted must not exceed the financial abilities of the committing company. In this respect, a certain practice has developed in Luxembourg and certain other jurisdictions whereby it is customary to include *"guarantee limitation"* language that limits the guarantee to a percentage of the net assets of the company. Although said clauses give comfort in this respect, the inclusion of guarantee limitation language is not itself sufficient to justify the corporate benefit of the company.

The provision of a guarantee may be remunerated in order to justify the corporate interest and benefit of the company to grant such guarantee. Such remuneration can take different forms, such as a fee or other monetary consideration.

As underlined, the assessment of the corporate interest criteria shall be carried out on a case-by-case basis, reviewing all the facts related to the applicable situation. Failure to have a specific corporate interest at the Luxembourg entity level can trigger the liability of the managers/directors (who have not done their assessment properly) and the potential annulment of the transaction on the grounds of illegal cause (*cause illicite*) if the Luxembourg courts consider the transaction to be a misappropriation of the corporate assets of the Luxembourg company. Anyone with a legitimate interest can bring an action before the Luxembourg courts (eg, shareholders, creditors of the shareholders and other creditors of the company).

6. Intercreditor Issues

6.1 Role of Intercreditor Arrangements

Almost all international acquisition financing transactions in Luxembourg include an intercreditor component or a subordination, regardless of their volume or the number of layers of financing involved. Intercreditor and subordination agreements are generally governed by a foreign law, but Luxembourg law is sometimes chosen.

Intercreditor arrangements related to acquisition finance structures set forth the commercially agreed respective rights of the finance parties as well as those of the intragroup lenders and shareholders, including ranking and priority. The application of payments and proceeds, the consequences of the occurrence of events of default and enforcement are included in the intercreditor arrangements, which also regularly include the appointment and terms of the security agent.

6.2 Contractual v Legal Subordination

Luxembourg law does not have specific provisions related to subordination itself beside the pari passu principle, which protects the principle of equality of creditors. The subordination principle will therefore fall under the freedom of contract provided under the Luxembourg Civil Code if a party agrees to contractually subordinate its claims to another party. Such subordination is usually dealt with in intercreditor agreements or subordination agreements, which are usually governed by English law or US law.

7. Enforcement

7.1 Process for Enforcement of Security

Criteria for Enforcement

Events of default and enforcement events are freely determined between the parties, and usually cover non-payment, the commencement of insolvency proceedings and material breach of contract.

The main financing agreements (such as the credit agreement) may provide that the debt shall be accelerated prior to the enforcement. This criteria should be checked on a case-by-case basis.

Procedures for Enforcement

Guarantees are usually simply enforced my means of notice. Such enforcement formalities are usually set forth in the guarantee agreement itself.

The procedures for the enforcement of security differ depending on the type of security being enforced. Mortgages and civil and commercial pledges are enforced by a public auction sale of the pledged assets. Debtors shall be notified by a bailiff before an enforcement procedure can begin.

For pledges on financial instruments governed by the Financial Collateral Law, several enforcement remedies are available. Unless otherwise agreed between the parties, no prior notification shall be given to allow the enforcement.

The pledgee may choose the manner of enforcement as set forth by the Financial Collateral Law. One or more of the following methods can be applied:

- appropriation of the pledged assets or causing the appropriation of the pledged assets by a third party at a price determined prior to or after its appropriation in accordance with an agreed valuation method – the valuation methodology has to be agreed between pledgor and pledgee, and is usually provided in the relevant security agreement;
- selling or causing the pledged collateral to be sold by private sale in a commercially reasonable manner;
- by sale over a stock exchange or by public auction;
- obtaining a court order that the pledged assets are attributed to the pledgee in discharge of the secured liabilities, according to a valuation made by a court-appointed expert;
- to the extent possible, setting off the pledged assets against the secured obligations;
- if the relevant financial instruments are listed, appropriating these financial instruments at the market price, or if they are units or shares of an undertaking for collective investment that determines and publishes a net asset value on a regular basis, at the price of the latest published net asset value; and

- if the pledged assets are monetary claims owed by a third party, demanding payment from the third party, subject to certain conditions.

