

Sovereign Immunity 2021

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Luxembourg

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BACKGROUND

Concept of sovereign immunity

1 | What is the general approach to the concept of sovereign immunity in your state?

Generally speaking, and in accordance with customary international law, the Luxembourg courts usually recognise the sovereign immunity of foreign states; however, this concept is not absolute, and the Luxembourg courts have adopted a relatively narrow definition.

Under this restrictive approach, a foreign state is only immune in relation to activities involving the exercise of a sovereign power. A state may, therefore, be sued and have its assets seized in the context of commercial or private matters, and an important distinction must be drawn between commercial and sovereign activities and assets.

Legal basis

2 | What is the legal basis for the doctrine of sovereign immunity in your state?

Sovereign immunity is not codified in Luxembourg law; the doctrine of sovereign immunity in Luxembourg is based on customary international law.

With regard to sovereign immunity from jurisdiction, the Luxembourg courts usually refer to principles of customary law and relevant case law.

In this regard, the Luxembourg District Court recently held the following (27 March 2019, No. 177266):

Immunity from jurisdiction is not enshrined in positive law but rather in customary international law. . . . Custom is inherently changeable and, in the absence of a written legal text, the rule of law that emerges therefrom is liable to change at any time, particularly in light of the evolution of legal, political, economic and social concepts. Important actors in these changes are the courts and tribunals, which must look beyond the custom as described at a given time by another court or in the literature.

Another major influence for the Luxembourg courts is French and Belgian case law.

Luxembourg is a party to the European Convention on State Immunity of 16 May 1972. It applies the Convention, or draws inspiration from it, even in cases between states that are not parties thereto.

The 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, which has not been signed by Luxembourg, is another source of inspiration for the Luxembourg courts.

Luxembourg case law shows that these multilateral conventions are widely used to apply the principles of customary international law.

Multilateral treaties

3 | Is your state a party to any multilateral treaties on sovereign immunity? Has the state made any reservations or declarations regarding the treaties?

Luxembourg ratified the European Convention on State Immunity on 11 December 1986 (entry into force on 12 March 1987) without reservation and declared that:

- in accordance with article 21 of the Convention, the competent Luxembourg court to determine whether effect should be given to a judgment issued pursuant to article 20 is the Luxembourg Court of Appeal; and
- in accordance with article 24 of the Convention, in specific cases falling outside the scope of articles 1 to 13, the Luxembourg courts can entertain proceedings against another contracting state, but only to the extent they are entitled to entertain those proceedings against states that are not parties to the Convention.

Luxembourg is not a party to the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property.

JURISDICTIONAL IMMUNITY

Domestic law

4 | Describe domestic law governing the scope of jurisdictional immunity.

The Luxembourg courts take into account two criteria when determining how to apply jurisdictional immunity in the context of proceedings: the legal person whose act gave rise to the dispute and the nature of the act.

Foreign states and their various organs benefit from jurisdictional immunity only if the act that gave rise to the dispute originated by nature or (secondarily) by its purpose in the exercise of sovereignty by a state. In other words, Luxembourg recognises the jurisdictional immunity of states and their various bodies for acts 'by order and on behalf of the state'.

Immunity applies when the act that gave rise to the dispute qualifies as an 'act of public authority' or if it was accomplished 'in the interest of a public service'. Immunity is denied to territorial subdivisions of states, including federated states, departments, regions and cities.

Immunity is also denied for private or commercial acts, which can also be performed by private entities and individuals. This approach is regularly mentioned in Luxembourg case law (eg, a recent decision of the Luxembourg District Court in a case against Iran (Judgment No. 2019TALCH01/0016 of 27 March 2019)).

Luxembourg case law describes jurisdictional immunity as giving rise to a 'lack of authority' on the part of the court. In legal proceedings, jurisdictional immunity may constitute grounds for dismissal of the case. This objection can be raised at any time during the course of proceedings and represents a basic due process right to which every party is entitled.

State waiver of immunity or consent

5 | How can the state, or its various organs and instrumentalities, waive immunity or consent to the exercise of jurisdiction?

A waiver of immunity or consent can be express or implied, provided it results from a clear act of renunciation and only if the person waiving immunity or consent does so voluntarily and with full knowledge of the facts, thus unequivocally demonstrating intent.

