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## **LUXEMBOURG**

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## 1. The institutional framework for resolution in Luxembourg

The Law of 18 December 2015 on *the resolution, reorganisation and winding up measures of credit institutions and certain investment firms and on deposit guarantee and investor compensation schemes* (hereinafter “BRR Act”) transposes into national law Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014<sup>1</sup> (hereinafter “BRRD”), as well as Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on *deposit guarantee schemes* (hereinafter “DGSD”).<sup>2</sup> The presentation of the BRR Law in October 2015 followed the opening of infringement proceedings by the Commission in May 2015 (Commission, 2015).<sup>3</sup> In accordance with Article 130 of Directive 2014/59/EU, Luxembourg, like the other Member States, had until 31 December 2014 to transpose this Directive.

The BRR Act includes all the substantive and procedural rules and instruments applicable to the resolution, reorganisation and winding-up of credit institutions and certain investment firms. It also defines the legal and institutional framework for depositor and investor protection. Part IV of the BRR Law makes a series of amendments to Luxembourg financial legislation (in particular the Law of 5 April 1993 on the financial sector,<sup>4</sup> the Law of 5 August 2005 on financial collateral arrangements,<sup>5</sup> the Law of 24 May 2011 on the exercise of certain rights by shareholders at meetings of listed companies),<sup>6</sup> in order to ensure the compatibility of these texts with the new resolution framework. On an institutional level, Article 207 of the BRR Law introduces a new Article 2(2) and a new Section 4-1 entitled “Resolution Board”, consisting of nine articles (Articles 12-1 to 12-9), to the Law *establishing a financial sector supervisory commission* (hereinafter “CSSF Act”).<sup>7</sup> The legal framework governing the resolution authority in Luxembourg is thus split between the BRR Act for material and procedural aspects and the CSSF Act for institutional aspects.

The BRR Act and the CSSF Act have been amended several times since 2015. The changes to the institutional framework are essentially limited to extending the resolution powers of the resolution authority to central counterparties in Luxembourg.<sup>8</sup> The institutional arrangements to avoid any conflict of interest

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<sup>1</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms, *Official Journal of the EU* (hereafter ‘OJ’) L 173/190, 12.6.2014.

<sup>2</sup> Mémorial A no. 246, 24 December 2015; last amended by the law of 15 July 2024 on the transfer of non performing loans (Mémorial A no. 292, 18 July 2024).

<sup>3</sup> Directive 2014/59/EU had to be transposed by 31 December 2014 and Directive 2014/49/EU, depending on the provisions, either by 3 July 2015 or 31 May 2016.

<sup>4</sup> Mémorial A no. 27, 10 April 1993; last amended by the law of 15 March 2023 (Mémorial A no. 147, 17 March 2023).

<sup>5</sup> Mémorial A no. 128, 16 August 2005.

<sup>6</sup> Mémorial A no. 109/2011, 27 May 2011.

<sup>7</sup> Law of 23 December 1998 establishing a financial sector supervisory commission. Mémorial A no. 112, 24 December 1998; last amended by the law of 20 July 2022 (Mémorial A no. 371, 20 July 2022).

<sup>8</sup> See also Articles 5 and 6 of the Act of 20 July 2022, cited above.

between the new functions entrusted to the CSSF and all the other functions with which it is entrusted have been strengthened.

In the remainder of this study, all references to the amended versions of the BRR Act, the CSSF Act and the law on the financial sector are made to the French and English versions of the texts proposed, for information purposes, by the CSSF on its website. Unless otherwise stated, references to the BRR, CSSF and financial sector acts are deemed to refer to the latest amended French version of these acts.<sup>9</sup>

### *1.1. The ‘Commission de surveillance du secteur financier’, Luxembourg’s resolution authority*

In accordance with Article 3(1) of the BRR Act and Article 2-2(1) of the CSSF Act the ‘Commission de surveillance du secteur financier’ (Financial sector supervisory commission, hereinafter “CSSF”) is designated as “the resolution authority within the meaning of Article 3(1) of the BRRD in Luxembourg”. The reference in Luxembourg legislation to the BRRD was unnecessary. As noted by the Council of State,<sup>10</sup> the correct transposition of Article 3 BRRD requires determining the resolution authority, without necessarily having to refer to the Directive.<sup>11</sup> By cross-reference effect of Regulation (EU) No 806/2014 (hereinafter “SRMR”) to Article 3(1) of the BRRD, the CSSF also constitutes the “national resolution authority in Luxembourg” for the purposes of the application of the SRMR. This status of national resolution authority is repeated in Article 3(1) of the BRRD, as well as in Article 2-2(2) of the CSSF Act, although the SRMR is mandatory and directly applicable.

In addition, since a law of 20 July 2022,<sup>12</sup> the CSSF is also the resolution authority for central counterparties in Luxembourg, within the meaning of Article 3(1) of Regulation (EU) 2021/23 of the European Parliament and of the Council.<sup>13</sup>

The Single Resolution Board (hereinafter referred to as the “SRB”) has jurisdiction over some credit institutions established in Luxembourg. Therefore, this EU body and the CSSF are referred to as the “Luxembourg resolution authorities”.<sup>14</sup>

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<sup>9</sup> All the consolidated versions of the laws applicable to the resolution of credit institutions and investment firms are available on [the CSSF website](#).

<sup>10</sup> Council of State (‘Conseil d’Etat’), Opinion on the draft law on measures for the resolution, reorganisation and winding-up of credit institutions, 10 December 2015, 6.

<sup>11</sup> As for the obligation of a reference to the directive in the transposition measures or at the time of the official publication of the transposition measures (see Article 130 of the BRRD), the Court of Justice has ruled that this type of obligation (regular for directives of a certain complexity) means that the Member States must adopt a positive transposition act (CJ, *Commission v Poland*, case C-29/14, point 49; CJ, *Commission v Romania*, case C-549/18, point 13).

<sup>12</sup> Precited.

<sup>13</sup> Regulation (EU) 2021/23 of the European Parliament and of the Council of 16 December 2021 on a framework for the recovery and resolution of central counterparties, OJ L 22/1, 22.12.2021.

<sup>14</sup> Article 59-15 of the Financial Sector Act.

