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IMPACT OF COVID-19 ON COMPANY & INSOLVENCY LAW: AN OVERVIEW OF LUXEMBURGISH RESPONSES

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Abstract: Covid-19 outbreak had a huge impact on the economy worldwide as businesses had to close or cease their activities due to the lockdown regulations. The "luckiest" firms were able to operate but under restricted conditions. In order to avoid what certain authors called "bankruptcy epidemic" (Madaus and Arias, 2020: 318) European countries took economic and fiscal measures to help companies compensate their financial losses. In addition to Government Grants, emergency legislations have been adopted with the aim to adapt insolvency and restructuring procedures to the sanitary situation and specific rules relating to company Law have also been implemented. This paper deals with the measures taken by the state of Luxembourg and gives a brief overview of the legal amendments.

I. Context

The lockdown same like in other European countries, began in March 2020. The situation led the government to declare a state of emergency on March 18, 2020 and different Grand Ducal Regulations (GDR) have been passed. The GDR of 18 March 2020 introducing a series of measures in the context of the fight against Covid-19, provided for the principle of closing commercial and artisanal businesses which are open to the public, while at the same time this regulation listed activities which will not be affected by the closure. In order to stay open, the businesses have to offer activities that are essential for the maintenance of the vital interests of the population and the country as required by Art. 5. This means that, businesses that do not meet the conditions of the above-mentioned provision were not able to continue their operations. For those who were not affected by the ban, it was not certain that their turnover would not suffer, since once the authorization to open was obtained, the health and opening restrictions affected the way the businesses operated. In different ways, the sanitary situation was causing financial distress and liquidity problems for several business operators. The

conditions for a chain reaction leading to the opening of massive insolvency proceedings were met and for avoiding this scenario legal measures have been implemented.

II. Impact on Insolvency Law

1. Suspension of the Debtor´s Obligation to make a Declaration of Cessation of Payment

Bankruptcy Law is regulated in Luxembourg by the Commercial Code (C.com). For more than two decades, a process of amendment of the Law on bankruptcy proceedings has been underway, but has not yet resulted in a legislative reform. The latest draft was submitted to the National Assembly on February 1, 2013 (explanatory memorandum to Bill n°6539). This bill on the modernization of bankruptcy Law was related to the rescue of businesses (Winandy, 2019: 920). Amongst other objectives, it intends to introduce new procedures more adapted to the needs of businesses while favoring, where necessary preventive insolvency proceedings. The proposed new legislation also aims to make the prosecution of fraudulent bankruptcy (banqueroute frauduleuse) more efficient and faster. According to the current legislation the fraudulent bankruptcy is punished as a felony and the trial procedure requires the intervention of an examining magistrate (juge d'instruction). This makes the procedure considerably more cumbersome. If the bill is finally adopted, the offence of bankruptcy will therefore be downgraded from a felony to a misdemeanor (délit). The rules applicable to this offence will also be unified because the distinction between fraudulent bankruptcy and simple bankruptcy will not exist anymore (explanatory memorandum to Bill n°6539, p.16).

With regards to the conditions for the opening of a bankruptcy proceeding, Art. 440 C.com provides for that any trader and any commercial company which ceases to make payments shall, within one month, make an admission thereof at the registry of the district court having jurisdiction in commercial matters of his domicile or registered office. If the declaration of cessation of payments (aveu de faillite) is not submitted within the legal deadlines, the bankrupt debtor or the managing partner of the bankrupt company may engage his criminal liability (Art. 495, 495-1, 573-585 C.com).

As expressly mentioned, traders and commercial companies are under an obligation to make a declaration of cessation of payment within a specific period. However, it remains to be clarified what the Law means by "being in cessation of payment". Two cumulative conditions have to be fulfilled in order to meet the requirements of Art. 440 C. com. Firstly, the company or the trader is unable to pay its debts as they fall due and secondly, the company or the trader is unable to obtain credit. The notion of cessation of payment therefore includes the lack of liquidity on the one hand and the impossibility for the company or trader to obtain credit on the other. This is precisely the financial situation that most of companies will be facing due to sanitary crisis of Covid-19 and the reason why Luxembourg legislation had to be adapted. As a state of emergency was declared on March 18, 2020 the government was validly entitled to govern by

regulatory measures, which derogate from existing Laws (Art. 32. 4 Luxembourg Constitution).

