

MEMO

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RE	<u>All you need to know about becoming an Insolvency Practitioner: Luxembourg</u>
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Bankruptcy is the most commonly used insolvency proceedings in Luxembourg. In bankruptcy proceeding, the bankruptcy receiver represents the interests of the bankruptcy estate (*masse des créanciers*), i.e. the interests of all creditors.

1. **ACCESS TO THE PROFESSION**

There is no formal requirement to be fulfilled to become bankruptcy receiver. Article 455 of the Commercial Code provides that *"The Government, upon obtaining the assent of the Superior Court of Justice, can appoint sworn liquidators in the courts that, due to the number and importance of bankruptcies, require such appointments."*

Article 457 of the Commercial Code provides that the Grand-Duke sets (i) the number of the sworn liquidators, based on the opinion of the Superior Court of Justice and the District Court (*Tribunal d'Arrondissement*) sitting in commercial matters, and (ii) the required services. They are named by the Grand-Duke on two double lists presented by the same bodies.

The Commercial Code however does not mention any specific requirement to be appointed as sworn liquidator. Paragraph 2 of Article 456 of the Commercial Code provides that *"in the absence of sworn liquidators, [and in the case where, in accordance with the preceding paragraph, the District Court (Tribunal d'Arrondissement) sitting in commercial matters believes it has a duty to make another choice], the bankruptcy receivers will be named among persons who will offer the most guarantees for the diligence and the fidelity of their management."*

According to article 458 of the Commercial Code, sworn liquidators are appointed for five years and maintain, in any case, this capacity until the oath-taking of their successors. At the expiration of their term, they can be reappointed.

A sworn liquidator who shall not be reappointed, will, nevertheless, finish the tasks which have been entrusted to him and close the liquidation of the bankruptcies for which he has been appointed bankruptcy receiver.

However, in practice, lists provided for in Article 457 of the Commercial Code have never been instituted and as explained above, in accordance with the provisions of paragraph 2 of Article 456 of the Commercial Code, bankruptcy receivers are chosen among the list of lawyers admitted to the bar and for major cases, the District Court may appoint a lawyer and an auditor.

2. APPOINTMENT

Bankruptcy receivers are appointed by the District Court sitting in commercial matters by the judgment opening the bankruptcy proceedings.

Article 460 of the Commercial Code states that: *"The appointed liquidators take oath to faithfully and accurately perform the functions of a bankruptcy receiver, within fifteen days as from their appointment in a public hearing of the District Court sitting in commercial matters."*

According to article 470 of the Commercial code: *"the appointed bankruptcy receivers will immediately take office after the pronouncement of the bankruptcy judgment; if they were not selected among the sworn liquidators, they will take beforehand, before the juge-commissaire, an oath to faithfully and accurately carry out the assigned functions; they will diligently manage the bankruptcy, under the supervision of the juge-commissaire"*.

Creditors cannot choose the bankruptcy receiver whose choice will be at the sole discretion of the District Court.

3. DUTIES

A bankruptcy receiver's main duty is to realize a bankrupt company's assets and distribute the proceeds amongst creditors taking into consideration their privileges and rank and not to manage the bankrupt company on a going concern basis (although a continuation of the business may be authorised for a limited period of time in some rare cases) .

The bankruptcy receiver is in charge of requesting the publication of the bankruptcy judgment (i) at the District Court within three days from its issuance, , where it shall remain publicly posted for three months, (ii) in the forms of extracts in the newspapers, selected by the District Court, which are printed in the cities and places that are located as close as possible to the debtor's residence or commercial establishments. Within the same three days, the bankruptcy receiver will proceed with the inventory of the debtor's assets, who shall be present or duly convened.

The bankruptcy receiver may, with the authorization of the *juge-commissaire*, immediately sell the objects that are about to deteriorate or imminently depreciate.

The other objects can only be sold with the authorization of the District Court.

According to Article 479 of the Commercial Code, the bankruptcy receiver will seek and recover all the credits or sums due to the debtor.