The CSSF was set up in 1998 as an “establishment governed by public law”, with the initial task of exercising prudential supervision over most financial sector players (credit institutions, UCITS,<sup>15</sup> investment firms, financial transaction advisers, brokers, market makers, professional depositories of securities or other financial instruments, stock exchanges). The BRR Act of 18 December 2015 extended the CSSF’s functions to the resolution of credit institutions.<sup>16</sup> Although the BRRD accepts that Member States may entrust resolution functions to already existing public authorities (e.g. national central bank, competent ministry or any other administrative authority), it specifies that this possibility must be “exceptional” when it concerns an authority exercising prudential supervision functions, due to the risks of conflict. The BRRD therefore requires that “adequate structural arrangements shall be in place to ensure operational independence and avoid conflicts of interest between [all those functions]”.<sup>17</sup> In the absence of any precision as to the nature of these “structural arrangements”, it must be assumed that they refer to any legal rule or administrative practice which ensures or has the effect of guaranteeing the independence of the decision-making of the authority concerned when carrying out its resolution functions. In the case of Luxembourg, the small size of the country does not allow for a proliferation of administrative authorities. Furthermore, the creation of a new public institution would have resulted in additional operating costs and a duplication of tasks already carried out by the CSSF, particularly with regard to information collected from credit institutions.<sup>18</sup> Accordingly, the CSSF shall exercise the tasks and powers conferred on it as the resolution authority by the BRR Act *through* a new internal body – the Resolution Board.<sup>19</sup> By way of derogation from the CSSF’s internal organisational rules, the Resolution Board is the CSSF’s “highest executive authority” for the purposes of exercising the tasks and powers conferred on the CSSF as resolution authority.<sup>20</sup> This means that the Resolution Board has the powers of assessment, decision, administration, external representation (including judicial and extra-judicial) normally vested in the management of the CSSF. Therefore, any reference to the Resolution Board in the BRR Act should be read as a reference to the CSSF in its resolution capacity. The Luxembourg Council of State has emphasised the special nature of this institutional arrangement: although the CSSF is *legally* the national resolution authority, the exercise of resolution tasks is carried out by an administrative structure and an *ad hoc* decision-making body.<sup>21</sup> It should be noted that the same approach was applied to establish the depositor and investor protection board (see below).

<sup>15</sup> Undertakings for Collective Investments in Transferable Securities.

<sup>16</sup> Article 2 of the CSSF Act.

<sup>17</sup> Article 3(3), 2<sup>nd</sup> sentence, of the BRRD.

<sup>18</sup> Chambre des députés, Report from the Committee on Finance and the Budget on the draft law on measures for the resolution, reorganisation and winding-up of credit institutions, no. 6866, 2015-2016 ordinary session, 14 December 2015, 5.

<sup>19</sup> Article 3(1), 2<sup>nd</sup> paragraph, of the BRR Act.

<sup>20</sup> Article 12-1 (2) of the CSSF Act.

<sup>21</sup> Council of State, Opinion on the draft law on measures for the resolution, reorganisation and winding-up of credit institutions, 10.12.2015, 6.

### The legal nature of the CSSF

Article 128 of the Constitution of the Grand Duchy of Luxembourg<sup>22</sup> provides the basis for the creation of a public establishment by law. By “public establishment” (*établissement public*, in French) is meant any legal person governed by public law entrusted by a legislative provision with the management of one or more specific public services under the supervision of the State.<sup>23</sup> Within the limits of its remit, the power to make regulations may be granted by law to a public establishment. The law may provide that these regulations are subject to the approval of the supervisory authority or even provide for their annulment or suspension by the supervisor, without prejudice to the powers of the judicial or administrative courts?<sup>24</sup> This legal status is distinct from that of an independent administrative authority (such as the Competition Council), as the latter is not subject to the hierarchical supervision of a ministry or other administration.<sup>25</sup>

The resolution tasks entrusted to the CSSF contribute to a public service mission and are therefore of an administrative nature. The majority of staff should logically be recruited as civil servants. The CSSF law only provides for a civil servant status for the members of the management. The other members of staff are recruited as employees under public law contract (i.e. ‘employés d’Etat’), assimilated to civil servants.<sup>26</sup> This public-sector staff may be supplemented, as required, by employees under private contract law (i.e. ‘salariés’).<sup>27</sup> This choice in staff management is to be understood in the light of the conditions linked to recruitment: access to the civil service requires a command of the country’s three administrative languages (Luxembourgish, French and German), and resolution activities require staff with a high level of technical expertise not necessarily available on the Luxembourg labour market (internationalised, very narrow and under pressure in the financial sector).

In addition to the institutional provisions inserted by the BRR Act into the CSSF Act, the internal operation of the CSSF is detailed in the rules of procedure. In accordance with Article 12-4 (5) of the CSSF Act, the Resolution Board

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<sup>22</sup> As amended by the law of 17 January 2023. Mémorial A no. 27, 18 January 2023. Any local authority, alone or with other local authorities, may also create public establishments, within the limits and in the manner determined by the law.

<sup>23</sup> Instruction of the Government in Council of 11 June 2004, the purpose of which is to set out guidelines and general rules for the creation of public establishments. Mémorial A no. 115, 12 July 2004; repealed by the Government Instruction in Council of 10 February 2017, and replaced by the Government Decision of the same day. Mémorial A no. 207, 21 February 2017.

<sup>24</sup> Article 129(2) of the Constitution (as of 1 July 2023).

<sup>25</sup> Judgment of the Administrative Court (‘Tribunal administratif’) of 13 June 2007, *Société ... c conseil de la concurrence*, no. 21870.

<sup>26</sup> Article 1 of the law of 16 April 1979 establishing the general status of civil servants. Mémorial A no. 31, 17 April 1979; last amended by the law of 19 May 2003. Mémorial A no. 78, 6 June 2003. The status of civil servant and employee of the State generally implies a lack of independence and submission to the political authorities (Chamber of Civil servants, Opinion on the draft law establishing the CSSF, 4 December 1998).

<sup>27</sup> Article 13 of the CSSF Act. Employees with public status are subject to the general status of civil servants, while employees with private status are subject to the ordinary rules of the Labour Code.

adopted its own internal regulations at its meeting on 27 July 2016. These rules were last amended on 14 December 2020.

### Powers of the Resolution Board

The Government and the national legislator favoured a literal transposition of the BRRD into Luxembourg law.<sup>28</sup> Under Article 38(1) of the amended BRR Act, the Resolution Board has the necessary powers to apply resolution instruments to credit institutions that meet the conditions for triggering a resolution procedure. The list of resolution powers conferred on the Resolution Board in Article 61(1) of the amended BRR Act reproduces word for word the list in Article 63(1) of the BRRD. On the other hand, Luxembourg has not made use of the option opened in Article 37(9) of the BRRD to grant additional instruments and powers to the Resolution Board (Conseil d'Etat, 2015: 10). The possibility for a resolution authority to call on alternative sources of financing in the event of a highly exceptional situation of systemic crisis is not formally included in the BRR Act either.