A waiver of immunity or consent is considered implied when the beneficiary is the party initiating the legal action, for example when the beneficiary appears voluntarily before the court without invoking immunity and argues the merits of the case. Another example is acceptance of a contractual jurisdiction clause.

In this regard, Luxembourg case law is clear when it comes to a request for exequatur of a foreign judgment before a Luxembourg court. In this case, jurisdictional immunity cannot be validly raised when the foreign judgment is based on a jurisdiction clause (Luxembourg District Court, 26 November 2008, No. 260/2008; Luxembourg District Court, 14 June 2011, No. 130191; and Court of Cassation, 2 February 2012, No. 3/12).

Moreover, the Luxembourg courts recently held that a foreign state that had agreed to an arbitration clause was not protected against recognition and enforcement of the resulting arbitral award by a Luxembourg court (Trib Arr Lux, 7 June 2019, No. 142988; Court of Appeal, 19 December 2019, No. CAL-20800013; and Court of Appeal, 11 February 2021, No. 43054).

6 | In which types of transactions or proceedings do states not enjoy immunity from suit (even without the state's consent or waiver)? How does the law of your country assess whether a transaction falls into one of these categories?

Luxembourg courts will only recognise the jurisdictional immunity of sovereign states and their bodies if the disputed act qualifies as an act of public authority or an act carried out in the interest of public authority. If the disputed act qualifies as a private or commercial act, jurisdictional immunity will not be recognised.

To determine the qualification of a disputed act, the Luxembourg courts base their analysis on the substantial derogations stipulated in both the European Convention on State Immunity and the United Nations Convention on Jurisdictional Immunities of States and Their Property, such as:

- a contractual obligation to be executed in the forum state;
- an employment contract executed in the forum state (Court of Appeal, 5 June 2003, No. 26852; Court of Appeal, 27 June 2013, No. 38859; Luxembourg District Court, 17 January 2014, No. 246/14; and Court of Appeal, 19 March 2020, No. 28/20);
- the acquisition of a stake in an organisation established in the forum state;
- intellectual property rights protected in the forum state;
- a right to a building established in the state of the ruling court (except embassy properties);
- donation, succession and trust law (Court of Appeal, 21 November 2000, No. 23230);
- compensation for material or personal injury or death resulting from an event occurring in the forum state if the perpetrator of the act was in the forum state at the time of occurrence (Luxembourg District Court, 27 March 2019, No. 177266); and
- arbitration (Court of Appeal, 11 February 2021, No. 15/21).

The Luxembourg District Court has held that customary international law does not provide for a derogation from immunity for acts constituting a violation of peremptory norms (Luxembourg District Court, 27 March 2019, No. 177266).

7 | If one of the exceptions to sovereign immunity set out above applies, is there any related principle that could prevent a court having jurisdiction over the state?

No other related principle would prevent the Luxembourg courts from exercising jurisdiction over the dispute.

Proceedings against a state enterprise

8 | To what extent do proceedings against a state enterprise or similar entity affect the immunity enjoyed by the state? Is there precedent for piercing the corporate veil to subject the state itself to those proceedings?

A state enterprise may benefit from sovereign immunity from jurisdiction, provided the entity is acting on behalf of the state and the disputed conduct or transaction amounts to a sovereign act.

For a creditor of a state enterprise to pursue enforcement against the state's assets (other than assets of the enterprise) or the assets of other state-owned enterprises (that are not parties to the dispute), the creditor must be able to demonstrate that the relevant state-owned enterprise constitutes a mere emanation (alter ego) of the state.

To determine whether a state enterprise should be considered an emanation of the state, the Luxembourg courts take into account the following factors:

- lack of functional independence from the state; and
- the absence of a distinct estate (ie, lack of separate assets from those belonging to the state) (Luxembourg District Court, 19 July 1996, No. 742/96).

Standing

9 | What is the nexus the plaintiff needs to have standing to bring a claim against a state?

Generally, a plaintiff need not demonstrate the existence of a particular nexus to initiate legal action against a state in Luxembourg.

The conditions to be met are similar to those applicable in legal actions against private parties: the plaintiff must have an interest in acting and standing.

