ALLEN & OVERY

Restructuring across borders

Luxembourg

Corporate restructuring and insolvency procedures | January 2022

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Contents

Introduction

Upcoming Luxembourg Insolvency reforms:

The Luxembourg insolvency regime is currently subject to an extensive overhaul with a view to its modernisation. A bill to that effect, providing for a legal framework that prioritises (where practicable) the preservation and/or reorganisation of a debtor's business as opposed to its liquidation, is pending in Parliament.

The proposed amendments include:

– the implementation of various mechanisms that will help companies in financial difficulties to: (i) avoid bankruptcy proceedings; and (ii) preserve their business; and

– the amendment of certain specific provisions of the bankruptcy procedure and the abolishment of certain obsolete insolvency procedures (eg controlled management and reprieve from payment) which are rarely used in practice.

EU Member States were bound to implement the restructuring frameworks directive (2019/1023) by July 2021 (subject to the extension option set out therein). The Luxembourg directive implementation will be provided for in the above wider insolvency law reforms. Even though the exact timeframe for the implementation of the above insolvency reforms remains uncertain, it is likely that the related amendments will be adopted in the course of 2022. In view of the number of outstanding issues raised by the insolvency reform bill, the legislator decided to split this bill into two separate bills, namely bill 6539 A regarding the above insolvency reforms and bill 6539 B on the creation of a procedure for administrative dissolution without liquidation, with the intention to adopt the latter first.

The purpose of the administrative dissolution without liquidation procedure is to eliminate shell companies, ie commercial companies with no employees and no assets which perform activities contrary to criminal law or which seriously contravene the provisions of the Commercial Code or the laws governing commercial companies including laws relating to the establishment of businesses. The new procedure will permit the fast elimination of shell companies and reduce the cost associated with the opening of a formal compulsory winding-up procedure.

The five principal restructuring and insolvency regimes for companies under Luxembourg law are:

– bankruptcy (*faillite*);

– controlled management (*gestion contrôlée*);

– composition in order to avoid bankruptcy (*concordat préventif de la faillite*);

– reprieve from payment (*sursis de paiement*); and

– compulsory winding-up.

Bankruptcy
(faillite)

Where a company has ceased to make payments, is unable to meet its commitments (*cessation des paiements*) and has lost its creditworthiness (eg loss of ability to obtain credit or new moneys) (*ébranlement du crédit*), the court in the district where the company has its principal place of business may declare the company bankrupt either:

– upon acknowledgement by the company;

– at the request of a creditor; or

– upon its own initiative.

The general purpose of the bankruptcy procedure is to realise the assets of the debtor and to distribute the proceeds to its creditors.

From the date of the bankruptcy order up to the date of the closing of the bankruptcy proceedings, the bankrupt company and its directors lose control of the administration of the company and the ability to deal with its assets. These tasks are entrusted to one or more receivers (curateurs) appointed by the court.

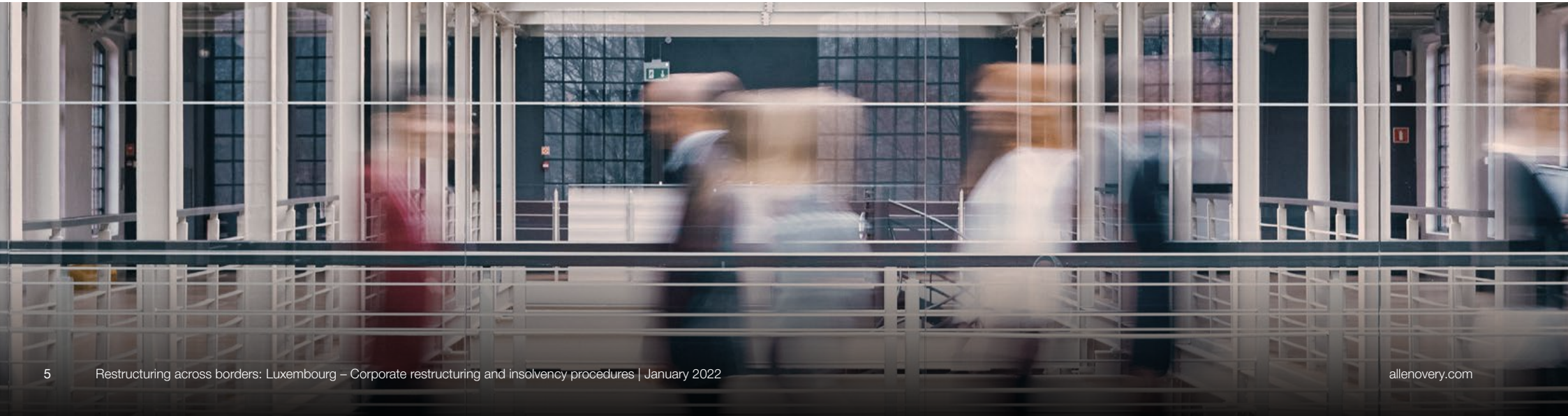
In addition, the making of the bankruptcy order removes the right of creditors to obtain individual enforcement of their rights against the debtor. They must submit all their claims to the appointed receiver.