With regard to the power to suspend payment or delivery obligations under safeguard measures, Luxembourg transposed Directive (EU) 2019/879 by a law dated 20 May 2021. The content of Article 33a of the amended BRRD is included in Luxembourg law in Article 34-1 of the amended BRR Act. Once again, the content of the BRR Act is a copy-paste of the BRRD. The national legislator has set at 250 euros the minimum daily amount to which depositors have access when the Resolution Board exercises its power to suspend eligible deposits.

### Internal organisation of the Resolution Board and the Resolution Department

The internal organisation of the Resolution Board is defined in article 12-2 of the CSSF Act. It is characterised by the great simplicity of its organisation chart. The Resolution Board is the highest executive authority for the purpose of exercising the resolution tasks and powers attributed to the CSSF.

Its internal composition meets the standard requirements applicable to public establishment.<sup>29</sup> It is made up of five members, three of whom are appointed *ex officio*: a representative of the supervisory ministry (ie. The Ministry of Finance<sup>30</sup>); the Director General of the 'Banque centrale du Luxembourg' (Central Bank of Luxembourg, hereafter 'BCL'); and the Director of the CSSF responsible for banking supervision. The other two members are the Resolution Director and a

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<sup>28</sup> Council of State, Opinion on the draft law on measures for the resolution, reorganisation and winding-up of credit institutions, 10 December 2015, 2.

<sup>29</sup> Government decision of 10 February 2017 cited above.

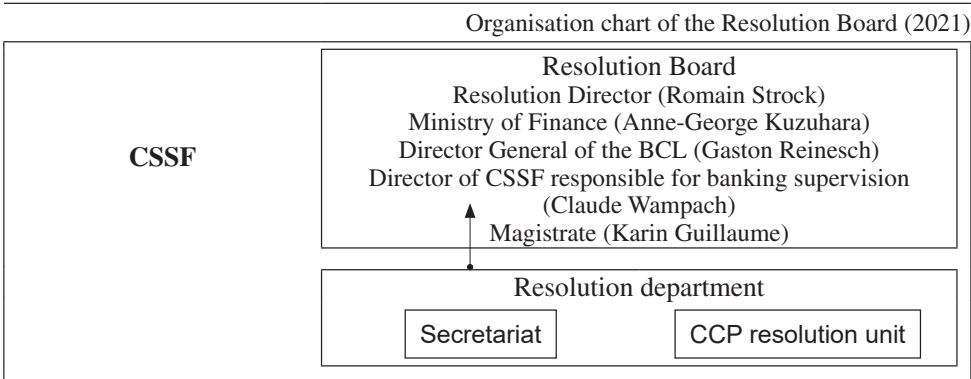
<sup>30</sup> Until a reform was adopted and came into force in July 2024, the Ministry of Finance was represented by the Director of the Treasury. From now on, the only requirement is that the Ministry be represented by "a civil servant of the ministerial department of the Ministry of Finance" (Article 12-2(1), letter b), of the CSSF Act). This change was introduced by government amendments during the legislative procedure before the Chamber of Deputies. As the Government explains, it "aims to provide greater flexibility in the appointment of the member [representing the Ministry of Finance]". See Government's amendment of 6 March 2024 to the Draft law on the transfer of non-performing loans, doc. no. 8185/03, amendment 4.

magistrate, both appointed by the Grand Duke on a proposal from the Government for a five-year term that shall be renewable.<sup>31</sup> The magistrate’s deputy is appointed in accordance with the same procedure, while the Resolution Director is responsible for choosing his own deputy from among the staff of the Resolution Department. The Resolution Director chairs the Resolution Board; if he or she is unable to attend, this role is assumed by the Director of the Treasury. The Resolution Director is not a member of the CSSF Executive Board but may attend meetings of the CSSF Executive Board as an observer. The Chamber of Deputies does not intervene in the procedure for appointing the members of the Resolution Board.

A CSSF department (the Resolution department) is set up within the Resolution Board to carry out the day-to-day tasks related to the resolution function. The secretariat of the Resolution Board is provided by a member of the Resolution department appointed by the Board.

It should be added that this scheme has become slightly more complex since a reform in 2022 which entrusted the CSSF with resolution tasks relating to central counterparties.<sup>32</sup> This new task must be exercised through the Resolution Board. In the absence of central counterparties established in Luxembourg,<sup>33</sup> the implementation of these tasks remains hypothetical. On the other hand, the day a CCP establishes its headquarters in Luxembourg, the Resolution Board will have to adopt the appropriate institutional arrangements to avoid any conflicts of interest between the resolution functions concerning CCPs and all other functions –including the resolution functions applicable to credit institutions. To this end, when it comes to resolving CCPs, it will be necessary to ensure that the Resolution department has “effective operational independence”, its own staff, separate reporting lines and a decision-making process that is distinct from the other tasks entrusted to the Resolution Board.<sup>34</sup> A priori, this will also involve separate agendas.

Chart 1



Source: CSSF, *List of members of the Resolution Board updated on 12 November 2024*

<sup>31</sup> Article 10(1), by reference to article 12-7(3) of the CSSF Act; and Article 12-2(1), letter e), of the CSSF Act.

<sup>32</sup> Article 7(2) of the law of 20 July 2022 implementing Regulation (EU) 2021/23, cited above.

<sup>33</sup> See European Securities and Markets Authority, List of Central Counterparties authorized to offer services and activities in the Union, 10 November 2022.

<sup>34</sup> Article 12-4(5) of the CSSF Act.

### The other Luxembourg authorities involved in resolution matters

Other Luxembourg public bodies have been entrusted with specific tasks in resolution matters: the ‘Fonds de Résolution Luxembourg’ (Luxembourg Resolution Fund, hereinafter “FRL”), the ‘Fonds de Garantie des Dépôts Luxembourg’ (Luxembourg Deposit Guarantee Fund, hereinafter “FGDL”), the Council for the Protection of Depositors and Investors (‘Conseil de protection des déposants et des investisseurs’, hereinafter “CPDI”), the Systemic Risk Board, the Consultative Committee for Resolution (‘Comité consultatif de la résolution’) and the Consultative Committee for Prudential Regulation (hereinafter “CCPR”).

#### *1.2. The ‘Fonds de Résolution Luxembourg’*

The FRL was set up by article 105 of the BRR Act, in the form of a public establishment, with legal personality and placed under the supervision of the ministry responsible for the financial centre (i.e. the Ministry of Finance).

The purpose of the FRL is to collect contributions from credit institutions authorised in Luxembourg, to manage the financial means and to participate in the financing of the resolution of a credit institution at the request of the Resolution Board.<sup>35</sup> To this end, the FRL has the power to raise ex-ante contributions, ex-post extraordinary contributions, contract borrowings and other forms of support, and to recover any reasonable expenditure properly incurred in connection with the use of resolution tools or the exercise of resolution powers.<sup>36</sup> The Resolution Board may also invite the FRL to make a contribution to offset or absorb losses of a credit institution which have not been covered by the internal bail-in.<sup>37</sup> Only the Resolution Board is empowered to trigger the use of the FRL.

