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ESSENTIAL INTELLIGENCE:

Fraud, Asset Tracing & Recovery

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Luxembourg

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Luxembourg, a country once known for its steel industry, has become an important worldwide financial centre, ranking among the top three EU financial centres; not bad for a country that has just over half a million inhabitants and where the capital city barely has 120,000 inhabitants overnight, which almost doubles during the day with workers streaming in from the countryside and neighbouring countries, Belgium, France and Germany.

Given the size and importance of the financial sector, the Luxembourg government and parliament have always endeavoured to keep the relevant legislation at a state-of-the-art level. As a result, and to the contrary of what is usually expressed by the public opinion, Luxembourg laws on money-laundering are extremely strict and the prosecution of criminal offences related to money-laundering is quite severe, especially with regard to non-compliance with AML regulations.

The official languages in Luxembourg are Luxembourgish (as a spoken language) and French and German as written/administrative languages. Judicial proceedings are usually conducted in French, but sometimes, oral arguments are also presented in Luxembourgish or German. Judgments are always written in French. Written evidence in English is becoming more and more accepted in Court proceedings, without the need for translation, but not in every Court.

Usually, fraud cases are pursued through civil litigation, rather than criminal, for reasons of speed and efficiency. It is not unusual to use insolvency as a tool in fraud cases, as it opens alternative routes for engaging liabilities and/or recovering assets.

Important legal framework and statutory underpinning to fraud, asset tracing and recovery schemes

A Framework for criminal proceeding

1 General considerations

The criminal legislation is based on the original French criminal code (the *code pénal* as Napoleon had it adopted) and violations of the criminal law are divided in three categories ranging from minor to criminal offences.

Since the law of 3 March 2010 on criminal liability of legal persons, legal persons such as companies are also criminally liable under Luxembourg law, this criminal liability applying to all types of criminal offences. In case a

company has been created for the sole purpose of committing a criminal offence or where, for certain specific offences, the company has been diverted from its object to commit the criminal offence, it may be dissolved by judgment of the criminal Courts.

Criminal proceedings are usually initiated by the State Prosecutor (*Procureur d'Etat*) either as a result of a criminal complaint, which has been filed with the State Prosecutor (*plainte pénale*) or with the Investigating Magistrate (*plainte pénale avec constitution de partie civile entre les mains du juge d'instruction*).

Such proceedings are very much in the hands of the authorities and the latter rarely take into account outside help. Access to the investigation files is also made as difficult as possible, as much for the perpetrators as for the victims. It is only when the investigation is at a very advanced stage that the victim and the perpetrator are granted access to the case file.

Furthermore, investigators rarely provide conclusive answers on the evolution of a case, as Luxembourg proceedings are subject to secrecy rules which are enforced quite tightly.

The State Prosecutor always has the right to decide whether prosecution is necessary and appropriate (*principe d'opportunité des poursuites*). However, if the State Prosecutor decides not to prosecute the case, this is not to be deemed as an acquittal, but simply an administrative decision. The victim, or any other third party which is able to prove that it has an interest to take action, can then still seize the criminal Courts directly, save for crimes.

The powers of the investigating authorities have become quite broad over the time, and, especially, the bank secrecy rules cannot be upheld towards the criminal authorities.

For certain specific offences, such as, for instance, money laundering, the Investigating Magistrate may further order a bank to inform them if a suspect has or controls any accounts with that bank or order a bank to inform them about all the operations conducted or planned. The Investigating Magistrate may further request mutual assistance in legal matters from foreign authorities.

At the beginning of an investigation, the Investigating Magistrate will usually freeze the bank accounts and assets, which appear to have a connection with the offence under investigation in that they are potentially subject to be proceeds of such offence. The victim or any third parties having a legitimate right on the frozen accounts may require from the Courts (the *Chambre du Conseil*) the lifting of the freezing order, bearing in mind that such liftings are rarely granted.

Unfortunately, fraud proceedings in criminal matters are painfully slow in Luxembourg and, since the victim barely has access to the case file, they are not very attractive; the result of which being that practitioners mostly turn away from criminal proceedings unless there really is no other option.