Art. 1 (1) of the GDR on March 25, 2020 provided for that the time limits prescribed in proceedings before the judicial, administrative, military and constitutional courts are suspended. It can be reasonably inferred that this general suspension of different legal deadlines expressed the need for the government to react very quickly and on a large scale to the prevailing sanitary situation. As the proceeding for the declaration of payment is a proceeding before a judicial court, - in this case before the jurisdiction in commercial matters - this suspension also applied to the one-month period prescribed by Art. 440 C. com. Furthermore, the above-mentioned GDR takes care to specify the areas in which the suspension does not apply. Indeed, the other provisions of this regulation (Art. 1(2), Art. 2), which reduce ratione materiae the scope of application of this measure, do not refer to the obligation to declare the cessation of payment. This confirms the application of this measure to the deadline of Art. 440 C.com.

Under Article II of the Law of 25 November 2020 amending the Law of 6 June 2020, the suspension of the obligation for traders and commercial companies to make a declaration of cessation of payment was extended to June 30, 2021. In contrast to the GDR of 25 March 2020, these two Laws expressly refer to Art. 440 C. com. However, this suspension did not prevent the debtor from filing a declaration of cessation if he wished so (Comp. Art. 1. I 1° Ordinance n° 2020-341 of 27 March 2020 (France); comp. Art. 2 of Royal Order (Arrêté royal) n° 15 of 24 April 2020 (Belgian). Indeed, the Luxembourg model offers the creditor the discretion to decide whether or not to use the legal suspension due to the sanitary crisis. The renewal of this prorogation has been once again decided by the Luxembourg legislator. Until December 31 2021, the legal suspension remains applicable (Art. 2, Law of 30 June 2020).

Similar amendments have been adopted in the legislations of other European countries. In Spain, for example, a debtor who was bankrupt, was not obliged to make a declaration of cessation of payment, as long as the state of emergency was in force (Art. 43.1 Royal Decree-Law 8/2020 of 17 March 2020). A temporary suspension of the debtor's obligation to file for insolvency had been passed until 14.3.2021(Torres et al., 2021: para. 130).

In France, the ordinance n°2020-341 of 27 March 2020 adapting the rules relating to business difficulties during the health emergency provides in its article 1 I 1° for an adjustment of the deadline for declaring the state of cessation of payments. Indeed, the state of cessation of payments is assessed in consideration of the debtor's situation on 12 March 2020 and this until 23 August 2020. Therefore, if the company's state of cessation of payments occurred between 13 March and 23 August 2020, it had until 7 October 2020 to request the opening of bankruptcy proceedings.

The Belgian measures also provided for a suspension of the debtor's obligation to file for bankruptcy, while indicating that this suspension was only valid if the conditions of the bankruptcy were the consequence of the Covid-19 pandemic and its aftermath

(Art. 1, Royal Order No. 15 of 24 April 2020 on the temporary suspension in favor of companies of enforcement measures and other measures for the duration of the Covid-19 crisis).

2. The Rejection of Limiting the Creditor´s Right to request the Opening of Bankruptcy Proceedings

Bankruptcy proceedings may be initiated either by the debtor's admission of bankruptcy as previously mentioned, or by a writ of summons (assignation) issued by one or more creditors, or ex officio (Art. 442 I C. Com). It is on the second mode of triggering bankruptcy proceedings that another legislative proposal has been submitted to the Luxembourg Parliament.

This proposal has the objective to render during the state of emergency and two months after it ends, petitions for bankruptcy field by creditors inadmissible (Koch et al., 2020). By withdrawing temporarily, the right of unpaid creditors to request the opening of a bankruptcy proceedings, the aim was to provide commercial enterprises and trad- ers with another legal instrument to mitigate the effects of the health crisis. This option has not been taken up by the Luxembourg authorities because a lot of financial aid had been made available to businesses. Moreover, this measure according to the govern- ment did not seem to be the most appropriate one to prevent the companies from bank- ruptcy and a two-month suspension would in any case not be sufficient to solve their liquidity issues (Koch et al., 2020).

Contrary to the Luxembourg model, the possibility to limit temporarily the creditor's right to initiate the opening of a bankruptcy proceeding have been adopted in other European countries. The French regulation rendered inadmissible between 13 March and 23 August 2020, any petition to open bankruptcy proceedings on the basis of a creditor's writ and even on the basis of a referral from the public prosecutor (Art. 2. I 1° of the Ordinance n°2020-341 of 27 March 2020). In Spain, creditor petitions were postponed between 14 March and 31 December 2020 (Torres et al., 2021: para. 130).