Effect of Insolvency Proceedings on Enforcement

The occurrence of an insolvency proceeding rearranges the order of priority of creditors and payments. It can also challenge the validity of certain transactions (including payments, granting of guarantees or security, sale of assets) and agreements concluded during the hardening period (*période suspecte*) and/or up to ten days preceding the hardening period. The date on which the hardening period starts is fixed by the court, but it is a maximum of six months (plus ten days) before the start of insolvency proceedings.

However, securities governed by the Financial Collateral Law are excluded from the bankruptcy estate, and an enforcement may therefore take place.

7.2 Enforcement of Foreign Judgments

The procedure for enforcing judgments depends on the forum chosen by the parties in the relevant agreement and the country in which such judgment has been issued. If the chosen forum is located in an EU member state (including Denmark), a judgment rendered by such competent court will be recognised and enforced in Luxembourg subject to the provisions of Regulation (EU) 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters or Regulation (EC) 805/2004 creating a European Enforcement Order for uncontested claims.

If the judgment is issued by a UK court pursuant to an exclusive jurisdiction competence clause included in the relevant agreement, then a final and conclusive civil or commercial judgment rendered by such competent court will be recognised and enforced in Luxembourg in accordance with, and subject to the conditions set out in, the Hague Convention on choice of court agreements (the Hague Convention on Choice of Court Agreements), provided the recognition or enforcement of the judgment is not refused on the grounds specified therein.

If the chosen forum is located in Switzerland, Norway or Iceland, then a final and conclusive civil or commercial judgment rendered by such competent court will be recognised and enforced in Luxembourg, subject to the provisions of the Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

Finally, if no enforcement treaty applies, a final and conclusive civil or commercial judgment obtained against a Luxembourg company in the competent courts of the relevant country would be recognised and enforced by Luxembourg courts, subject to the applicable enforcement procedure (exequatur) as set out in the relevant provisions of the New Luxembourg Civil Procedure Code and in Luxembourg case law. Pursuant to Luxembourg case law, the granting of exequatur is subject to the following requirements:

- the non-Luxembourg court order must be enforceable in the country of origin and must not contradict a court order already enforceable in Luxembourg;
- the non-Luxembourg court order must not infringe the exclusive jurisdiction of the Luxembourg courts, and there must be a real link (*lien caractérisé*) between the case and the non-Luxembourg court;

- the non-Luxembourg decision must not violate the rights of defence and the right to a fair trial;
- the considerations of the non-Luxembourg court order, as well as the judgment as such, must not contravene Luxembourg international public policy or must not have been given in proceedings of a tax or criminal nature; and
- the non-Luxembourg court order must not have been rendered subsequent to an evasion of Luxembourg law or jurisdiction (*fraude à la loi*).

8. Lenders' Rights in Insolvency

8.1 Rescue and Reorganisation Procedures

Before the law on reorganisation procedures dated 7 August 2023 came into effect on 1 November 2023 (the Reorganisation Law), Luxembourg only provided for the following reorganisation procedures:

- the composition with creditors (*concordat préventif de la faillite*);
- the suspension of payment (*sursis de paiement*); and
- the controlled management (*gestion contrôlée*).

Those procedures were barely used and have been abrogated by the Reorganisation Law.

The Reorganisation Law aims to improve and modernise restructuring procedures and the insolvency legislation. It applies to commercial companies (S.A., S.à r.l., S.C.A. and S.C.S.), special limited partnerships (S.C.Sp) and civil companies. Credit institutions, investment firms, insurance and reinsurances companies, investment funds and securitisation undertakings issuing financial instruments to the public are excluded from the scope of the Reorganisation Law.

The main objectives of the Reorganisation Law are to detect businesses in financial difficulties and to introduce out-of-court and in-court reorganisation procedures. The out-of-court procedure allows the debtor to propose a mutual agreement (accord amiable) on a payment plan relating to the reorganisation of all or part of its assets or activities, to at least two of its creditors. This mutual agreement shall be sanctioned by the court (homologation) in order to be enforceable. No publication will be made.

Alternatively, the debtor can apply for a judicial reorganisation procedure, which can be:

- a stay of payment (*sursis*) to negotiate a mutual agreement;
- a collective agreement (*accord collectif*); or
- a transfer of assets by court order (*transfert par decision de justice*).