2 Foreign requests for mutual judicial assistance in criminal matters

Foreign requests for mutual assistance in criminal matters are usually executed in a timely manner by Luxembourg authorities. The judicial remedies against mutual assistance available in Luxembourg have become, over time and through a number of modifications of legislation, very limited, in that the suspect is generally not informed of the existence of such request and its execution by the authorities, and the bank does not have the right to inform a suspect of the freezing of his account.

The general concept of this legislation, based on Luxembourg's strong intent to fulfil its international obligations, is that any judicial remedies against such foreign request should be undertaken in the country making the request, and not in Luxembourg.

Bona fide third parties to the investigation have the right to be informed of the existence of the request and have a judicial remedy available in order to protect their rights.

Any evidence collected under such request for judicial assistance in criminal matters may only be used, by the requesting State, in the proceedings for which the request has been made, but not in other types of proceedings.

The judicial assistance will not be granted if it relates to offences, which are qualified as "political" under Luxembourg law, or if it relates exclusively to offences against tax laws or foreign exchange rules or if the request violates essential interests of the country or is a risk to its sovereignty or national security.

However, the actual verification on this is virtually non-existent, as the means of control by Luxembourg jurisdictions are limited and the legal remedies non-existent.

3 Confiscation

In national criminal proceedings, confiscation may be ordered over assets of any kind, including any revenue of these assets, as well as over assets which have substituted the assets mentioned before.

Any assets belonging to *bona fide* third parties

will not be subject to confiscation but will be returned to them.

As far as foreign confiscation decisions are concerned, they may be enforced in Luxembourg after having obtained an exequatur, which is awarded by way of national two-instance proceedings where the convict is heard. The exequatur may be refused for a number of reasons, such as, for example, political offences, or in case of a violation of the European Human Rights Convention, etc.

Third parties may claim their rights in the Luxembourg exequatur provisions, unless they had the possibility to already claim their rights during the foreign proceedings, but they did not do so.

4 Anti-money laundering framework

Luxembourg has one of the toughest anti-money laundering frameworks in place, and violations by professionals subject to AML rules are punished rather severely and with a lot of publicity.

5 Unexplained wealth orders

A recent law has introduced the concept of unexplained wealth orders into Luxembourg law.

They have quite a broad area of application and give the State Prosecutor substantial powers, but have not been tested much in case-law so far.

B Framework for civil remedies

1 Jurisdiction

The EU rules are applicable as far as jurisdiction is concerned. Luxembourg is also a party to a number of international conventions relating to jurisdiction, such as the Lugano Convention.

In cases where neither an international convention nor EU rules are applicable, Luxembourg Courts generally have jurisdiction if the defendant resides in Luxembourg. Also, if a case is initiated by a Luxembourg resident against a foreign national who is not resident in the EU or a country with which Luxembourg has concluded an international convention, Luxembourg Courts will accept jurisdiction.

The Luxembourg Courts generally also accept jurisdiction clauses, even if agreed upon by two parties, which do not have any connection with Luxembourg.

The simple fact that part of the assets relevant to a Court case are located in Luxembourg will generally not be sufficient for Luxembourg Courts to take jurisdiction over the entire case, unless the assets are immoveable property such as real estate. This principle does not, however, apply to conservatory measures for which Luxembourg Courts will accept jurisdiction.

2 Court proceedings

Legal proceedings are generally initiated by a summons to appear (an *assignation,* which is a deed served by a bailiff, the *huissier*), which needs to fulfil some formal requirements to be valid. Further, it needs to contain a detailed description of the facts and of the exact relief sought; otherwise, it will be voided by the Courts for *obscuri libelli.*

Civil proceedings may either be of pure civil nature or of commercial nature.

Pure civil proceedings are in writing, meaning that the parties' lawyers exchange written submissions between them and, when the preliminary written phase is concluded, the Court will hear the parties during a short hearing, in which the Court may require further explanations. The cases are usually not pleaded again orally during these hearings (a full pleading is highly unusual), but certain points may be clarified. It is therefore usual for the parties to simply refer to their written submissions during such hearings. This makes these proceedings quite slow and burdensome.