Relatively to the Belgian legislation, the opening of insolvency proceedings by a creditor was inadmissible unless the debtor gave its consent (Art. 1 para. 3, Royal Order No. 15 of 24 April 2020). However, the possibility to request an opening of insolvency proceeding was still possible on the initiative of the public prosecutor or through the request of the provisional administrator who was appointed by the President of the court. These special measures have been in force until 17.6.2020 (Art. 1 para. 3, Royal Order No. 15 of 24 April 2020; see, for further reading Heynickx and Goldschmidt, 2021: 239-251). Another distinctive characteristic of Belgian Law was that the Royal Order expressly stated that the exceptional measures taken during the health crisis (sursis temporaire) only concerned companies falling within the scope of Book XX of the Economic Law Code that were not in a state of cessation of payment on March 18, 2020 (Art. 1 para. 1, Royal Order No. 15 of 24 April 2020). Furthermore, any interested party (partie intéressée) could request by summon (citation) to the President of the

competent court to decide that an enterprise does not fall within the scope of the exceptional measures. The interested party could also request the President of the competent court to lift the exceptional measures in whole or in part by a specially reasoned decision (Art. 1 para. 6, Royal Order No. 15 of 24 April 2020).

III. Impact on Company Law

1. Digitalization as Solution for fulfilling Corporate Governance Obligations

There are several obligations that can be followed in the governance of companies. The scope of these legal obligations depends under other criteria on the legal form of the company, its size and the number of shareholders or partners. Whether the rules governing decision-making, representation of the company vis-à-vis third parties or accounting obligations, these are all either prescribed by the legislator or contained in the company's statutory clauses. Focusing on the rules relating to decision-making, we can refer to the modalities of exercising the partners' voting rights and to the method of convening general meetings (ordinary and extraordinary general meetings). For example, public limited companies (société anonyme) must hold at least one general meeting each year in the Grand Duchy of Luxembourg. The meeting must be held within 6 months of the end of the financial year and the first general meeting may be held within 18 months of its constitution (Art. 450-8 para. 1, Loi sur les Sociétés Commerciales (LSC)). Limited liability companies (société à responsabilité limitée) on the other hand are required to hold physical general meetings, when they have more than 60 partners. In this case, an ordinary general meeting must be held each year at the time defined in the articles of association (Art.710-21 (1) LSC).

Holding of general meetings have become challenging given the Covid-19 Pandemic. As such, amendments have been made to the existing legislation regarding the general meetings. On a comparative basis, legislation around the world relating to general meetings of shareholders has generally focused on the following 4 aspects: postponing of meetings, shortening the convocation period, relief on formal voting requirements and allowing for virtual shareholders meetings (Zetzsche et al., 2020:10). In Luxembourg, the first Covid-19 responses provided for the Grand-Ducal Regulation of 20 March 2020 granted the right to hold general meetings without a physical meeting, notwithstanding any provision to the contrary in the statutes and irrespective of the number of participants at its general meeting. Shareholders or partners who participate through such means shall be deemed to be present for the purpose of calculating the quorum and majority at those meetings (Art. 1 (1)).

In addition, the exercise of voting rights by shareholders or associates, as well as any other participants entitled to take part in the meeting, could be done exclusively by remote voting in writing or in electronic form; through a proxy appointed by the company; or by videoconference or other means of telecommunication allowing their identification. The same rule is also applicable to the meeting of bondholders (Art. 1 (1)).

This dematerialization of meetings also applies to meetings of the management bodies such as boards of directors. The latter, notwithstanding any provision to the contrary in the articles of association, could hold their meetings by written circular resolutions; or by videoconference or other means of telecommunication allowing the identification of the members of the body attending the meeting (Art.1(2)).

It is important to mention here that the issue of digitization of general meetings is not a new one in Luxembourg, and even in Europe (Directive 2007/36/EC, Art. (3)) - which would have emerged because of the current health crisis. The legislator has left this option of holding virtual meeting to the discretion of the companies, which, if they wanted to take advantage of it, had to include it in the statutory clauses. The novelties in the health context of Covid-19 therefore consisted firstly in allowing electronic meetings for companies that had not provided for them in their articles of association and secondly in permitting these meetings to be held entirely digitally. In fact, Art. 710-21(2) LSC made the holding of electronic meetings in respect of annual general meetings of limited liability companies conditional on the physical presence of a partner or his proxy at the company's headquarters. The exceptional crisis legislation thus enshrined the transition from hybrid annual general meetings to entirely virtual meetings.