The FRL manages its assets and, where appropriate, takes out loans or borrowings when it is called upon to participate in the financing of a resolution measure and its assets are insufficient to meet the financing requirements linked to the resolution measure in question.

The creation of the FRL in the form of a public establishment separate from the CSSF may come as a surprise, given the recurrent concern of the Luxembourg Government and legislator to limit the number of administrative structures. In the present case, the purpose of this structural arrangement was to separate the contributions collected from the credit institutions from the assets of the CSSF so as to reserve their use solely for the resolution measures decided by the Resolution Board. In this way, any risk of conflict of interest was avoided between the CSSF’s resolution function and the FRL’s contributions to the financing of the resolution of a credit institution.

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<sup>35</sup> Article 105(2) of the BRR Act.

<sup>36</sup> See Article 105-14) and Article 38(5) of the BRR Act.

<sup>37</sup> Article 45(4) and (5) of the BRR Act.

The FRL is managed by an Executive Board. In order to facilitate decision-making and to ensure the most efficient exchange of information and cooperation between the FRL and the Resolution Board, the members of the Resolution Board are also the members of the FRL Executive Board. Thus, the Chairman of the Executive Board is the Resolution Director referred to in article 12-7 of the amended CSSF Act. If the Resolution Director is unable to attend, the representative of the Ministry of Finance will chair the FRL Executive Board. In addition, in order to minimize the operating costs of the FRL, the CSSF is responsible for carrying out its operational tasks. A member of the CSSF's Resolution department acts as the FRL's secretariat. The Resolution department assists the FRL Executive Board in the operational tasks of the FRL.<sup>38</sup>

### *1.3. The Fonds de Garantie des Dépôts Luxembourg and the Council for the Protection of Depositors and Investors*

The creation of a public deposit guarantee scheme, the 'Fonds de Garantie des Dépôts Luxembourg', is one of the major innovations introduced into Luxembourg law by the BRR Act. Like the FRL, the FGDL is set up as a public body. Credit institutions incorporated under Luxembourg law and Luxembourg branches of credit institutions headquartered in third countries are required to join the fund and pay annual contributions.<sup>39</sup> The decision to set up a fund separate from the CSSF ensures, on the one hand, that the CSSF is not legally bound by the obligations of the FGDL and, on the other hand, to create separate assets that can only be used to reimburse depositors in the event of a credit institution going into liquidation or to protect guaranteed deposits in the event of the resolution of a credit institution. This institutional arrangement is part of Luxembourg's efforts to strengthen the credibility of its deposit protection scheme and, in so doing, to guarantee the attractiveness and competitiveness of Luxembourg as a financial centre.<sup>40</sup> At the end of 2023, the FGDL had 88 member institutions against 95 in 2021<sup>41</sup> and its available financial means, including the buffer of additional financial means, amounted to EUR 516.3 million. The covered deposits decreased by 2.3% over a year to EUR 37.3 billion.<sup>42</sup>

<sup>38</sup> Article 105(5) of the BRR Act.

<sup>39</sup> Article 154 of the BRR Act.

<sup>40</sup> Article 179 of the BRR Act. Following the same approach, the Government has accelerated the implementation of the FGDL. Under the DGSD, the fund was to reach its target level on 3 July 2024. The BRR provided that the target level would be reached by 31 December 2018. In addition, there is a buffer of additional financial means equal to 0.8% of guaranteed deposits to be financed by annual contributions to be paid by the banks over a period of 8 years, once the target level defined in the DGSD has been reached. A Grand-Ducal regulation may extend the 8-year period depending on the economic situation and in order to avoid pro-cyclical effects linked to the payment of contributions.

<sup>41</sup> The current total number of members amounts to 84 in November 2024. The full list of credit institutions authorised or registered in Luxembourg is available on the [FGDL's website](#). See also: CSSF, *Annual Report 2023*, September 2024, 119.

<sup>42</sup> *Ibidem*.

Before the BRR came into force, the deposit guarantee function was carried out by a non-profit association, the ‘Association pour la garantie des dépôts Luxembourg’, to which credit institutions operating in Luxembourg were obliged to belong. Resources were contributed *ex post* by members according to the needs.<sup>43</sup>

Under the BRR Act, the CSSF has set up a new internal executive body called the “Council for the Protection of Depositors and Investors”<sup>44</sup> (CPDI), which is responsible for performing both the functions assigned by the DGSD to deposit guarantee schemes and those assigned by Directive 97/9/EC to investor compensation schemes. The CPDI comprises 4 to 5 members.<sup>45</sup> In order to facilitate decision-making and the reimbursement of depositors, the members of the CPDI are also members of the FGDL’s management committee.

The CPDI, represented by its chairman, is involved as an *ex officio* member of the colleges of resolution authorities, in cases where the resolution board acts as resolution authority at group level.<sup>46</sup> The CPDI is responsible for the administration and operational tasks of the Luxembourg Deposit Guarantee Fund (FGDL).<sup>47</sup> The CSSF shall carry out the operational tasks related to the duties of the CPDI and the operational tasks of the FGDL.<sup>48</sup>

#### 1.4. The Systemic Risk Board

The Systemic Risk Board is a “college of authorities”,<sup>49</sup> i.e. an administrative structure<sup>50</sup> with no legal personality, regulatory powers or resources of its own. It may be consulted by the Resolution Board when assessing the impact of the failure of a credit institution on the financial system.<sup>51</sup> It may also, on its own initiative, issue opinions, warnings and recommendations to the CSSF, as well as to the Government, the *Commissariat aux assurances* and the BCL as part of its duties to monitor liquidity and supervise financial systems.<sup>52</sup>

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<sup>43</sup> Bank for International Settlements, Deposit Protection Schemes in Basel Committee Member Countries, June 1998.

<sup>44</sup> Article 12-10 of the CSSF Act.

<sup>45</sup> As of now, only four people are members of the CPDI: the Director of the CSSF responsible for the operational tasks related to the duties of the CPDI and of the FGDL (Claude Wampach), a representative of the Ministry of Finance (Anne-George Kuzuhara), the Director General of the BCL (Gaston Reinesch) and a magistrate appointed by the Grand Duke (Karin Guillaume).

<sup>46</sup> Article 88(3) of the BRR Act.

<sup>47</sup> Article 154 of the BRR Act.

<sup>48</sup> Articles 2-3, 12-10 and 12-15 of the CSSF Act.

<sup>49</sup> Article 1(2) of the law creating a systemic risk committee.