Controlled management
(gestion contrôlée)

Controlled management is a remedy granted by the court to protect a company which has lost its creditworthiness or which is experiencing difficulties in meeting all of its commitments. The purpose of controlled management is to assist a company in reorganising its business or in converting its assets into cash under the supervision of the court and of court-appointed commissioners and with the approval of the creditors.

As mentioned above, the company is placed under the control of the court and the commissioners. The directors continue to manage the business of the company, but they are no longer allowed to act without the authorisation of the commissioners. The commissioners also have the power to compelthe company to take certain actions.

The commissioners are entrusted with the preparation of a plan for the reorganisation of the business or for the realisation of the assets. This plan is submitted to the creditors who vote on it. If approved by a majority in number of all the creditors, representing more than 50% of the overall amount of the creditors' undisputed claims, the plan will be presented to the court for approval.



Composition in order to avoid bankruptcy (concordat préventif de la faillite)

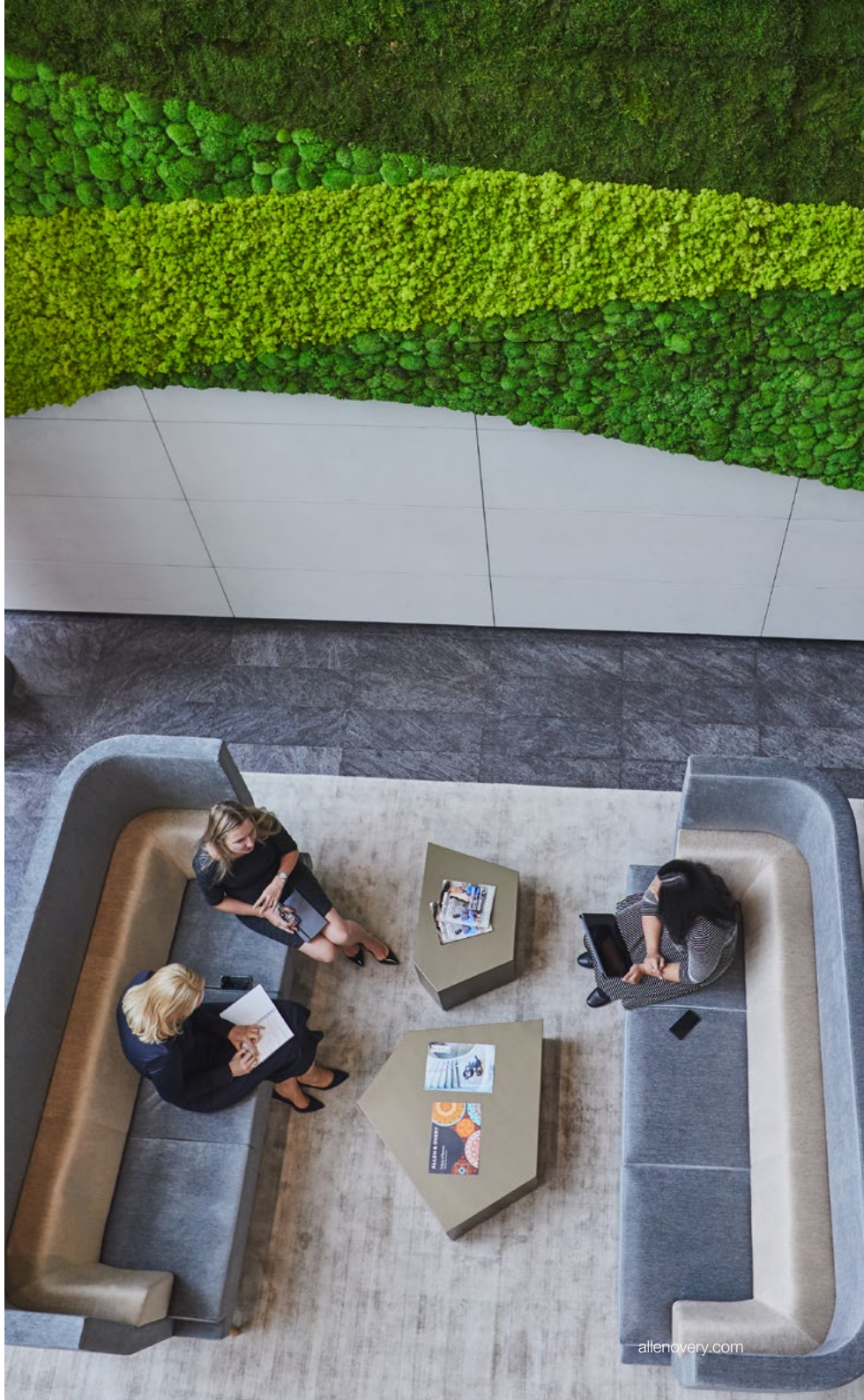
A composition is an agreement between a company experiencing financial difficulties and its creditors, the purpose of which is to avoid bankruptcy. The agreement is made under the control, and with the approval, of the court.