In commercial proceedings (e.g. proceedings between two merchants (*commerçant*) or between commercial companies, or proceedings brought by an individual against a merchant or a commercial company), first instance proceedings are subject to hearings where the parties present their oral arguments and the Court then renders a judgment, but the parties may also choose to conduct the proceedings in writing, in which case the procedure will be the same as for pure civil proceedings.

In appeal and in cassation, the proceedings will be only in writing.

Summary proceedings may be initiated by a claimant to seek interim relief, such as for the victim of a fraud to obtain a provisional allowance (if there are no contestations deemed to be serious), for a shareholder to suspend the effects of a general meeting of shareholders, to have a provisional administrator appointed for a company, a request for the appointment of a receiver over some assets (*séquestre*), to have an expert appointed to make technical findings, etc. Summary proceedings are usually reserved for urgent matters, but may still take some weeks if not months before a judgment is reached.

There are very limited possibilities to obtain *ex parte* orders, in case of serious urgency, but judges are quite reluctant to award such orders. Such *ex parte* orders may then be challenged in open court; the refusal to grant will also be challenged.

3 Conservatory measures

Luxembourg Courts accept to take jurisdiction for conservatory measures if the assets are located in Luxembourg (i.e. physical assets, claims, or assets held on a bank account, such as cash or shares or any other type of asset held, in any form, of financial institution).

Conservatory measures may be undertaken under Luxembourg law by way of a *saisie-conservatoire*, a *saisie-arrêt*, or a *saisie sur salaire*.

A *saisie conservatoire* allows a claimant to seize the assets of his debtors on a provisional basis. It will only be granted where there is urgency and a debt which is due and payable. The *saisie conservatoire* is authorised by the President of the District Court upon *ex parte* application. The asset which has been seized by way of a *saisie conservatoire* may not be sold (and the claimant paid) until the claimant has obtained an enforceable judgment against his debtor and validated the *saisie conservatoire*. It is to be noted that in practice the *saisie conservatoire* is rarely used.

The *saisie-arrêt* is used far more often. It allows a creditor to seize assets of his debtor which are in the hands of a third party such as, for example, the debtor's bank account, or a debt owed by a third party to the debtor.

The *saisie-arrêt* is either made on the basis of an enforceable title (such as a final judgment or an authentic title), or upon authorisation by the President of the District Court, if the claimant has no enforceable title, but has a claim which is certain, liquidated and payable. Such authorisation may be requested *ex parte* and an order authorising the *saisie-arrêt* is delivered upon such application, if the conditions are fulfilled.

In both cases, the deed of *saisie-arrêt* will be served by way of a bailiff first to the third party having a debt against the debtor and then to the debtor.

From the moment of the service of the deed of *saisie-arrêt*, the third party will have to block payment of all amounts it owes to the seized debtor (i.e. in case of a bank account, the whole account will be frozen even if there are assets on the account in excess of the debt).

In case of a *saisie-arrêt* authorised by the President of the District Court only, after the *saisie-arrêt* has been served upon the debtor, and until the Court is seized regarding the merits of the *saisie-arrêt*, the debtor may, by way of summary proceedings, request from the President of the District Court to have the order authorising the *saisie-arrêt* reviewed *inter partes* and to have it retracted or to have the effects of the *saisie-arrêt* limited to the amount of the claim for which the *saisie-arrêt* has been effected (a *cantonnement*).

In order to obtain the transfer of the claim which has been seized (and request payment thereof), the creditor has to request validation of the *saisie-arrêt* before the Luxembourg Courts. If

the Luxembourg Courts have jurisdiction over the case on the merits, they will hand down a judgment on the merits and on the validation of the *saisie-arrêt*.

If the Luxembourg Courts do not have jurisdiction on the merits, they will allow the claimant time to seek a judgment from a foreign Court and to have it declared enforceable in Luxembourg.