<sup>50</sup> A. SMOLEŃSKA, *Multilevel cooperation in the EU resolution of cross-border bank groups: lessons from the non-euro area Member States joining the Single Resolution Mechanism (SRM)*, (2022) *Journal of Banking Regulation*, 42-53.

<sup>51</sup> Article 59-26 of the CSSF Act.

<sup>52</sup> Article 7 of the law of 1 April 2015 establishing a Systemic Risk Board. Mémorial A no. 64, 3 April 2015. The creation of this structure ensures the implementation of the ESRB recommendation of 22 December 2011 on the macroprudential mandate of national authorities. OJ C 41/1, 14 February 2011.

The Systemic Risk Board comprises the Minister responsible for the financial centre, who chairs the Committee, the Director General of the CSSF, the Director of the Commissariat aux assurances and the Director General of the BCL. The Secretariat of the Committee, which is responsible in particular for drafting and publishing the recommendations, opinions and warnings issued by the Committee, is provided by the BCL, under the direct authority of its Director General (BCL, 2016: 2).

### *1.5. The Consultative Committee for Resolution*

Finally, another body of the CSSF fulfils an advisory function with regard to resolution. Not provided for in the BRRD, the Consultative Committee for Resolution was established by the BRR law in 2015. This committee may issue opinions to the government on any draft law or grand-ducal regulation concerning regulation in the field of resolution falling within the remit of the CSSF. It may also be consulted by the Resolution Board for advice on any draft CSSF regulation relating to resolution.<sup>53</sup> This committee is composed of the Minister responsible for the financial centre (or his representative), the Resolution Board represented by its director, the CSSF director in charge of the CPDI, four representatives of credit institutions and investment firms appointed by the Minister responsible for the financial centre, and a member of the ‘Institut des réviseurs d’entreprises’ (Institute of external auditors).<sup>54</sup>

### *1.6. The Luxembourg prudential supervisory authority*

Since 1998, the CSSF has been the authority responsible for supervising the financial sector. In its initial version, article 2 of the CSSF Act entrusted the CSSF with the prudential supervision of all legal entities carrying out one of the following financial activities: credit institutions, UCITS, investment firms, financial transaction advisers, brokers, market makers, professional depositories of securities or other financial instruments, and stock exchange activities. Subsequently, the transformation of the financial sector and developments in European legislation have led to regular revisions of the CSSF Act and an extension of its prudential remit.

Today, the CSSF is the competent authority for the prudential supervision of the following entities: credit institutions, financial professionals (whether they are support agents, such as operators of IT and communication systems in the financial sector, or specialised agents, such as registrars, professional custodians of financial assets or instruments, operators of a regulated market authorised in Luxembourg, etc.), investment firms, central securities depositories, payment/electronic money institutions, account information service providers, investment fund managers, real estate credit intermediaries, data communication service

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<sup>53</sup> Article 15-2(1) of the CSSF Act.

<sup>54</sup> Article 15-2(3) of the CSSF Act.

providers, virtual asset service providers and the audit profession. The very broad scope of the CSSF's tasks could lead to a misunderstanding regarding the inclusion of the BCL – and other public authorities intervening on the financial markets – among the entities supervised by the prudential supervisory authority (ECB, 1998: 3; BCL, 1998: 4). Article 2(1) of the CSSF Act explicitly excludes the exercise of prudential powers in respect of the BCL, but also in respect of the European Investment Bank, the European Investment Fund and European financial assistance schemes.<sup>55</sup>

In addition, the CSSF has been entrusted with a set of complementary tasks in connection with the prudential supervision of the financial sector. For example, it is the competent authority to ensure that all persons subject to its supervision comply with professional obligations relating to the fight against money laundering and terrorist financing.<sup>56</sup> It is also the competent authority for consumer protection, overseeing the implementation of European legislation on credit rating agencies. It also has a general remit, within the limits of its powers, to promote transparency, simplicity and fairness in the markets for financial products and services.<sup>57</sup>

Following the European reforms aimed at establishing a Banking Union, the CSSF's missions have been extended to the field of resolution. In addition to the missions and powers provided for under the BRRD and SRBR, the CSSF carries out the operational tasks of several new public entities: the FRL, the FGDL and the CPDI (see previous sections).

Until the creation of the CSSF, the supervision of the financial sector was ensured by a 'Commissariat au contrôle des banques' (1945-1983),<sup>58</sup> then by the 'Institut monétaire luxembourgeois' (1983-1998, hereinafter "IML")<sup>59</sup> – the attribution of prudential tasks to the new monetary institution followed in this respect the model of the Bank of England.<sup>60</sup> The Law of 5 April 1993 on the financial sector modernised the rules governing prudential supervision of the financial sector and strengthened the IML's responsibilities in prudential matters, as well as in the reorganisation and liquidation of the institutions under its supervision.<sup>61</sup> The supervision of stock exchanges remained under the

<sup>55</sup> The European Financial Stability Facility and the European Stability Mechanism.

<sup>56</sup> Article 2(4) of the CSSF Act.

<sup>57</sup> Article 2(5) of the CSSF Act.

<sup>58</sup> Set up in 1945, the Commissariat au contrôle du secteur bancaire was radically overhauled in 1965. See: b. ZENNER, *75 years of Banking Supervision in Luxembourg*, in C. MARX, M. LIMPACH, B. MAJERUS, *Supervision, independence and integrity. 75th anniversary of prudential supervision and supervision of the financial centre in Luxembourg* (University of Luxembourg (C2DH), CSSF, 2020), 129-139.

<sup>59</sup> Article 2(1) of the law of 20 May 1983 establishing an Institut Monétaire Luxembourgeois. Mémorial A no. 38, 28 May 1983. The IML then took over the prudential, statistical and international representation functions of the 'Commissariat au contrôle des banques'.

<sup>60</sup> Council of State, Opinion on the draft law amending the laws on the Institut Monétaire Luxembourgeois and the monetary status of the Grand Duchy of Luxembourg, 15 December 1995, 5.

