

Luxembourg Gestion Côtrolée/Controlled Management Q&A

1. What is the process for opening a Controlled Management procedure?

Controlled Management is only available if a company could potentially recover from its financial difficulties, or where the procedure will assist in an orderly realisation of the company's assets.

A company may file for Controlled Management where it does not have sufficient funds or is unable to satisfy its obligations to creditors. However, if there is no actual prospect of a reorganisation or ordered liquidation controlled management will be refused and the company will instead use the standard bankruptcy proceedings.

Initially the directors or managers of the company will file an application for Controlled Management with the district court (the *Tribunal d'arrondissement siégeant en matière commerciale*), which should be supported by evidence including a list of the company's known creditors. Following this, there will be a private hearing, if the application is not rejected one of the judges will be appointed as the reporting judge (*juge délégué*). They will investigate and report on the company, usually with expert assistance.

Each of ESI, Rioforte and ESFG has been accepted into separate Controlled Management processes. In each case two experts have been appointed, an accountant and a financial advisor.

2. How does the opening of Controlled Management affect the ability of creditors to enforce their rights?

From the date of the judgement opening Controlled Management proceedings unsecured creditors are precluded from enforcing their rights against the company and the company may not, without the written approval of the *juge délégué* dispose of its assets, grant pledges or mortgages, make commitments or receive movable property. Controlled Management will not prevent any secured creditors, whose collateral falls within the Financial Collateral Directive from enforcing their claims.

3. What is the Controlled Management process?

On receipt of the judge's final report the court will decide whether to grant the application for Controlled Management. If the application is granted administrators (*commissaires*) will be appointed by the Court. The administrators will prepare an inventory of the assets of the company and assess its financial situation, they will then prepare a reorganisation or liquidation plan. The plan must take into account the interests of all the interested parties, i.e. the company and the creditors, and respect the ranking of the privileges and mortgages.

A copy of the plan will be provided to the known creditors and excerpts will be published in the Luxembourg legal gazette. Creditors will have two weeks from publication to inform the court whether they accept or reject the plan.

The court may only accept the plan if more than 50% of the creditors (in number) representing more than 50% of the claims that have not been disputed by the administrators approve the plan. Creditors that do not vote are deemed to have accepted the plan. If the plan is accepted the court will give a binding judgement to that effect, which will be published in the Luxembourg legal gazette and in another newspaper determined by the court. Creditors have 8 days to appeal the judgement.

If the plan is rejected the court will either reject the application for the controlled management irrevocably, or it will inform the administrators that the plan should be amended and re-circulated.

4. What are the key time frames?

The process outlined above can take six months from initial application for Controlled Management by the company to the provision of the judge's final report. However, ESFG has publicly disclosed that the court will decide on ESFG's application for Controlled Management on 6 October 2014.

5. Does management retain control?

Management retains day to day control. However, from the appointment of the *juge délégué* and during the appointment of the administrators, the company may not dispose of its assets, grant pledges or mortgages, make commitments or payments, enter into settlement agreements, borrow money or receive funds, without the prior consent of the *juge délégué* or the administrator respectively. Any such transactions made without consent will be void.

6. What is the claw back regime?

The following transactions may be set aside by the administrators if they took place within the period of *cessation des paiements*:

- donations by the company of movable and immovable property
- transactions where the company received a consideration but where the consideration is below to the effective, fair value of the asset
- payments whether in cash or by way of a set-off for non-matured debts
- for matured debts, payment that have not been in cash or by way of negotiable and
- non-negotiable papers (*effets de commerce*)

- mortgages and pledges granted during the *cessation des paiements* period for antecedent debts (it being noted that security granted under the 2005 law is excluded)
- payments of debts which have not fallen due and transactions realized during the period of the *cessations des paiements*, if the contracting party has knowledge of the *cessation des paiements*
- mortgages and privileges that have been granted either 10 days prior to or after the date of the *cessation des paiements* if more than 15 days have elapsed between the granting of the mortgage/privilege and its registration.

The *cessation de paiements* period is set by the court, but may not be more than **six months** prior to date on which the company made the application to be entered into Controlled Management.

In addition, the administrators may set aside any transaction that has been made fraudulently against of creditors' rights or in violation of Luxembourg law.

7. Is it necessary to file a proof of claim?

It is not necessary to file a proof of debt to perfect a claim against a company in Controlled Management. The court and administrators are under an obligation to provide information to known creditors. It may therefore, be prudent for creditors to make themselves known to the court at the earliest opportunity.

However, if the Controlled Management application is ultimately rejected and the company is subsequently declared bankrupt, it will become necessary to file a statement of claim. The statement of claim can be filed at any time during the bankruptcy proceedings, however, any dividends will be paid out to those creditors that have filed their statement of claim so late filing could result in missing out on dividend distributions.

8. What is the entitlement to claim for default interest and what is the applicable rate under Luxembourg law?

Pursuant to the Civil Code if the bond has matured and not been repaid there is automatic default interest applicable. The rate is set annually and presently is approximately 3%.

9. What public information is available or likely to become available (e.g. publication of creditor lists, procedures etc.)?

Controlled Management is a private process and only a limited amount of information is required to be made available to creditors. The only documents that are required to be made available are the judge's report and excerpts of the reorganisation/liquidation plan, which will be sent to creditors and published in the Luxembourg legal gazette.

10. Are claims transferable under Luxembourg law and would a buyer receive the equivalent rights of the original claim holder including any right to vote?

Yes, claims and all rights attaching thereto are transferrable under Luxembourg law, including the transfer of partial claims.

Given the uncertainty surrounding the Espirito Santo Group we would recommend that any transfer documentation explicitly transfers all ancillary rights and claims that the creditor may have against any member of the Espirito Santo Group.

11. Do all rights under contract in relation to transfers continue to apply after filing for controlled management?

Yes, all contractual rights continue to remain in force following the filing for Controlled Management.

12. Is there any equitable subordination risk if the buyer of a claim purchases from a seller that was a connected party/shareholder with the Borrower?

There is no concept of equitable subordination under Luxembourg law.

13. Is “controlled management” considered an insolvency process which is likely to trigger typical insolvency Events of Default?

Yes, Controlled Management is considered an insolvency procedure under Luxembourg law, and would therefore generally trigger an Event of Default under the credit documentation. However, this will depend on that exact wording of the relevant credit or bond documentation.

14. Are there any taxes applicable to the transfer of claims/payments of distributions on claims? If so, what is the rate and can a buyer be held jointly and severally liable for such taxes?

No taxes apply.

15. Does Luxembourg law recognise trusts?

Trusts do not exist under Luxembourg law since it is a civil law system which does not differentiate between legal and equitable ownership, however, Luxemburg will recognise foreign law trust arrangements.

16. What is the recommended process to transfer a bond/debt of a company in Controlled Management?

We would recommend the Buyer receives an LMA based form of claims confirmation under English law, including, without limitation, the sale of all rights to file a claim in connection with the bond, an undertaking from the Seller to assist with any claims filing and the sale of all ancillary rights and claims. The form of Assignment Agreement will

depend upon underlying bond or loan documentation and the governing law of the contract.