It is only after the judgment validating the *saisie-arrêt* has become final that the claim in the hands of the third party will be transferred to the claimant (who may then seek payment from the third party); and that the claimant may seek the third party to disclose which funds or assets are held on behalf of the debtor. This is done by way of a summons addressed by the creditor to the third party, the *assignation en déclaration affirmative*. This summons will also, if the above conditions are fulfilled, lift bank secrecy. If the claimant has an enforceable title, the *assignation en déclaration affirmative* may however be served on the third party before the *saisie-arrêt* is validated.

Until this *assignation en déclaration affirmative* has been served, the creditor will not know whether his *saisie-arrêt* has been efficient, i.e. whether any assets have been frozen, especially where bank accounts are frozen, given bank secrecy, which is only lifted after this summons.

This entails that it only makes sense for a creditor to undertake a *saisie-arrêt* in the hands of a third party where the creditor is sure that there are assets. If the creditor does not know at which bank his creditor has an account, and whether there is any money on such account, the creditor could theoretically serve a deed of *saisie-arrêt* on a number of different banks, but the costs of such proceeding do rapidly become elevated thus rendering it unfeasible in practice.

A *saisie sur salaire* allows the claimant to seize a debtor's salary in the hands of the employer, where the claimant has a certain, liquidated and payable claim. Once the *saisie sur salaire* is validated, the debtor's employer will directly pay part of the salary (a minimum of the salary is protected against the *saisie* to allow the debtor to buy food and pay for his rent) to the creditor instead of the debtor.

4 Pre-trial discovery

Luxembourg law does not provide for a pre-trial discovery regime as one would know from the United States, but there is the possibility to obtain pre-trial communication of certain documents, in accordance with article 350 of the New Code of Civil Procedure, according to which a claimant, under certain very specific conditions, may seek to obtain documents from the defendant in a fraud case or any other third party. The conditions are as follows:

- the result of the case on the merits has to depend on the fact for which the conservation or the establishing of the evidence is requested;
- the motive for obtaining such evidence has to be legitimate;
- the requested measures have to be legally admissible;
- the request has to be made before any Court case on the merits is initiated (otherwise the request will be refused); and
- the claimant has to describe in detail what evidence is sought, he may not simply limit himself to requesting the production of all evidence related to a potential Court case.

The seeking of evidence for the mere purpose of appreciating the opportunity of initiating a Court case on the merits will not be sufficient for the disclosure order to be granted.

Such a disclosure request is initiated by way of summary proceedings held in front of the President of the District Court.

5 Register of beneficial owners

In 2019, Luxembourg introduced a register of beneficial owners, whereby a company has to disclose the name and address of any person having a beneficial interest higher than 25% in the company.

An important number of companies have still not filed the relevant information with the register, but most entities that are domiciled with a registered agent have.

The weakness of this register is that a number of companies have circumvented the rules by issuing bonds convertible into shares, and thus hiding the true beneficial owner as a creditor, and thereby avoiding publicising the information about them.

In our view this is a fraudulent manoeuvre, but it remains to be tested in court.

All in all, this register is a very small progress towards easier fraud investigations, even though its practical use still remains to be tested.

Case triage: main stages of fraud, asset tracing and recovery cases

Most fraud cases we deal with only have a partial Luxembourg element to them, which means that in these types of cases Luxembourg counsel only intervenes in a small part of the case, mostly to freeze assets or enforce a judgment against assets located in Luxembourg, or to find out information about assets held by a Luxembourg entity.

However, in our work as insolvency receivers, we regularly conduct fraud investigations ourselves.

Whatever the type of case, typically, what we would do first would be to check the documentation which is available at the Trade and Companies Register in relation to any entity involved in the fraud scheme, as well as the register of beneficial owners for these entities.

For the moment, the register of beneficial owners does not allow to retrieve the entities in which a person has an interest on the basis of that person's name, but it could be contemplated to try to obtain an injunction against the register, forcing the latter to run a search against the person in their register.

We would also run a verification on whether any of the persons and/or entities involved own any real estate in Luxembourg, even though access to this type of information has been rendered considerably more difficult with the arrival of GDPR. It is also possible to verify, on the basis of a Court order, whether a person is employed in Luxembourg or is paid a pension by the Luxembourg State.