<sup>61</sup> Articles 60 et seq. of the Law of 5 April 1993.

responsibility of a separate institution, the *Commissariat aux bourses*, placed under the responsibility of the Minister in charge of the financial centre (i.e. the Minister of Finance).<sup>62</sup>

With a view to Luxembourg's participation in the third stage of the Economic and Monetary Union, the government wanted to reorganise the financial institutional landscape and assign prudential supervision of the financial sector and stock market control to a single body.<sup>63</sup> There were several reasons for this step backwards. The first was the exceptional proportional importance of the financial sector in relation to the size of the country and its economy. The development of the financial centre is the result of innovative legislation, a niche policy and a concentration of financial and technical expertise.<sup>64</sup> In this context, "it was probably not intended by anyone that the prudential supervision of banks should be organised as a mere ancillary function to that of a central bank".<sup>65</sup> On the contrary, the structure of the banking supervisory authority was intended to reflect the specific characteristics of the Luxembourg financial centre. In addition, the allocation of prudential supervision tasks to the IML in 1983 was criticised from the outset by the Conseil d'Etat. For this consultative body of the Government, the exercise of prudential supervision and monetary functions within the same authority exposed it to the risk of conflicts of interest. Consequently, organising the monetary function and prudential supervision under the same roof required that "the supervisory functions be clearly distinct from the other functions, particularly monetary functions, of the IML".<sup>66</sup> Implicitly, the Conseil d'Etat stressed that this solution was purely transitory and imposed by "the circumstances of the time". The application of the obligation of independence of national central banks from the 2<sup>nd</sup> stage of EMU (1<sup>er</sup> January 1994) hardly suited the influence that the Minister of Finance wished to retain in the supervision of the financial sector, given the economic, financial and, possibly, public finance issues specific to this sector. A reorganisation of the IML's operations and structures was recommended.<sup>67</sup> By implementing an institutional separation of the functions of prudential supervision and monetary supervision, "the Luxembourg government intended to create a clear situation in which the independence of

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<sup>62</sup> Law of 21 September 1990 on the supervision of certain professional activities in the financial sector and on stock exchanges. Mémorial A, no. 52, 5 October 1990.

<sup>63</sup> Supervision of the insurance sector is the responsibility of a separate public body, the *Commissariat aux assurances*, created in 1991. See also Law of 6 December 1991 on the insurance sector. Mémorial A no. 84, 23 December 1991; replaced by the Law of 7 December 2015 on the insurance sector. Mémorial A no. 229, 9 December 2015.

<sup>64</sup> See: J.-M. KREINS, *Histoire du Luxembourg* (PUF, 2015, Coll. Que Sais-Je), 104-113; M. LIMPACH, N. HUMBERT, *Chronologie de l'évolution de la place financière du Luxembourg et de sa surveillance*, in C. MARX, M. LIMPACH, B. MAJERUS, *Supervision, independence and integrity*, cit., 17-102.

<sup>65</sup> Chamber of commerce, Opinion on the draft law amending the laws on the Institut Monétaire Luxembourgeois and the monetary status of the Grand Duchy of Luxembourg, 30 January 1995, 9.

<sup>66</sup> Council of State, Opinion on draft law no. 2575 on the creation of the Institut Monétaire Luxembourgeois, 16 July 1982.

<sup>67</sup> Council of State, Opinion on the draft law amending the laws on the Institut Monétaire Luxembourgeois, cit., 3.

the Central Bank would be complete and prudential supervision exercised under the direct responsibility of the competent Minister”.<sup>68</sup> The Conseil d’Etat fully supported this proposal.<sup>69</sup>

These political considerations met with practical opposition. The multiplication of administrative structures could come up against Luxembourg’s limited human and financial resources. The physical separation of the monetary institution and the institution responsible for prudential supervision would require regular collaboration, which could complicate the fluidity of the decision-making and implementation processes in the financial sector and make governance less transparent and predictable for the companies concerned. In addition, the question arose as to the scope of concentrating the prudential missions of credit institutions, but also of stock exchange and insurance supervision within a single entity.<sup>70</sup> In the end, it took five years of debate before the law creating the CSSF was adopted.

#### The allocation and coordination of the tasks of the Resolution Board with the other Luxembourg authorities

The CSSF, acting *through* the Resolution Board, is the resolution authority in Luxembourg, without prejudice to the tasks and powers of the SRB established by Regulation (EU) No 806/2014. Pursuant to Article 12-1(3) of the CSSF Act, the Resolution Board is competent to decide on resolution measures and to ensure their implementation. The other national authorities intervene only on a complementary basis, either to transmit information (or carry out assessments), or to be informed of measures envisaged or decided by the Resolution Board.

Article 3(4) of the BRRD requires Member States to ensure that supervisory authorities and resolution authorities, as well as the persons performing these functions on their behalf, cooperate closely in the preparation, planning and implementation of resolution decisions, including where the functions are performed within the same entity. In application, article 12-9 of the CSSF law retains the principle of exchange of information and cooperation between the Resolution Board and the management of the CSSF for the purposes of the exercise of their respective duties. This requirement for close cooperation makes perfect sense in Luxembourg, given the asymmetry of human resources and expertise that exists within the CSSF for the exercise of these functions. With only sixteen staff members, the Resolution Board is undersized compared to the CSSF acting as a supervisory authority, which has nearly 1,000 staff members, or compared to the BCL and its 435 staff members (for the year 2021).

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<sup>68</sup> Chamber of Deputies, Report by the Finance and Budget Committee on the draft law amending the laws on the Institut Monétaire Luxembourgeois and the monetary status of the Grand Duchy of Luxembourg, 16 March 1998.

<sup>69</sup> Council of State, Opinion on the draft law amending the laws on the Institut Monétaire Luxembourgeois, cit., 1-2.

<sup>70</sup> Chamber of Deputies, Report by the Finance and Budget Committee on the draft law amending the laws on the Institut Monétaire Luxembourgeois, cit., 2.

### Cooperation between the CSSF and the Resolution Board

More specifically, the CSSF, as a supervisory authority, is called upon to contribute to the exercise of resolution functions: it must cooperate with the Resolution Board to provide it with the information necessary to draw up the resolution plans, where it already has all or part of this information.<sup>71</sup> It also has an advisory role, at the request of the Resolution Board. The latter must consult it when it identifies substantive impediments to the resolvability of a group,<sup>72</sup> to trigger a resolution measure,<sup>73</sup> to suspend certain payment or delivery obligations,<sup>74</sup> to authorise/refuse the transfer of assets to the acquirer of the activities of a credit institution under resolution procedure,<sup>75</sup> to grant temporary authorisation to a bridge institution,<sup>76</sup> to determine the minimum capital requirement and eligible liabilities for resolution entities,<sup>77</sup> to assess the reorganisation plan of a credit institution (assessment carried out in agreement between the Resolution Board and the supervisory authority).<sup>78</sup> Inheriting the powers of the Commissariat aux bourses (responsible for the supervision of the Luxembourg Stock Exchange), the CSSF may also be requested by the Resolution Board to withdraw or suspend the admission to trading on a regulated market or to official listing of financial instruments issued by a credit institution subject to a resolution measure.<sup>79</sup>

With regard to early intervention powers and special administration functions, the measures laid down in Articles 27 to 29 BRRD were transposed into Luxembourg law by the BRR Act of 18 December 2015, in Articles 59-43 to 59-45 of the law of 5 April 1993 on the financial sector. The national legislator did not go beyond what the BRRD provides for: the CSSF, as prudential supervisor, must notify the Resolution Board without delay when the conditions are met for the adoption of early intervention measures with regard to a credit institution, and as soon as possible of the measures taken. On the other hand, no notification is required where the CSSF requires the dismissal en bloc or individually of the management or a management body of the credit institution concerned. The same applies to the appointment of a temporary administrator by the CSSF. Nor does the applicable legislation provide for any obligation to notify the CSSF when the resolution board decides to appoint a special administrator.<sup>80</sup> The absence of a notification obligation does not exempt either the CSSF or the Resolution

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<sup>71</sup> Article 8(2) of the BRR Act.