Stay of Payment

The stay of payment aims to achieve a mutual agreement between the debtor and its creditors. The stay can be granted for a period of between 4 and 12 months (if extended by the courts). Such procedure suspends all payments on debts incurred prior to the application. In addition, no enforcement of the debtor's claims may be continued or exercised on its assets, no seizure of assets may be made and no individual enforcement measure is allowed.

The debtor can also unilaterally suspend the performance of its obligations, except for agreements having successive executions and employment contracts. Finally, during the stay, the debtor may not be declared bankrupt, dis-

solved judicially (except as a consequence of criminal activities or serious violations of the laws governing commercial companies) nor made subject to administrative dissolution without liquidation.

Collective Agreement or Reorganisation Plan

Similar to the stay of payment, the collective agreement or reorganisation plan involves all the creditors of the debtor, which shall be divided into two categories (ordinary and extraordinary creditors). The plan will only be approved if it is sanctioned by a favourable vote from the majority of the creditors in each category and represents at least half of the sums due in principle in that category.

Even if the creditors reject the proposed reorganisation plan, the courts can still approve it under the following conditions:

- the plan has been approved by at least one category of creditors entitled to vote;
- if the plan was approved by the ordinary creditors, it shall ensure that the extraordinary creditors are treated more favourably; and
- no category can receive more than the total amount of its claims.

If sanctioned by the court, the reorganisation plan binds all creditors (irrespective of their category). It shall be implemented within five years from the date of its approval by the court.

If the debtor is declared bankrupt during the stay, the plan shall be automatically revoked. The revocation of the plan deprives it of all effect, except for payments and transactions already implemented in accordance with the plan (including payments and disposals of assets or activities).

Transfer by Court Order

This procedure allows all or part of the assets or activities of the debtor in financial distress to be transferred by court order. It may be initiated by the debtor or directly by the public prosecutor.

If the transfer is initiated upon the request of the public prosecutor, a legal representative (*mandataire de justice*) shall be appointed by the court and shall be responsible for organising the transfer of all or part of the assets or activities to ensure the continuity of these (or part of them) and the preservation of employment by one or more third-party buyers. To that end, the court-appointed officer shall seek various offers, taking into consideration the going concern of the activities subject to the transfer.

Although certain provisions of the Reorganisation Law contain a number of ambiguities and uncertainties, the legal doctrines tend to agree that (save for very specific cases that shall be examined on a case-by-case basis) the security granted in accordance with the Financial Collateral Law remains enforceable if the Luxembourg debtor files for a reorganisation procedure. The professional payment guarantee also remains enforceable.

8.2 Main Insolvency Law Considerations

Under Article 437 of the Luxembourg Commercial Code, a commercial company is bankrupt when it has ceased its payments (*cessation des paiements*) and its credit is exhausted (loss of creditworthiness – *ébranlement du crédit*). Those two criteria shall be met on the day of the bankruptcy judgment by the relevant competent court. The non-payment of a single debt is sufficient to be considered as cessation of payment. The bankruptcy of a debtor can be requested by the directors/managers of such debtor if it has ceased its payment and has lost its creditworthi-

ness, or can occur at the request of a creditor or the public prosecutor, or by the court's own motion.

Once appointed by the court, Luxembourg bankruptcy receivers manage the bankrupt estate in the interest of the creditors as a whole and the bankrupt company, without being controlled by either. Receivers are not subject to any obligations to involve the shareholders or creditors in the liquidation process; while they have an obligation to obtain the best price or fair value for the assets sold in view of all relevant circumstances, they are not required to allow credit bidding, etc. The board of managers is divested, and only the receiver is able to represent the company. Creditors shall file their respective claims with the receiver and the competent court.

The occurrence of insolvency proceedings may challenge the validity of certain transactions (including payments, the granting of guarantees or security and the sale of assets) and agreements concluded during the hardening period (*période suspecte*) and/or up to ten days preceding the hardening period:

- specific transactions (eg, the granting of a security interest for antecedent debts; the payment of debts that have not fallen due, whether such payment is made in cash or by way of assignment, sale, set-off or by any other means; the payment of debts that have fallen due by any other means than in cash or by bill of exchange; and the sale of assets without consideration or for materially inadequate consideration) are set aside or declared null and void, as the case may be;
- payments made for debts that are due, as well as other transactions concluded for consideration during the hardening period, are subject to cancellation by the court upon proceedings being initiated by the receiver if they were concluded by a relevant counterparty with the knowledge of the bankrupt company's cessation of payments; and
- regardless of the hardening period, Article 448 of the Luxembourg Code of Commerce and Article 1167 of the Luxembourg Civil Code (*actio pauliana*) give the receiver the possibility to challenge any fraudulent payments and transactions made prior to the bankruptcy, without limitation of time.