The agreement (which is to be negotiated by the debtor company and its creditors) may take various forms. For example, it may consist of an extension of the time for the payment of debts, reimbursement of part of the claims by means of a lump sum payment or the partial reimbursement of the debts by instalments.

The application for the composition must be supported by a majority in number of the (unsecured) creditors representing three-quarters of the outstanding (unsecured) amounts. After ratification by the court, the composition will be binding on all unsecured creditors and those secured creditors who have waived their rights of priority.

While a composition is under negotiation, the debtor is unable to dispose of, or grant any security over, any assets without the approval of a judge. After ratification of the composition, the debtor can conduct its business without any restrictions again, save for those restrictions provided for in the composition agreement.

Although never formally abolished, the procedure of composition in order to avoid bankruptcy has rarely been used in practice, since: (i) it appears to be difficult for a debtor to meet the conditions necessary for implementing the procedure; and (ii) it does not provide full protection against enforcement proceedings brought by secured and privileged creditors.



Reprieve from payment (sursis de paiement)

The reprieve from payment procedure is available to a company experiencing financial difficulties. Its purpose is to allow such a company to suspend its payments for a limited period of time. Reprieve from payment acknowledges and ratifies, by means of a court order, an agreement which has been reached with the creditors of the company (by a majority in number of the relevant unsecured creditors, representing three-quarters of the outstanding unsecured amounts).

The reprieve from payment, however, only applies to those commitments which have been assumed by the debtor prior to obtaining the court order and has no effect as far as secured claims or taxes and other public charges are concerned.

During the time for which a reprieve from payment is in force, the beneficiary of the reprieve loses the right to administer its assets and is only allowed to manage its business under the control of court-appointed commissioners.

As with the composition, in order to avoid bankruptcy the reprieve from payment has rarely been used in practice.