Similarly, in Germany the principle of a compulsory face-to-face meeting concerning public limited companies (Aktiengesellschaft) was completely abolished through Art. 2 § 1 II CoronaG. and regarding the participation of shareholders, a purely virtual general meeting has been made possible (Vetter and Tielmann, 2020:1176).

Other measures have been issued after the GDR from March 2020 to extend or give more details about the provisions of the crisis legislation. Regarding the rules stating the right to full digitalization of general meetings and board meetings, the Law of 30 June 2021 extends their validity until 31 December 2021.

2. Postponement Deadline for filing accounting Documents and holding general annual Meetings

One of the purposes of annual general meetings is to approve the annual accounts of the company, which must be provided within specific deadlines and subsequently be filed with the Trade and Companies Register (Régistre de Commerce et des Sociétés, RCS). This filing obligation is incumbent on all commercial companies listed in Art. 8 of the Commercial Code and in accordance with Art. 75 para. 1 of the Law of 19 December 2002 on the Register of Trade and Companies. In observance of the legal requirements, the corporate financial statements must be filed with RCS within one month following their approval, or no later than 7 months after the close of the financial year. In case of breach of this obligation, the director or managing partner of the concerned companies will have to pay between 500 and 25 000 € (Art. 1500-1, 1500-2 2° LSC).

The adoption of the Law of 22 May 2020 allowed companies to be granted an additional period of 3 months to meet the obligations to file and publish accounting documents. Furthermore, the same Law in Art. 3 postponed the convening of annual general meetings until a period of 9 months after the end of the financial year. Under normal circumstances, the meeting should be held within 6 months.

In order not to allow companies that were already overdue in fulfilling their accounting obligations to benefit from the extension of the deadlines, the Luxembourg legislator took care to fix two ratione temporis limitations. The Law of 22 May 2020 extending the deadlines specifies firstly that it shall only apply to annual accounts, consolidated accounts, reports and general meetings relating to a financial year ending on 24 June 2020 (End of the state of emergency). Secondly the deadlines for filing, publishing or keeping these documents should not have expired by 18 March 2020 (Art. 5).

The option of extending the deadlines was also adopted in France. In relation to the convening of the annual general meeting and the approval of the accounts, Ordinance No. 2020-318 of 25 March 2020 prescribed an extension of 3 months (Art. 3). This Ordinance, as in Luxembourg Law, specified the scope of application of these derogatory measures in order to clearly determine the companies which were eligible to benefit from the extension.

IV. Conclusion

The analysis of the Luxembourg responses allows us to conclude that there were no drastic changes in the existing legislation. The Adoption of temporary measures based on the suspension of certain obligations and on the extension of deadlines allowed for a more flexible regime for businesses. This is what some authors have called “simplest form of intervention” by tackling – legally- the Covid-19 Crisis (Enriques, 2020: 260-261). Another approach would have been “the crafting of new special temporary rules” (Enriques, 2020: 261). However, it carries the risk of introducing new rules in a hasty manner that would not have been deeply discussed.

Legal adjustments in combination with economic measures were taken in Luxembourg in a progressive manner and were subsequently renewed if the Luxembourg authorities deemed them necessary and always adapted to the needs of the moment. In insolvency matters, the legislator's concern was to find a right balance between the creditor and the debtor rights while at the level of company Law, the increasing of digitalization in proceedings company’s governance was observed. Furthermore, the availability of accounting information for companies had to be preserved in order to continue to ensure legal security. Therefore, eligibility criteria for companies that could benefit from the extension of the deadlines for filing and publishing accounting documents have been set.

Nearly 18 months after the beginning of the health crisis, what can we learn from the application of the exceptional measures? According to the press release of 30 June 2021 by the Luxembourg Ministry of Justice, these measures are currently being

analyzed to see whether they should be perpetuated. An opinion, which is also shared in Germany with regard to the legal simplifications adopted during the crisis in company Law. These should not be shelved at the end of their period of validity but should serve as a basis for a modernization of the Law (Vetter and Tielmann, 2020:1180).

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