A set-off between reciprocal debts that are both claimable and due for immediate payment is still valid during the hardening period. A contractual set-off, however, is not permitted unless there is a strong connection (common cause) between the mutual claims to be set off so that they can be considered indivisible.

As addressed in the foregoing, the financial collateral arrangements governed by the Financial Collateral Law are considered bankruptcy remote. Even if such financial collateral arrangements are contracted on the day of the court ruling establishing the bankruptcy of the debtor, they shall remain enforceable. The same protection applies to professional payment guarantees.

9. Tax and Regulatory Considerations

9.1 Tax Considerations

Stamp Duty

Registration duties are levied on certain legal deeds or acts. While the registration formality is compulsory for certain deeds or acts enumerated by the law, the registration of an act or a deed can also be made voluntarily. Registration of a document is also required if such document

is attached to a deed that itself must be registered or deposited with a notary.

Depending on the act or operation, registration duties are either levied at a fixed amount (EUR12 in general and EUR75 for certain specific deeds) or at a proportionate amount (as a general rule, proportionate duties are computed based on the fair market value of the assets or rights transferred, except where law provides for a different basis). Proportionate registration duties apply to specific deeds and acts enumerated in the law. Deeds that are not subject to proportional duties are therefore subject to fixed registration duties.

Deeds that are subject to mandatory registration and that trigger proportionate registration duties are limited, and mostly concern agreements related to real estate properties located in Luxembourg (transfer of real estate, mortgages, etc, or aircrafts or vessels registered under the Luxembourg flag).

Documents evidencing a debt claim are not subject to mandatory registration under Luxembourg laws. If registered, a 0.24% proportionate registration duty is due (assessed on the amount of the claim) unless the debt instrument takes the form of a negotiable security.

Withholding Tax/Qualifying Lender Concepts

In principle, interest payments made by a Luxembourg company are not subject to withholding tax in Luxembourg, except under certain specific circumstances (eg, certain profit participating securities, equity instruments or instruments deemed to be equity and similar arrangements) or where the interest payments are made (or deemed to be made) by a paying agent established in Luxembourg to individuals resident in Luxembourg, in which case the withholding tax is a final tax (*retenue à la source libératoire* – RELIBI).

Loan documents typically provide for an obligation for a Luxembourg borrower to gross up interest payments made to a lender for any withholding tax becoming due, except for the aforementioned RELIBI. Furthermore, it is market practice that the obligation of the gross-up obligation is limited to lenders who are so-called *"qualifying lenders"* on the date of the loan agreement. In other words, it is standard that the withholding tax risk of a change in law is allocated to the borrower. The concept of *"qualifying lender"* essentially covers lenders to which payments can be made without being subject to withholding tax (or that benefit from an exemption) or lenders that are tax resident in a country with which Luxembourg has concluded a treaty providing for an exemption (or reduced rate) of withholding tax for interest.

Thin Capitalisation Rules

Luxembourg tax law does not provide for thin capitalisation rules other than the general arm's length principle. If a Luxembourg company is considered to be excessively indebted, the interest on the exceeding portion of the debt financing would be treated as a non-tax-deductible hidden dividend and may be subject to a 15% dividend withholding tax.

Based on the arm's length principle, the debt-to-equity ratio of a Luxembourg company has to be substantiated through a transfer pricing study. In the past, the tax authorities generally required an 85:15 debt-to-equity ratio as a matter of practice for (related-party or third-party) loans taken up by a Luxembourg company to finance shareholdings qualifying for the Luxembourg participation exemption regime. Considering the new OECD guidelines on financial transactions

issued in 2020, the debt-to-equity ratio for such investments should now also be benchmarked.