Generally, it is assumed that an interest in bringing a claim exists when the outcome of the claim could alter or improve the plaintiff's legal position (Court of Appeal, 24 March 2005, No. 26616).

Nexus of forum court

10 | What is the nexus the forum court requires to exercise jurisdiction over a state if the property or conduct that forms the subject of the claim is outside the forum state's territory?

For the Luxembourg courts to exercise jurisdiction over a state, the conditions set out in articles 27 to 48 of the New Code of Civil Procedure and in otherwise applicable international instruments on jurisdiction, such as Regulation (EU) No. 1215/2012 of 12 December 2012 (Brussels I Recast), must be fulfilled.

In general, the Luxembourg courts will exercise jurisdiction over a state when the property or conduct that forms the object of the claim is outside the forum state's territory, in other words if:

- the parties agreed to Luxembourg jurisdiction in a contractual clause (article 29 of the New Code of Civil Procedure and articles 25 and 26 of Brussels I Recast); or
- if one of the following conditions is met:
 - the defendant resides or has its registered office in Luxembourg (articles 28 and 41 of the New Code of Civil Procedure and article 4 of Brussels I Recast);

- the contract that forms the object of the dispute is executed in Luxembourg (article 28 of the New Code of Civil Procedure and article 7(1) of Brussels I Recast);
- the harmful act that forms the object of the dispute was committed in Luxembourg, for example if the defendant is domiciled in Luxembourg or the harm occurred in Luxembourg (article 42 of the New Code of Civil Procedure and article 7(2) of Brussels I Recast); or
- if the plaintiff is of Luxembourg nationality, provided Brussels I is inapplicable, subject to strict conditions (article 14 of the Civil Code).

In exceptional circumstances, the Luxembourg courts may accept jurisdiction if there is a proven risk of denial of justice and a connection exists with Luxembourg (Court of Appeal, 6 November 2013, *Pasicrisis*, 2014/1, pages 448 to 454).

Interim or injunctive relief

11 | When a state is subject to proceedings before a court or arbitral tribunal in your jurisdiction, what interim or injunctive relief is available?

A variety of interim measures may be requested before a court or an arbitral tribunal in Luxembourg.

Luxembourg rules of civil procedure provide for expedited procedures before the president of the district court. In urgent cases, the president of the district court may order, in interlocutory (summary) proceedings, 'all measures that do not give rise to a serious objection or that are justified by the existence of a dispute' (article 932 of the New Code of Civil Procedure).

A plaintiff can request 'any measure that is necessary to avoid imminent harm or to put an end to disorderly conduct' (article 933 of the New Code of Civil Procedure).

In addition, the court may award interim damages to the plaintiff or order the defendant to perform an obligation that is prima facie established (article 933(2) of the New Code of Civil Procedure).

The jurisdiction of the Luxembourg courts is strictly limited to the territory of the Grand Duchy of Luxembourg. Interim or injunctive relief ordered by a Luxembourg court is therefore 'of purely territorial application' (Court of Appeal, 24 February 1988, No. 10047; Luxembourg District Court, 4 June 2006, No. 473/2002), and jurisdiction is assessed on that basis.

Final relief

12 | When a state is subject to proceedings before a court or arbitral tribunal in your jurisdiction, what type of final relief is available?

No distinction is made between the type of final relief that may be ordered by domestic courts and arbitral tribunals against a state or private party.

In general, under Luxembourg law, any measure may be ordered (specific performance where legally and practically possible, damages, restitution, injunction, etc) to restore what the plaintiff lost due to the defendant's wrongful conduct (the status quo ante).

Service of process

13 | Identify the court or other entity that must be served with process before any proceeding against a state (or its organs and instrumentalities) may be issued.

Unless international instruments such as Regulation (EC) No. 1393/2007 of 13 November 2007 or the Hague Convention of 15 November 1965 apply, article 156 of the New Code of Civil Procedure is applicable.

14 | How is process served on a state?

Unless international instruments such as Regulation (EC) No. 1393/2007 or the Hague Convention of 15 November 1965 apply, article 156(1) of the New Code of Civil Procedure is applicable.

Judgment in absence of state participation

15 | Under what conditions will a judgment be made against a state that does not participate in proceedings?