As soon as a bankruptcy receiver takes office he must, under his own personal liability, make all the necessary arrangements to protect the rights of the debtor against his own debtors.

In addition, where a bankruptcy receiver appointed is a lawyer admitted to the bar, he will also be acting under the supervision of the Bar's Executive Council.

4. SUPERVISION

According to Article 459 of the Commercial Code, *“The sworn liquidators are subject to the monitoring of the District Court sitting in commercial matters. They can be revoked by the Grand-Duke”*. In addition, Article 462 of the Commercial Code provides that *“The District Court sitting in commercial matters can, at any time ... revoke the bankruptcy receiver, or replace him by others or increase the number of bankruptcy receivers.”*

Prior to being revoked a bankruptcy receiver will be convened and heard in a council chamber. The judgment will be pronounced at a hearing.

According to Article 4 of the law dated 30 June 1930 establishing a creditors committee with the mission to safeguard the interests of creditors in bankruptcies and controlled management, bankruptcy receivers shall also be supervised by a creditors committee.

However, in practice, bankruptcy receivers act solely under the supervision of the judge appointed (*juge-commissaire*) to supervise the bankruptcy proceedings (appointed by the same judgment appointing the bankruptcy receiver) as creditors' committees are never appointed.

5. REMUNERATION

According to Article 461 of the Commercial Code, *“the fees of bankruptcy receivers are regulated by the District Court, according to the nature and size of the bankruptcy, on the basis which has been established by a Grand-Ducal Decree.”*

In accordance with the provisions of the Grand Ducal Decree dated 18 July 2003, the remuneration of bankruptcy receivers is calculated according to the assets sold with a minimum of EUR 1,250. The remuneration is a percentage at a decreasing rate depending on the amount of the said assets. In case the bankruptcy receiver sold immovable assets, a second percentage is calculated on the amounts obtained from such sale, at a decreasing rate (from 5% to 1%).

In the event the bankruptcy is closed for lack of assets, the expenses incurred by the bankruptcy receiver will be taxed by the District Court. The latter will settle the fees depending on the nature and the importance of the tasks carried out by the receiver; however, these fees cannot be inferior to a minimum amount or above a maximum amount to be provided for by Grand-Ducal Decree. The minimum is currently of EUR 1,000 and the maximum of EUR 3,000. The fees and expenses will be advanced by the State under the conditions laid down by the Law of 29 March 1893 on legal aid.

6. POTENTIAL AMENDMENTS IN THE NEAR FUTURE

The Luxembourg Government filed a new bill of law (Bill n°6539 – the **“Bill”**) on the protection of undertakings and the modernisation of insolvency law on 1st February 2013 which provides for measures to prevent financially distressed undertakings from being declared bankrupt should their financial problems be detected at an early stage.

The Bill tends to establish bankruptcy receivers as a profession and to revive provisions of Articles 455 and 456 of the Commercial Code. Lists of bankruptcy receivers shall hence be created and they could include non-lawyer bankruptcy receivers. This provision will certainly be welcomed by both creditors and debtors as it will imply a professionalization of bankruptcy receivers and a better quality of services.

The Bill also aims to create an administrative winding-up proceeding without liquidation that will be opened by the manager of the Trade and Company Register (*gestionnaire du registre de commerce et des sociétés*) upon the request of the State Prosecutor (*procureur d'Etat*), within three days as of the reception of the order issued by the State Prosecutor with respect to (i) any commercial company, in accordance with Article 437 of the Commercial Code (i.e. a company that has ceased its payments), that does not have any employees and whose assets do not exceed a threshold determined by Grand-Ducal Regulation (*règlement grand-ducal*); or (ii) any company in accordance with Article 203 of the Law of 10 August 1915 on commercial companies as amended. The insolvency proceeding rules of Article 444 of the Commercial Code shall be applicable to the administrative winding-up without liquidation as from the opening of the proceeding. In such administrative winding-up, bankruptcy receivers will no longer be involved.