At this stage, if there are the slightest thoughts that the perpetrators may have bank accounts in Luxembourg, we would seek a freezing order (*saisie-arrêt*) as described above.

If there is a very strong urgency in the case and a severe risk of disappearance of the funds, the best options would be to contact Luxembourg's Financial Intelligence Unit, with the goal of obtaining a provisional blockage of the funds held in Luxembourg to avoid any spoliation thereof, and then request civil conservatory measures on top.

Generally, any measure that we would seek would first be sought *ex parte*, and only upon refusal of an *ex parte* application, *inter partes*.

We would also contemplate using insolvency of a Luxembourg entity as a tool to recover assets or engage the liability of company officers (*de jure* or *de facto* ones). To that regard we should mention that Luxembourg Commercial Courts have, so far at least, been pretty open to litigation funding in relation to insolvency proceedings, even though, in general, litigation funding is not yet fully established in Luxembourg.

Parallel proceedings: a combined civil and criminal approach

In Luxembourg, the introduction of criminal proceedings is generally only useful where the victim (or the civil complainant) has not gathered enough evidence to support a civil claim on its own and needs the help of the coercive tools of criminal law to obtain such evidence.

Criminal proceedings, especially in complex fraud cases, are usually slower than civil proceedings and the victim loses control of the proceedings, which lie entirely in the hands of the public authorities. The victim could introduce criminal proceedings directly before the Criminal Courts by way of a direct summons (*citation directe*), but there is no direct advantage of proceeding that way as the risks of a trial of criminal nature are not avoided (at civil level, the proof of the wrongdoing is much easier as the criteria are lower: the simplest wrongdoing (*culpa levissima*) will generally trigger civil liability).

Also, Luxembourg investigating authorities are very reluctant to use mutual legal assistance tools, for reasons that are, to be honest, not entirely clear today.

The biggest issue is, however, that criminal proceedings will automatically entail a stay on any civil proceedings related to the same facts.

Therefore, it makes only little sense to initiate criminal proceedings unless there is absolutely no other choice, as these would block the whole civil recovery for a long period of time.

In our practice, we almost totally refrain from filing criminal proceedings and put weight only on civil remedies, which can be useful enough.

Key challenges

1 Bank secrecy laws

One of the essential concepts of the Luxembourg financial sector is the professional secrecy obligation, which is applicable not only to banks but also to the professionals of the financial sector (PSF), and is, in essence, an obligation to keep all the information obtained by a bank or PSF relating to its client confidential.

The breach of this duty of confidentiality constitutes a criminal offence sanctioned by imprisonment from eight days to six months and a fine of €500 to €5,000.

The duty of confidentiality is provided for by article 41 of the law of 5 April 1993 on the financial sector, which imposes a duty of confidentiality on the professionals of the financial sector (including banks), their employees, managers, directors and even their liquidators.

This article also provides that the wilful violation of the professional secrecy obligation constitutes the offence of breach of professional secrecy incriminated by article 458 of the Luxembourg criminal code, which essentially determines the duty of confidentiality of doctors, pharmacists and lawyers.

As a result, the duty of confidentiality of professionals of the financial sector is of the same substance as that of the latter professions.

The duty of confidentiality can only be overridden in very limited circumstances, such as:

- where there is a statutory provision (even prior to the law of 5 April 1993) authorising the revealing of confidential information;
- *vis-à-vis* national or international authorities in charge of prudential supervision if they are acting within their legal framework, and only if they are also bound by a duty of confidentiality;
- where the professional of the financial sector has to defend his interest in a Court case for his own cause;
- where a professional of the financial sector is called as a witness by a Court;
- *vis-à-vis* criminal authorities (such as an Investigating Magistrate who may require the professional of the financial sector to provide evidence on movements or owner of bank accounts concerned by an investigation);
- in case of money laundering: professionals of the financial sector are compelled, by law, to make a suspicious transaction report to the Public Prosecutor if they suspect money laundering; and
- in case of a *saisie-arrêt* that has been validated, the professional of the financial sector is obliged to disclose the information on his client against whom the *saisie-arrêt* has been validated.