In Luxembourg, if a defendant fails to participate in legal proceedings before a national court, articles 78 to 89 of the New Code of Civil Procedure apply, regardless of whether the defendant is a state.

If the claim was validly served on the defendant, the court will rule on the merits of the claim and uphold it if it finds it to be 'proper, admissible and substantiated'.

On a request for exequatur of a US court decision against Iran and various of its bodies (including the Central Bank), the Luxembourg District Court recently ruled as follows (27 March 2019, No. 177266):

the failure of the CENTRAL BANK to appear before the American court cannot be interpreted as a waiver of immunity from jurisdiction before that court, which would have repercussions for the benefit of immunity from jurisdiction before the courts of that place. While it can be acknowledged that the failure to appear is the result of a deliberate decision, it must however be recognised that this abstention alone does not indicate the intention of the CENTRAL BANK to waive its immunity from jurisdiction before this [Luxembourg] court.

ENFORCEMENT IMMUNITY

Domestic law

16 | Describe domestic law governing the scope of enforcement immunity.

In general, enforcement immunity applies; therefore, state-owned assets are insulated from enforcement measures in Luxembourg, unless it can be shown that:

- the state has waived its enforcement immunity (by expressly consenting to enforcement measures being carried out or by earmarking specific assets to satisfy its creditor's claim); or
- the targeted assets are not specifically in use or intended for use by the state for non-commercial public utility purposes and have a connection with the entity against which the legal proceedings that gave rise to the debt were directed.

To determine the scope of immunity from execution, the criterion currently used – as opposed to the commercial or non-commercial, public or private nature of the act or activity that gave rise to the dispute – relates to the nature of the funds or property that forms the object of the enforcement measure, thereby ensuring autonomy between immunity from execution and immunity from jurisdiction.

This criterion entails distinguishing between public funds, against which no measures can be taken, and private funds, which may be garnished, and prevents states from abusing their immunity from execution (Luxembourg District Court, 22 November 2013, No. 219/13).

Application of civil procedure codes

17 | When enforcing against a state, would debt collection statutes and the enforcement sections of civil procedure codes or similar codes also apply?

When enforcing against a state, civil procedure rules, especially those set forth in the New Code of Civil Procedure, apply, as described below.

In Luxembourg, as a prerequisite to the enforcement of a foreign judgment (ie, one rendered outside the European Union and provided no multilateral treaty applies), a creditor must first obtain a decision from the president of the district court called an *exequatur* (article 678 of the New Code of Civil Procedure) (ie, an authorisation to enforce the foreign judgment or arbitral award).

The president of the district court will hear the parties in *inter partes* proceedings and verify that the foreign judgment is not irregular and that *exequatur* may be conferred.

If *exequatur* is sought for an arbitral award, pursuant to article 1250 of the New Code of Civil Procedure, the creditor is required to apply to the president of the district court on an *ex parte* basis (ie, without notifying the award debtor). In this instance, the court will only make a *prima facie* verification that:

- the document submitted to it is an arbitral award; and
- the arbitral award is not manifestly in violation of Luxembourg or international public policy.

If the judgment is vested with *exequatur*, it will be enforced under the same conditions as a Luxembourg judgment (ie, only once the *exequatur* order has been served on the defendant). In the absence of service of the *exequatur* order, the creditor does not have an enforceable title allowing the court to rule on the validity (of the judgment) (Court of Appeal, 3 June 2009, JTL, 2011/14, page 47).

Consent for further enforcement proceedings

18 | Does a prior submission to the jurisdiction of a court or tribunal constitute consent for any further enforcement proceedings against the property of the state?

Prior submission to the jurisdiction of a court or arbitral tribunal, or even a waiver by the state of its jurisdictional immunity, does not amount to a valid waiver by the state of its sovereign or diplomatic immunity against enforcement.

A waiver of immunity from jurisdiction does not automatically entail a waiver of immunity from enforcement. A waiver of immunity from enforcement must be unequivocal. It may, for example, result from a specific provision of an agreement expressing, even implicitly, a definite and unequivocal intention to that effect. It is up to the court to analyse the agreement in light of its content and the circumstances to determine the will of the foreign state (Luxembourg District Court, 26 November 2008).