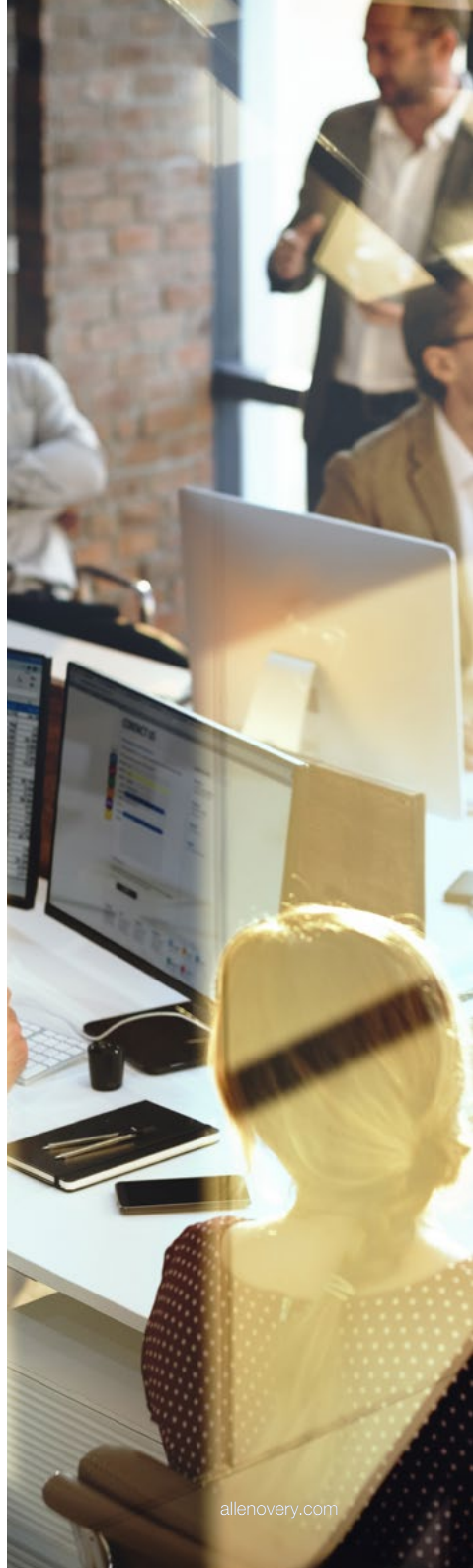
Compulsory winding-up

Compulsory winding-up is governed by Arts. 1200-1 and 1200-2 of the Act of 10 August 1915 relating to commercial companies, as amended (the **Companies Act**).

The purpose of a compulsory winding-up is to terminate a company, or any establishment of a foreign company, which pursues activities contrary to criminal law or which seriously contravene the laws applicable to commercial companies, including laws relating to the establishment of businesses (eg where the company has no known place of business, the directors of the company have resigned and no new directors have been appointed, the annual accounts of the company have not been prepared and published in accordance with the law, etc).

Compulsory winding-up is ordered by the court upon application of the public prosecutor. A supervising judge and one or more liquidators are appointed and may determine the way in which the liquidation is to proceed, and the extent to which, if at all, the rules governing bankruptcy proceedings should apply.

Compulsory winding-up is, strictly speaking, not an insolvency procedure (although it generally has the same effect).



European Insolvency Regulation

The EU Regulation on Insolvency Proceedings 2015 (Regulation (EU) 2015/848) (the **Recast Regulation**) applies to all proceedings opened on or after 26 June 2017. Its predecessor, the EC Regulation on Insolvency Proceedings 2000 (Regulation (EC) 1346/2000) (the **Original Regulation**) continues to apply to all proceedings opened before 26 June 2017. One of the key changes in the Recast Regulation is that it brings into scope certain pre-insolvency "rescue" proceedings and these are now listed alongside the traditional insolvency procedures in Annex A to the Recast Regulation. The Recast Regulation retains the split between main and secondary/territorial proceedings but secondary proceedings are no longer restricted to a separate list of winding-up proceedings - secondary proceedings can now be any of those listed in Annex A. By contrast, the Original Regulation listed main proceedings in Annex A and secondary proceedings (which were confined to terminal proceedings) in Annex B.

Of the above restructuring and insolvency regimes, bankruptcy (*faillite*), controlled management (*gestion contrôlée*) and composition in order to avoid bankruptcy (*concordat préventif de la faillite*) were available as main proceedings under the Original Regulation.

Bankruptcy (*faillite*) was also available as a secondary proceeding under the Original Regulation.

Under the Recast Regulation, bankruptcy (*faillite*), controlled management (*gestion contrôlée*) and composition in order to avoid bankruptcy (*concordat préventif de la faillite*) are listed in Annex A.

Key contacts

If you require advice on any of the matters raised in this document, please contact any of our partners or your usual contact at Allen & Overy, or email **rab@allenovery.com**

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Further information

Developed by Allen & Overy's market-leading Restructuring group, "**Restructuring Across Borders**" is an easy to use website that provides information and guidance on all key practical aspects of restructuring and insolvency proceedings in Europe, Asia, Africa, the Middle East and the U.S.

To access this resource, please **click here**.

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