<sup>72</sup> Article 30 of the BRR Act.

<sup>73</sup> Article 33(1) of the BRR Act.

<sup>74</sup> Article 34-1(1) of the BRR Act.

<sup>75</sup> Article 39(7)-(8) of the BRR Act.

<sup>76</sup> Article 42(1) of the BRR Act.

<sup>77</sup> Article 46(4) of the BRR Act.

<sup>78</sup> Article 53(6) of the BRR Act.

<sup>79</sup> Article 62(1) of the BRR Act.

<sup>80</sup> In addition, the CSSF, acting as the resolution authority, applies to the Luxembourg District Court for a stay of payment in respect of a credit institution, which leads to the appointment of an administrator.

Board from the general obligation to exchange information with each other for the purposes of carrying out their respective duties.<sup>81</sup>

The allocation of responsibilities and powers relating to early intervention measures, including temporary administration measures, did not give rise to any specific comments during the legislative work relating to the transposition of the BRRD. By the end of 2022, no early intervention measures had been adopted by the CSSF.<sup>82</sup>

#### Cooperation with other Luxembourg authorities involved in resolution

As for the other entities involved in the resolution tasks, the Ministry of Finance, as the competent ministry, the FRL, the CPDI and the FGDL are involved to varying degrees. In terms of procedural obligations, all of them (with the exception of the CPDI) must be informed, by way of notification, of the existence of the conditions for triggering a resolution procedure.<sup>83</sup> The Resolution Board must notify them of any resolution measure within a reasonable period of time.<sup>84</sup>

The scope of these exchanges and cooperation must be specified in the rules of procedure of each public body or institution concerned. In practice, the rules of procedure do not provide much detail and leave a wide margin of discretion to the various authorities: each authority exchanges with the other authorities “duly and in a timely manner, all information necessary for the performance of their respective tasks, either upon request or on a voluntary basis in the absence of any explicit request”.<sup>85</sup> The information that may be transmitted is determined from a functional perspective: the information must be linked to the tasks entrusted to the authority making the request. However, the detailed description of the information to be included in the recovery plans or the information that the Resolution Board may request from credit institutions as part of the preparation and updating of the resolution plans enables the precise identification of the information that may be requested and exchanged between national authorities and the Resolution Board. This limits the risk of debate as to whether a request for information is justified. To date, no disputes have arisen as a result of a refusal to exchange information.

In addition, the small size and the professional and cultural proximity of the members of management and their teams ensure that cooperation and exchanges are fluid. Relations between the various authorities in charge of the financial

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<sup>81</sup> Article 59-50(4) of the amended law on the financial sector; Article 12-9 of the CSSF Act.

<sup>82</sup> This situation is not unique to Luxembourg. In 2020, EBA reported that only nine prudential supervisors had adopted early intervention measures. See EBA, 2020.

<sup>83</sup> Article 81(3) of the BRR Act.

<sup>84</sup> Article 83(2) of the BRR Act.

<sup>85</sup> Point 5 of the Rules of Procedure of the Resolution Council of 27 July 2016, as amended on 14 December 2020; Article 13 of the Rules of Procedure of the CPDI of 17 January 2017; Article 33(2) of the amended Law of 23 December 1998 on monetary status and the Banque centrale du Luxembourg. Mémorial A no. 112, 24 December 1998.

sector, as well as between their managers, have long been characterised by their commitment, their competence and their spirit of consultation and conciliation.<sup>86</sup>

Table 1

Voting participation of Resolution Board members  
in the decision-making bodies of other authorities involved in resolution

Members / Authorities	Resolution Council	Management of the CSSF	CPDI	FRL	FGDL
<i>Resolution director</i>	X			X	
<i>Director of the Treasury (Ministry of Finance)</i>	X		X	X	X
<i>Director General of BCL</i>	X		X	X	X
<i>Director of the CSSF (banking supervision)</i>	X	X	X	X	X
<i>Other Director of the CSSF</i>		X	X		X
<i>Magistrate appointed by the Grand Duke</i>	X		X	X	

Source: Frédéric Allemand. Data: Websites of the Luxembourg authorities (CSSF, FRL, FGDL).

Information exchanged in financial matters between Luxembourg authorities is covered by the confidentiality regime of the law of 5 April 1993 and compliance with this regime is mandatory for staff with access to such information, under administrative sanctions. The obligation of professional secrecy and confidentiality do not preclude the exchange of information between staff and experts of the Resolution Board and other national bodies or entities.<sup>87</sup>

As regards relations between the Resolution Board and the BCL, exchanges of information may not undermine the independence of the monetary institution and must comply with the confidentiality regime applicable to the BCL under Article 37 of the Statute of the ESCB<sup>88</sup> (ECB, 2015: 4). Arrangements for coordination and cooperation in the area of monitoring the general liquidity situation on the markets and the assessment of market operators are the subject of agreements between the BCL and the CSSF. The same applies to promoting the smooth operation of payment systems. An agreement (not published) has been concluded in this respect between the two authorities and revised when the Resolution Board was set up.

#### Relationships with other institutions/committees

The Resolution department represents the CSSF as resolution authority within international bodies, for matters relating to resolution in the financial sector.

<sup>86</sup> Chamber of commerce, Opinion on the draft law amending the laws on the Institut Monétaire Luxembourgeois, cit., 9.

<sup>87</sup> Article 59-50(4) of the law of 5 April 1993 on the financial sector.

<sup>88</sup> Article 12-9(2) of the CSSF Act.

Thus, the Resolution department staff participate in the work of the following permanent sub-committees of the SRB: SRB Resolution Committee (and its sub-groups MREL Task Force and National Handbooks Expert Network), SRB Fund Committee, SRB Administrative and Budget Committee and SRB Legal Network. The CSSF also participates in the SRB ICT Network.<sup>89</sup>

In a cross-border context outside the SRB framework, the Resolution department is responsible for the management of four resolution colleges (three colleges relating to credit institutions for which the CSSF is the resolution authority at group level and one so-called “European” college relating to sister banks in several EU Member States which are subsidiaries of an entity from a third country).