Property or assets subject to enforcement or execution

19 | Describe the property or assets that would typically be subject to enforcement or execution.

Unless the state has waived its enforcement immunity, only assets that are not specifically in use or intended for use by the state for non-commercial public utility purposes may be subject to enforcement in Luxembourg.

Assets covered by enforcement immunity

20 | Describe the assets that would normally be covered by enforcement immunity and give examples of any restrictive or broader interpretations adopted by the courts.

Based on Luxembourg case law, assets 'specifically used or intended for use by states for non-commercial public utility purposes' include, without limitation:

- assets, including bank accounts, that are used to perform or intended for the performance of the functions of a state's diplomatic missions or consular posts, special missions, missions to international organisations or delegations to organs of an international organisation or international conferences;
- assets of a military character or used or intended for the performance of military functions; and
- tax or social security debts of the state.

21 | Explain whether the property or bank accounts of a central bank or other monetary authority would be covered by enforcement immunity even when such property is in use or is intended for use for commercial purposes.

Assets held or managed by foreign central banks or monetary authorities in Luxembourg may be seized in two cases only:

- if the assets are not held or managed by the foreign central bank or monetary authority on its own behalf or on behalf of the state or states on which they depend; or
- if the assets are held or managed by the foreign central bank or monetary authority on its own behalf but are used for private purposes.

Test for enforcement

22 | Explain whether domestic jurisprudence has developed any further test that must be satisfied before enforcement against a state is permitted.

In Luxembourg, enforcement against a state is permitted after the arbitral award or foreign judgment to be executed has obtained *exequatur* in Luxembourg. No further tests are necessary.

Service of arbitration award or judgment

23 | How is a state served with process or otherwise notified before an arbitration award or judgment against it (or its organs and instrumentalities) may be enforced?

Luxembourg applies international instruments such as Regulation (EU) No. 1393/2007 of 13 November 2007 and the Hague Convention of 15 November 1995, which set out the applicable procedure.

If no procedure for the service of process is determined under international law, article 156 of the New Code of Civil Procedure provides the following:

With regard to persons domiciled or residing abroad, service shall be made in the forms agreed between Luxembourg and the country of domicile or residence of the addressee. Unless another form of service is provided for by an international agreement, the bailiff sends a copy of the document by registered letter with an acknowledgement of receipt to the domicile or residence of the addressee abroad. If the foreign state does not allow service of process by post to persons established on its territory, the bailiff shall send a copy of the document by registered letter, with an acknowledgement of receipt, to the Ministry of Foreign Affairs so that the document can be served on the addressee by diplomatic channels.

This process must be respected; otherwise, enforcement of the arbitral award or judgment may be declared null and void.

A state can waive its rights in this regard by appearing in court and arguing the merits of the case without objecting to the form of service of process.

History of enforcement proceedings

24 | Is there a history of enforcement proceedings against states in your jurisdiction? What part of these proceedings is based on arbitral awards?

A recent study of Luxembourg case law shows that the national courts often hear exequatur proceedings regarding foreign decisions or arbitral awards. In parallel to those proceedings, the creditor often seeks to attach assets belonging to the foreign state that are located in Luxembourg.

As Luxembourg is considered a major European financial centre, many creditors initiate enforcement proceedings against foreign states in Luxembourg. Many of those proceedings are for refusal to execute arbitral awards rendered against a state.

Public databases

25 | Are there any public databases through which assets held by states may be identified?

There are no public databases specifically dedicated to the identification of sovereign assets located in Luxembourg; however, several publicly available resources may be used to search for those assets.

For example, creditors may be able to use the Luxembourg Trade and Companies Register to trace companies registered in Luxembourg, including state-owned corporations, and to identify their assets and major shareholders.

Court competency

26 | Would a court in your state be competent to assist with or otherwise intervene to help identify assets held by states in the territory?

The Luxembourg courts will not assist creditors with the identification of assets held by foreign states in Luxembourg or otherwise intervene in this regard.

IMMUNITY OF INTERNATIONAL ORGANISATIONS

Specific provisions

27 | Does the state's law make specific provision for immunity of international organisations?