Luxembourg applies earnings stripping rules in accordance with Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (Anti-Tax Avoidance Directive (ATAD) I). Subject to certain exclusions, the earnings stripping rules limit the deduction of the net amount of interest expenses and economically equivalent expenses (ie, the excess, if any, of such expenses over interest income) in a taxable year to 30% of EBITDA for tax purposes or EUR3 million, whichever is higher. The earnings stripping rules do not distinguish between third-party and related-party interest. Moreover, if the ratio of equity to assets of a taxpayer is equal to or higher than such ratio for the consolidated group to which it belongs, such taxpayer is excluded from the scope of the rules.

The rule should have no tax impact if the Luxembourg company uses the amounts borrowed under a loan agreement to grant other loans: in compliance with the arm's length principle, the Luxembourg company should derive interest income in excess of its interest expenses, and the Luxembourg company should thus not have exceeding borrowing costs. Similarly, if the Luxembourg company uses the amounts borrowed under a loan agreement to acquire shares in another company qualifying for the Luxembourg participation exemption regime, the earning stripping rules should not adversely impact the Luxembourg company.

9.2 Regulatory Considerations

There are no particular regulatory considerations with respect to Luxembourg borrowers. However, the granting of loans for one's own account to the public (without receiving deposits or other repayable funds from the public) by a company located in Luxembourg (or by a foreign entity lending to Luxembourg borrowers) is subject to the holding of a professional of the financial sector (PFS) licence and to the prudential supervision of the Luxembourg supervision authority of the financial sector (the *Commission de Surveillance du Secteur Financier* – CSSF). Pursuant to Article 28(4) of the Law of 5 April 1993 on the financial sector, as amended from time to time (the LFS), authorisation as a specialised PFS is required for professionals engaged in lending activities – ie, the extension of loans to the public on their own behalf. This activity is different from that performed by credit institutions in that it does not involve the collection of deposits or other repayable funds from the public. Such entity shall obtain its licence prior to starting its activities. This applies to the origination of loans and may apply to the acquisition of loans.

The reference to *"the public"* implies that lending activities between entities belonging to the same group are excluded. The CSSF has also indicated that the term *"public"* generally refers to a group of non-identifiable persons, and has stated that the granting of loans to a limited circle of previously determined persons is not deemed lending to the public and therefore does not fall within the scope of Article 28-4 of the LFS.

Finally, the CSSF has excluded from the scope of this provision lending activities where:

- the nominal value of the loan amounts to at least EUR3 million (or the equivalent in another currency); and
- the loan is granted exclusively to a professional, as defined in Article L. 010-1.2 of the Luxembourg Consumer Code – ie, any natural or legal person acting (including through

another person acting in his/her/its own name or on his/her/its own behalf) for purposes relating to his/her/its trade, business, craft or profession.

Lending activities in the EU will be affected by new regulation applicable from January 2027. Directive 2024/1619, known as the sixth Capital Requirements Directive (CRD VI), was adopted on 19 June 2024 and will amend the existing EU regulatory framework applicable to banks. CRD VI will notably introduce an obligation for undertakings established in a third (non-EU) country to establish a branch in the EU and to apply for authorisation in order to carry out certain activities. In particular, undertakings established in a third country that would qualify as a credit institution (or as a large investment firm) if they were established in the EU will need to establish a branch in the EU in order to lend to EU-based borrowers. Non-bank lenders (such as credit funds for instance) should not be affected by this provision. Interbank and intragroup lending are not affected. Finally, a branch is not required where the EU borrower reaches out to the third-country lender on its own exclusive initiative (reverse solicitation).

10. Jurisdiction-Specific or Cross-Border Issues

10.1 Additional Issues to Highlight

There are no further major considerations that are important to acquisition finance practice in Luxembourg.

Trends and Developments

Contributed by:
Audrey Jarreton, Kévin Emeraux and Adrien Pierre
Loyens & Loeff

Loyens & Loeff is a leading continental European law and tax firm with over 1,000 advisers, and is the logical choice for companies doing business in or from its home markets of the Netherlands, Belgium, Luxembourg and Switzerland. Loyens & Loeff keeps track of developments in the constantly evolving banking environment and helps its clients navigate the increasingly complex debt and financial markets. It also goes a step further, guiding clients in identifying opportunities and innovative ways to access the funding most suitable for them, whilst also managing risk. The firm's ability to stay ahead of these changes enables clients to stay focused on their core business.

