

The pollution of operating sites challenged by bankruptcy

As a preview to her plenary session at the Annual Congress in Amsterdam in October, Christel Dumont shares her experience with cases involving environmental issues



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This article¹ charts the main issues and challenges that result from the interplay between the bankruptcy legal framework and environmental duties of classified establishments in Luxembourg with high-risk polluting activities.

The bankruptcy regime aims to liquidate assets and protect creditors, while environmental laws require site restoration, health and ecosystem protection. The environmental duties do not change with bankruptcy, but depend on the activity and its nuisance. A clean-up is needed when a classified establishment stops operating. However, the insolvency practitioner (“IP”) may not find buyers for the assets if the remediation is too expensive. This article explores the legal and financial consequences of environmental liability for bankrupt companies.

The bankruptcy and environmental law regimes

The bankruptcy regime in Luxembourg is based on Articles 437 *et seq.* of the Commercial Code, which have not been significantly changed since their introduction and are now subject to a reform by a draft law inspired by the Belgian law on business continuity. The main criteria for declaring a commercial company or a trader bankrupt are the cessation of payments and the loss of credit, which must both be present at the time of the court’s ruling. The bankruptcy judgment deprives the debtor of the management of all its assets,

which are entrusted to an IP appointed by the court. The IP’s role is to represent the creditors collectively, to sell assets and to settle debts, under the control of the bankruptcy judge and in compliance with the rules of the Commercial Code. The bankruptcy judgment or the closure of the bankruptcy does not automatically dissolve the company, which remains in existence until a formal decision of dissolution is made by the general meeting of the shareholders or by the court.

Luxembourg’s environmental laws lack a specific legal framework for soil protection, unlike the laws on water and air. Instead, they rely on various legislation, mainly the laws on classified establishments and on waste management. Courts have ruled that these laws are not mutually exclusive, as they have partially overlapping, but independent, objectives and require separate permits, even if the same authority grants them. However, none of these laws addresses the bankruptcy of such an establishment and applying them to this situation may cause inconsistencies and/or deadlocks. A draft law on soil protection and contaminated site management is currently under discussion in the Chamber of Deputies, which aims to clarify the status of polluted or potentially polluted sites.

Under the legislation on classified establishments, the last operator of the establishment is responsible for the remediation, decontamination and restoration of the site. It is also presumed to be the author of the pollution, as long as the pollutants are likely to

have been released by the operating establishment. The first obligation for the last operator in case of cessation of activity is to declare this cessation to the Ministry of the Environment, as provided by the amended law of 10 June 1999 on classified establishments,² commonly known as the “*Commodo/Incommodo Law*”. The failure to comply with this obligation is criminally sanctioned with imprisonment and/or a fine.³

The concept of ‘operator’ is defined as ‘any natural or legal person who operates or holds, in whole or in part, an establishment or any person who has been delegated a determining economic power with regard to its technical functioning’.⁴ The court has clarified that the recipient of the obligations arising from the *Commodo/Incommodo Law* is a *priori*, and in principle, the former and final operator who has ceased activity⁵ and who is deemed to be responsible for the subsequent restoration of the site.

The IP’s role and challenges

When a classified establishment goes bankrupt, the operator loses control of its assets from the date of the bankruptcy judgment. Although its assets are entrusted to the IP, the environmental duties under the *Commodo/Incommodo Law* remain in force. The case law has decided that the IP, as the legal representative of the bankrupt operator, must declare the cessation of activity of the classified establishment.⁶ The IP is not the operator, but manages the bankruptcy under the supervision of the bankruptcy judge and the



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District Court. This is the only solution in bankruptcy because the managers are divested of their legal obligations for the company.

Therefore, the IP will have to assume all the duties related to the procedure of cessation of activity, remediation and restoration of the classified exploitation. In order for the public authorities to be able to impose the restoration obligations on the IP, it is necessary that the liquidation operations of the bankrupt company are not closed at the date of notification of the administrative prescriptions.

The costs of remediation, decontamination or restoration of the site are so high that the resources of the bankrupt company may be insufficient. The IP cannot argue insolvency or scarcity of funds to avoid the environmental duties faced in the bankruptcy context. Therefore, a court can order, even on its own initiative, the closure of the bankruptcy proceedings for lack of assets,⁷ if it finds that the assets are insufficient to cover the estimated costs of administration and liquidation of the bankruptcy. The closure of the bankruptcy does not dissolve the bankrupt company, but only suspends the bankruptcy proceedings. It ends the IP's functions and terminates the bankrupt's divestment, which regains free disposal of its assets. In this case, the creditors can resume their individual actions against the person and property of the bankrupt.

However, if the bankrupt company owns the polluted land and the IP cannot sell it to a third party, the presence of such property in the bankruptcy estate may prevent the closure of the bankruptcy for lack of assets, as it impedes the effective determination of the lack of assets and the corresponding closure. In principle, the bankruptcy cannot be closed as long as there are still assets. There is no Luxembourg case law on this issue, so it is uncertain whether the judge would close the bankruptcy for insufficiency of assets, based on the impossibility to sell the



property and its negative value due to the restoration obligation on the IP, as the presumed costs of administering and liquidating the bankruptcy can no longer be met.

Under the waste management legislation, the holder, (i.e. the waste producer or anyone who possesses the waste), must dispose of it according to the 'polluter pays' principle. However, if no holder can be identified, environmental duties fall on the landowner, who is deemed the holder by this law, or ultimately on the IP if the bankrupt is the owner. In this scenario, environmental duties are trapped in an *ouroboros* of regulations as only the IP can enforce them. It is a Catch-22 situation!

Exceptional state intervention

When the debtor responsible for environmental duties becomes fully insolvent, the State may step in to deal with the pollution risks at the site. As the guarantor of public safety, the State can use the Environmental Protection Fund to finance its actions to prevent and combat air, noise and climate

pollution, manage waste, protect nature and resources, and clean up waste dumps and contaminated sites. The Environment Minister can charge the full clean-up cost to the fund. Nonetheless, this national support is not a right for the defaulting parties. The use of the fund must be exceptional, requiring the approval of the Government in Council for the project as a public interest. The fund then substitutes for the bankrupt debtor. The State can then claim back the costs from the liable parties, following the polluter pays principle. ■

Footnotes:

- 1 This article is a summary of a French language piece, jointly written by C. Dumont and M. Heitz, published in the Luxembourg Real Estate Law Journal (*Revue immobilière de droit immobilier*), Issue No. 6, Ed. Legitech, 2019.
- 2 Article 13.8, *Commodo/Incommodo Law*.
- 3 *Ibid.*, Article 25.
- 4 *Ibid.*, Article 2 (14).
- 5 Administrative District Court, 9 February 2015, Docket No. 33851.
- 6 Administrative Court of Luxembourg, 23 July 2008, Docket No. 24157C.
- 7 Article 536, Commercial Code.



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