In Luxembourg, there is no general provision providing for immunity of international organisations; however, certain international instruments, such as those mentioned below, provide for such immunity (Luxembourg District Court, 29 July 2015, No. 374/2015):

- article 105 of the Charter of the United Nations of 26 June 1945 provides that '[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes';
- article 105 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 provides for specific rules concerning the scope and modalities of immunities enjoyed by the United Nations; and
- the Convention for European Economic Cooperation (Supplementary Protocol No. 1 of 16 April 1948 and Supplementary Protocol No. 2 of 14 December 1960) provides specific rules on the immunities enjoyed by the Organisation for Economic Co-operation and Development.

Many European entities are located in Luxembourg and may be subject to enforcement measures; however, the measures are subject to certain restrictions. Article 1 of Protocol No. 7 on the privileges and immunities of the European Union to the Treaty on the Functioning of the European Union provides: 'The premises and buildings of the Union shall be inviolable. They shall be exempt from search, requisition, confiscation or expropriation. The property and assets of the Union shall not be the subject of any administrative or legal measure of constraint without the authorisation of the Court of Justice.'

Pursuant to this article, the immunity enjoyed by the European Union prevents any enforcement proceedings in Luxembourg, unless they have been duly authorised by the Court of Justice of the European Union (CJEU). According to CJEU case law, the purpose of this provision is to prevent interference with the functioning and independence of the European Union (*Antippas v Commission*, Case C-1/02 SA, EU:C:2003:187, paragraph 12).

Such immunity is not absolute since a measure of constraint may be ordered upon authorisation by the CJEU where there is no risk that it will hinder the functioning of the European Union (*Tertir-Terminais de Portugal v Commission*, C-1/04 SA, EU:C:2004:803, paragraph 11). For instance, the CJEU has ruled that the functioning of the European Union may be impeded by measures of constraint that affect the financing of common policies or the implementation of action programmes drawn up by the European Union (*Tertir-Terminais de Portugal v Commission*, C-1/04 SA, EU:C:2004:803, paragraph 14).

Domestic legal personality

28 | Does the state consider international organisations headquartered or operating in its territory as enjoying domestic legal personality and could such organisations be subjected to proceedings before a court or arbitral tribunal?

International organisations, whether established or operating in Luxembourg, may be considered domestic legal persons if their constituent agreement or the host agreement so provides.

As a result, if allowed by the terms of their constituent agreement or host agreement, international organisations may be recognised as domestic legal persons in Luxembourg and thus subject to legal proceedings before the domestic courts and arbitral tribunals. However, the recognition of the domestic legal personality of an international organisation does not prevent that organisation from invoking the immunities provided for by relevant international instruments.

Enforcement immunity

29 | Would international organisations in the state enjoy enforcement immunity? Are there any cases where debtors sought to enforce against a state by attaching or executing assets held by international organisations?

The immunities from enforcement enjoyed by international organisations are established and governed solely by international instruments to which Luxembourg is a party and, in particular, by their constituent agreements or host agreements.

UPDATES & TRENDS

Key developments of the past year

30 | Are there any emerging trends or hot topics in your jurisdiction?

Recent case law shows that the Luxembourg courts are determined to ensure the effectiveness of foreign decisions and arbitral awards in Luxembourg, even when the decisions are rendered against sovereign states.

Much recent case law demonstrates that the Luxembourg courts apply a restrictive approach to sovereign immunity and that attachments can be made against the assets of sovereign states located in Luxembourg.

In this regard, Luxembourg has not codified specific rules on sovereign immunity and does not currently intend to do so. This reflects Luxembourg's will to apply customary international law and incorporate a certain degree of flexibility into the concept of sovereign immunity.

Coronavirus

31 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The government put in place a series of measures to soften the financial and economic impact of the pandemic for companies and economic actors, such as the following:

- businesses and self-employed persons experiencing liquidity problems can apply for a deferral of their quarterly tax payments;
- until 30 June 2021, businesses were not obliged to file for bankruptcy within one month of determination of the need to do so;
- Luxembourg-based companies are authorised to organise virtual shareholder and board meetings, even if the company's articles of association do not provide for this possibility;
- financial assistance is available for companies in the sectors that have been most severely affected by the pandemic; and
- several laws introducing state aid measures to support the Luxembourg economy have been implemented.

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