However, the client's authorisation does not allow the professional to disclose confidential information subject to its duty of confidentiality.

Finally, Luxembourg has started to sign a number of bilateral non-double taxation treaties with other countries based on the OECD model convention and which contain provisions on automatic exchange of information in tax matters. A law was also introduced in 2012 authorising the Luxembourg tax authorities to collect information from the entities holding them (including banks). Basically, this means that the duty of confidentiality may be lifted in tax matters, if the originating Member State concluded a non-double taxation treaty with Luxembourg based on the above model treaty.

2 Securitisation vehicles

In my recent experience, the biggest challenge we face in Luxembourg are securitisation vehicles, which have now come up a number of times in fraud cases.

As per Luxembourg law, securitisation vehicles are quite opaque and are only subject to outside regulation if they offer their shares to the public, which is rarely the case. Also, an investor into a securitisation vehicle is not allowed to petition for insolvency of the vehicle, and some vehicles even cut off any rights of the investors to seek a judgment against such vehicle, which opens the door to fraud.

We have seen the case where such vehicles are set up and functioning as a form of investment fund. Even if these unregulated securitisation vehicles are often reserved for qualified investors, there are no real control mechanisms in place, which can result in shares ending up in the wrong hands.

This is, in our view, a result of the legislation for securitisation vehicles being too lax and definitely in need of being verified and/or secured for investors, as the fraud cases in relation to these vehicles keep on piling up.

Cross-jurisdictional mechanisms: issues and solutions in recent times

Mutual legal assistance in criminal matters has become much more effective recently, as Luxembourg law has eliminated all forms of appeal, with the result that nowadays mutual

assistance is granted almost automatically, with very little review by the courts as to whether the conditions are fulfilled.

Technological advancements and their influence on fraud, asset tracing and recovery

While Luxembourg brands itself as a favourable environment for startups (and we do have a substantial number of Fintech companies), when it comes to the combat of fraud, Luxembourg unfortunately lags a bit behind, especially at the level of the authorities, where there is some room for technological progress.

At the level of the private sector, one can certainly feel an important evolution in the use of technology; however, things are rendered a tad complicated by Luxembourg's multilingual environment: the day-to-day language is Luxembourgish, which is technology-resistant, while the official languages are German and French. Add to that, that English is used regularly in business, as well as the fact that Luxembourg has substantial expat communities from other countries that speak other languages than the four above, you have the right recipe for making it very difficult to use any technology that is not language-neutral.

Recent developments and other impacting factors

The most important recent development certainly is the register of beneficial owners.

As described above, it allows for any person to look up the beneficial owner of a Luxembourg company, even anonymously. Luxembourg has moved to full transparency as you can see.

There is, however, a number of caveats to this.

So far it is not possible to do a reverse search through the database of the register, i.e. to find companies that a specific person is the beneficial owner of.

It could, however, be contemplated to try and obtain an injunction against the register in order to force the latter to disclose the names of the companies that a person has a beneficial interest in.

To the best knowledge of the author, this has not been tried so far, but should definitely be an avenue to explore.

Max Mailliet specialises in litigation with a focus on fraud and asset tracing, white-collar crime, commercial and shareholder litigation and high-profile insolvencies.

Prior to opening his own firm, E2M, in 2008, Max was an associate in the litigation and corporate law departments of a major Luxembourg law firm. With his team, Max specialises in litigating complex fraud cases in front of the Luxembourg courts, including cases with an international element. Max and his team also regularly represent institutional clients in litigation related to financial matters, such as disputes between investment funds, between funds and their service providers, or between shareholders, in which Max has a very extensive experience.

Max is regularly appointed by the Luxembourg courts as insolvency receiver or liquidator in complex insolvency cases including multi-jurisdictional issues and asset recovery.

Max is also a lecturer in Luxembourg insolvency law. He is the Luxembourg exclusive representative to the ICC's FraudNet, a network of lawyers specialised in fraud and asset tracing.

Max studied at Robert Schuman University in Strasbourg and the London School of Economics and Political Science.

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