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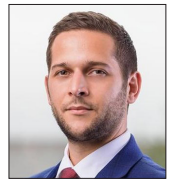

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LOYENS & LOEFF
Law & Tax

Enforcement, Debt Restructuring and Recovery

Enforcement

Where some see financial distress or even bankruptcy, other may see opportunities. The relative inactivity of international markets and the morose financial global situation caused by the general geopolitical context may fragilise certain businesses.

However, such circumstances could attract investors who are waiting for the best moment to acquire a company, especially one in distress, in order to either acquire additional competence at a lower price, extending their original market, or simply to kill the competition (subject to clearance).

Such acquisitions can be done by means of enforcement, where investors acquire the debt for a lower price and usually enforce it to appropriate the underlying assets. Indeed, there has been an increase in enforcements, especially on Luxembourg share pledges granted over the shares of Luxembourg holding companies. As there is a single point of enforcement, and because the means of enforcement are efficient and cannot be stopped (only challenged afterwards), Luxembourg remains the go-to-jurisdiction for lenders (both credit institutions and debt funds) in case of new financing or restructuring.

Although some banks and noteholders might be ready to enforce, borrowers may still push for a more consensual path, even if this comes with a high price, in order to preserve their credibility and reputation.

Debt restructuring

As a result of the global trend of rising interest and inflation (although there were slight improvements in 2024 and an expected decrease in interest rates in 2025), borrowing costs have become a real burden for financed structures. Some borrowers, adopting a prudent approach, have reached out to their lenders to (re)negotiate the credit terms, extend the repayment deadlines or term, revaluate ratios and financial covenants or increase the secured liabilities in order to avoid default.

Anticipation is a key word in such negotiations but also provides comfort to banks, which are becoming somewhat sensitive with respect to money lending when the borrower is not performing.

In some cases, a Luxembourg borrower might request additional financing, but this does not come cheap and would in fact increase the indebtedness burden on such borrower, who is already in trouble. The banks are also more prudent, requesting either additional security or guarantee or increasing their fees in order to cover the additional risk taken. Nevertheless, debt restructuring avoids worst-case scenarios such as bankruptcy.

Market expectations, although better than last year, remain cautious, and the authors still foresee (re)negotiations of credit terms, especially on the covenant side (mostly financial or loan to value) and the extension of maturity during 2025 (as was already the case in 2024).

The market remains prudent and awaits a decrease in interest rates and improvements in the global economic situation, especially in the context of geopolitical risks and tensions (especially given that the conflicts in Ukraine and the Middle East have escalated in the last few weeks at the time of writing) and the volatility of the US markets since Mr Trump's accession to the US presidency.

Recovery: the introduction of new reorganisation procedures

Before the law on reorganisation procedures dated 7 August 2023 came into effect on 1 November 2023 (the Reorganisation Law), Luxembourg only provided, as *"reorganisation procedures"*, (i) preventive bankruptcy arrangements (*concordat préventif de la faillite*), (ii) the suspension of payment (*sursis de paiement*) and (iii) controlled management (*gestion contrôlée*). Those procedures were barely used and have been abrogated by the Reorganisation Law.

The Reorganisation Law aims to improve and modernise restructuring procedures and insolvency legislation. It applies to (i) commercial companies (S.A., S.à r.l., S.C.A. and S.C.S.), (ii) special limited partnerships (S.C.Sp) and (iii) civil companies. Credit institutions, investment firms, insurance and reinsurances companies, investment funds and securitisation undertakings issuing financial instruments to the public are excluded from the scope of the Reorganisation Law.

The main objectives of the Reorganisation Law are to detect businesses in financial difficulties and to introduce out-of-court and in-court reorganisation procedures, where the intention is to provide a second chance to the debtor and to avoid bankruptcy thereof. The out-of-court procedure allows the debtor to propose, to at least two of its creditors, a mutual agreement (accord amiable) on a payment plan relating to the reorganisation of all or part of its assets or activities. This mutual agreement shall be sanctioned by the court (homologation) to be enforceable.

Alternatively, the debtor can apply for a judicial reorganisation procedure, which can be:

- a stay of payment (*sursis*) to negotiate a mutual agreement;
- a collective agreement (*accord collectif*); or
- a transfer of assets by court order (*transfert par decision de justice*).

