



Luxembourg News

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MEMORANDUM : GENERAL INSOLVENCY FILING OBLIGATIONS OF LUXEMBOURG COMPANIES' MANAGERS

This memorandum gives a short summary on the bankruptcy petition and general insolvency filing obligations of the management body of Luxembourg companies, i.e. actions the managers or directors must perform, in what form and the applicable penalties in the event of non-compliance with their obligations.

This memorandum is based on Luxembourg laws and is subject to any change in law or interpretation or application thereof that may take effect after such date.

1. Legal overview of bankruptcy

1.1 Conditions that amount to bankruptcy

Pursuant to article 437 of the Commercial Code, bankruptcy is recognized when the following three conditions are met:

- a) there is a **trader** ("*commerçant*"), i.e. any natural or legal person who carries out commercial acts as his/her profession. This is recognized de facto for any commercial company;
- b) there has been a **cessation of payments**, i.e. the debtor is unable or refuses to meet his/her commitments or to pay his/her debts. The debt must be certain, of a fixed amount and due;
- c) there is a loss of **creditworthiness**. This may result from an inability to obtain new funds/cash in order to pay debts and bring the cessation of payments to an end, or from the refusal of the creditors to grant an extension to the time for payment.

The commercial district court (*tribunal d'arrondissement*) will assess whether the above-mentioned conditions are satisfied before declaring the bankruptcy proceedings open.

1.2 Cessation of payments, insolvency and bankruptcy proceedings

Insolvency filing obligations in Luxembourg arise in any situation where there is a cessation of company payments. Cessation of payments is not defined by the Commercial Code, but shall be understood as occurring when a debtor cannot meet current liabilities with the available assets, i.e. he/she does not have enough money to pay his/her debts.

A cessation of payments gives rise to legal insolvency and bankruptcy proceedings.

The acknowledgement of bankruptcy is governed by the rules of the Commercial Code, in particular the provisions set out in Articles 440 to 442.

Bankruptcy is declared by a judgment of the district court sitting in commercial matters, rendered either on the acknowledgement of the bankrupt, or on the summons from one or more creditors, or ex officio.

The bankruptcy is not different whether the company's business is run by a natural person (by the **trader himself**) or whether the business is run in the form of a commercial company. As it is a legal person, we are talking about the **decision-making body**.

2. Bankruptcy's petition

A bankruptcy petition must be filed by the trader or the decision-making body of the insolvent company.

In order to make a bankruptcy petition, the insolvent company must hold a board meeting and managers/directors must resolve upon the decision to recognize the bankruptcy and give powers to any director/manager to file bankruptcy petition with the commercial court.

It is not necessary for manager(s) / director(s) to convene the shareholders of the company that meetings the conditions for bankruptcy to a general meeting that will resolve upon the state of bankruptcy. There is no need for a confirmation by the shareholders and it's the responsibility of the management board to determine if the conditions required by law are met or not.



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Pursuant to Article 440 of the Commercial Code, the trader must file for bankruptcy with the competent district court (which is determined depending on the domicile of the business or its registered office) **within one month** from the cessation of payments. The petition must be submitted in 2 copies and it is necessary to make an appointment with the clerk of the competent district court to file the petition.

Following Article 440 paragraphs 2 and 3 of the Commercial Code, the bankruptcy petition must be written on plain paper and indicate:

- a) the name and address of each of the partners (or the sole trader) who have joint and several liability for the commitments of the company in the case of:
 - a partnership (*société en nom collectif – SENC*) ;
 - a limited partnership (*société en commandite*) ;
 - a cooperative company (*société coopérative*) ;
- b) the names of the directors or business managers, regardless of the type of company.

3. Mandatory bankruptcy documents

According to Article 441 of the Commercial Code, the bankrupt company managers or directors must attach the following documents to the petition:

- a) the balance sheet of the business or a note indicating the reasons why this cannot be submitted; the balance sheet must be certified, dated and signed by the trader and must contain:
 - a list and valuation of all the movable and immovable assets of the debtor;
 - a statement of accounts receivable and payable;
 - a profit and loss table;
 - a table of expenses ;
- b) the ledgers (books and accounts) held for business accounting purposes in accordance with the general rules governing double-entry book-keeping.

Additional documents may also be requested, including but not limited to:

- a document of identity ;
- a recent extract from the Trade and Companies Register (*Registre de commerce et des sociétés – RCS*) ;
- a recent balance sheet and profit and loss account;
- a statement of the assets and liabilities of the company (bank balance, list of movable assets, receivable invoices, list of creditors and the amounts of receivable debts, etc.).

Any other document concerning the bankruptcy can be submitted to the clerk's office at a later stage without another act of deposit being necessary.

A bankruptcy judgment will then be delivered by the court after hearing the bankrupt party.

4. Deadlines for the filing obligations

According to the provisions of Article 440 paragraph 1 of the Commercial Code, a trader or commercial company that wishes to file for bankruptcy must file a bankruptcy petition with the clerk of the competent court **within one month** from the cessation of payments.

If a bankruptcy order is pronounced by a court of its own motion or following a creditor's petition, this indicates that the trader/commercial company failed to comply with the obligation to file for bankruptcy. To ensure that the director(s) or manager(s) of the company are not held personally liable, it is preferable to file a bankruptcy petition, even at a late stage, rather than do nothing.

The start date of effective cessation of payments is decided by the court before declaring the bankruptcy proceedings open. The date must fall within a time frame which is, according to Article 442 paragraph 3 of the Commercial Code, limited to **6 months before the declaration of bankruptcy**.

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5. Penalties in case of a late filing, absence of filing and other failures

Pursuant to Article 574 of the Commercial Code, if the management body of the bankrupt company has failed to declare and submit the cessation of payments within the prescribed deadline of Article 440, it can be held criminally liable of a negligent bankruptcy ("*banqueroute simple*").

- The same applies if the declaration of cessation of payments does not contain the names of all jointly and severally liable partners;
- if the declaring person has not supplied the information required under Article 441 of the Commercial Code; or
- if such information is inaccurate;

The penalty incurred by managers and directors in this situation is punishable under Article 489 of the Criminal Code by a prison sentence of between one month and two years. In addition, simple bankrupts may be banned from exercising their profession, in accordance with Article 24 of the Criminal Code.



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