A few debtors have already applied for these new reorganisation procedures in Luxembourg and in some cases were successful. The debtors who applied to obtain a stay of payment (*sursis*) were generally small local businesses. The Luxembourg courts have already ruled that the procedure for transfer of assets by court order (*transfert par decision de justice*) is not applicable to holding companies as their main assets are participations in other company(ies).

As of today, petitioning or filing for the new reorganisation procedures remains relatively rare, although there have been a few filings for operating companies, some of which were successful in that a plan was approved. Whether those procedures, particularly the collective agreement (*accord collectif*), will be used as restructuring tools for group companies where the top holding company is located in Luxembourg is questionable, as such procedures may require a cram-down of the creditors – who can only be divided into two classes (ordinary creditors and extraordinary creditors) – and the court may impose a cram-down on all the creditors of the Luxembourg debtor. Although the intention of the legislator was to implement a restructuring toolbox to provide a second chance to the Luxembourg debtor, the use of such reorganisation procedures might be limited to local businesses. Usually, applications therefor are made by local operational companies and not – for the moment – by holding companies as a means of restructuring (as can be seen in the UK or USA). Case law on successful reorganisation procedures is fairly limited.

From a creditor perspective, and in particular where a double Luxco structure is used to secure the financing granted to the Luxembourg entity or its subsidiary(ies), pledges and other financial collateral arrangements governed by the Luxembourg Law of 5 August 2005 on financial collateral arrangements, as amended, should remain enforceable and should retain their bankruptcy remoteness feature. The same applies to professional payment guarantees governed by the Law of 10 July 2020. Luxembourg should therefore remain attractive for debt and security structuring, retaining its status as a lender-friendly jurisdiction.

Emergence of Alternatives to Traditional Bank Financing

Private debt equity

The Luxembourg market remains impacted by the financial crisis, especially reflected in the increase in interest and inflation rates during 2023 albeit that there was a slight decrease in the interest rate in 2024. Compared to other jurisdictions, mid-size transactions (up to EUR250 million) were less impacted by the financial crisis. Large-cap transactions (over EUR250 million) drastically decreased although the market was not totally frozen.

As traditional banks have become more reluctant to grant or extend credit, or have tightened their conditions or require additional security, borrowers have sought alternative means of borrowing. Luxembourg debt funds took this opportunity to lend directly to borrowers, thereby positioning themselves in the Luxembourg market and abroad. The growth in debt financing observed in the last two years can be attributed to various factors, including overall economic growth, globalisation (fostering business expansion), increased entrepreneurial activities, real estate development requiring substantial capital and government stimulus programmes that may have encouraged borrowing for various purposes. These factors collectively contributed to the utilisation of debt financing as a means to access capital for business and economic activities.

Depending on the risk appetite of their investors, debt funds may directly lend funds to a variety of borrowers, such as middle-market companies. They also offer more flexibility with respect to the form and features of the loans granted, including payment-in-kind (PIK), mezzanine and bullet loans, unitranche financing, etc. However, these financings usually come with other challenges such as higher interest rates or stricter covenants.

However, lending to (without collecting funds from) the public is a regulated activity supervised by the Luxembourg financial supervision authority (*Commission de Surveillance du Secteur Financier* or CSSF). Professionals performing lending operations grant loans to the public of their own accord, where it is assumed that the activity in question is the main activity carried out by the company and that it is performed repetitively. However, there are a few exemptions, such as granting loans to one or several companies belonging to the same group to which the concerned entity belongs; lending to targeted, identifiable persons (limited circle exemption); and the professional exemption, which excludes (i) loans having a nominal value of at least EUR3 million and (ii) loans granted exclusively to a professional, as defined in Article L. 010-1.2 of the Consumer Code – ie, any natural or legal person acting (including through another person acting in his/her/its own name or on his/her/its own behalf) for purposes relating to his/her/its trade, business, craft or profession.

In addition, some professionals are specifically excluded from the scope of this legislation, including undertakings for collective investment (UCIs), specialised investment funds (SIFs), pension funds, venture capital investment companies (*sociétés d'investissement en capital à risque* – SICARs) and other persons carrying out an activity the taking up and pursuit of which are governed by special legislation in Luxembourg.

In almost all cases, private debt funds would not fall within the scope of financial sector law as it pertains to professionals or would fall under an exemption accepted by the Financial Sector Supervisory Commission (*Commission de Surveillance du Secteur Financier* CSSF).

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