The staff of the Resolution department also participate in the work of the European Banking Authority (EBA). In particular, the Resolution department is represented on the EBA’s Resolution Committee (ResCo), which was set up in January 2015 for the purpose of taking decisions and carrying out the tasks devolved to the EBA and the national resolution authorities under the BRRD. The voting members of this committee are the directors of the NRAs, namely the Resolution Director for Luxembourg. When it was set up in 2016, the Resolution Department also participated in the work of the Subgroup on Crisis management, a joint subgroup of the Standing Committee on Regulation and Policy (SCRePol) and the Resolution Committee. Since 2018, it has participated in the work of the Subgroup on Resolution Planning and Preparedness (SGRPP), a subgroup of the Resolution committee.<sup>90</sup>

#### Political or judicial tension or dispute arisen in relation to the framework in place

The most sensitive debates in the financial sector took place in the second half of the 1990s, when the BCL and the CSSF were created (see above). The launch of the Banking Union in 2012 and the establishment of the SSM and then the SRM between 2014 and 2016 did not give rise to any particular political tensions. Luxembourg welcomed the new governance of these two systems, insofar as each preserved the influence of national authorities in the prudential supervision or resolution of credit institutions.

On the substance, the adoption of the law transposing the BRRD provoked little debate. At most, the question of the functional independence of the Resolution board from the CSSF was the subject of a formal reservation by the Conseil d’Etat. The Chamber of Deputies followed the opinion of the Conseil d’Etat and specified in Article 3(2) of the BRRD that “[t]he Resolution Board shall carry out the resolution functions independently from the supervisory functions of the CSSF”.

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<sup>89</sup> CSSF, *Annual Report 2016*, September 2017, 146; CSSF, *Annual Report 2021*, cit., 145.

<sup>90</sup> CSSF, *Annual Report 2018*, September 2019, 146; CSSF, *Annual Report 2021*, cit., 144-145; CSSF, *Annual Report 2023*, cit., 117.

A more critical point concerned the financing of the FGDL. Luxembourg is keen to maintain the competitiveness of its financial centre. The introduction of the SSM has had a significant financial impact on companies in the financial sector. As the Minister for the Economy stated in 2015, “[t]he total annual cost of supervision charged by the CSSF to all the market players amounted to EUR 77.5 million in 2013. The SSM share to be financed by the banks based in Luxembourg is 7 million”.<sup>91</sup> This cost and the concern to preserve the financial sector in relation to the financing of the FRL and FGDL were probably important factors in justifying Luxembourg’s late transposition of the BRRD and DGSD. This issue was at the heart of the criticism made by the Chamber of Commerce in its opinion on the draft law transposing the BRRD – the strictly institutional aspects were not discussed. The Government was criticised for having opted to allocate additional financial cushions to the FGDL once the target level had been reached. In the Chamber’s view, this choice was detrimental to the interests of the financial centre, insofar as the cash contributions paid by Luxembourg banks would amount to approximately EUR 600 million (i.e. 1.6% of guaranteed deposits) instead of the EUR 300 million (i.e. 0.8% of guaranteed deposits) constituting the minimum level provided for by the DGSD. Although “this EUR 600 million would be divided into two compartments (half by the end of 2018, the rest within 8 years), [it] would nonetheless represent a significant cost for the Luxembourg financial centre, especially as this would be in addition to the EUR 1.2 billion to be paid by the banks to the compensation fund”.<sup>92</sup> The legislator favoured the argument of the credibility of the deposit guarantee scheme over that of the cost of financing for the financial sector and confirmed the Government’s position.

To date, there have been no disputes concerning the establishment of the Resolution Board. However, the decisions taken by the Resolution Board in the ABLV Bank Luxembourg S.A. case have been the subject of a legal challenge and have drawn criticism from Luxembourg politicians. As a reminder, in February 2018, ABLV Bank, the parent company of ABLV Bank Luxembourg, was accused of money laundering by the US Treasury and was even suspected of being involved in illegal weapons development programmes in North Korea. Faced with depositors’ concerns and liquidity risks, the ECB implemented the moratorium instrument with regard to ABLV Bank and instructed the CSSF, as supervisory authority, to do the same with regard to ABLV Bank Luxembourg.<sup>93</sup> Following this, the CSSF referred the matter to the commercial chamber of the Luxembourg District Court to request the suspension of payments by the Luxembourg subsidiary.<sup>94</sup> However, on 24 February, the ECB declared ABLV Bank “failing or likely to fail”, given the sharp deterioration in its financial

<sup>91</sup> KPMG, *Luxembourg Banking Insights 2015*, 12.

<sup>92</sup> Chamber of commerce, Opinion on the draft law amending the laws on the Institut Monétaire Luxembourgeois, cit. 5.

<sup>93</sup> ECB, *ECB instructs national supervisors to impose moratorium on ABLV Bank*, press release, 19 February 2018.

<sup>94</sup> CSSF, Press release concerning ABLV Bank Luxembourg, no. 18/07, 19 February 2018.

situation. The ECB also considered that ABLV Bank Luxembourg was in “actual or foreseeable default”.<sup>95</sup> The SRB confirmed the ECB’s assessment and concluded that there were no supervisory or private sector measures that could prevent the banks from failing. Furthermore, it considered that the functions performed by ABLV Bank Luxembourg were not critical and that the failure of the bank was not likely to have significant adverse effects on financial stability in Luxembourg or in other Member States. The SRB concluded that, as a result, the bank should be liquidated in accordance with Luxembourg law and its decision for liquidation implemented by the Resolution Board.<sup>96</sup> The shareholders of the parent company decided to proceed with the voluntary liquidation of the bank. In the case of ABLV Bank Luxembourg, the FGDL was activated for the first time for the benefit of depositors<sup>97</sup> and the CSSF, acting as the resolution authority, again referred the matter to the Luxembourg District Court to request, primarily, that the subsidiary be put into compulsory liquidation and, secondarily, that a suspension of payment procedure be initiated. The Public Prosecutor, representing the State of Luxembourg, took the view that ABLV did not meet the conditions for winding up and liquidation and did not oppose the suspension of payment obligations. In its ruling of 9 March, the Court rejected the application to place the Luxembourg subsidiary in liquidation and declared that the bank’s payments were suspended for a period of six months, “in a protective manner”. The measure was then renewed twice, before the bank was finally wound up on 2 July 2019.

The March 2018 judgment is interesting because the judge refuses to consider that the assessments and findings made by the ECB and the SRB are binding on the national authorities. In addition, the Court criticised the CSSF for failing to give sufficient reasons for its winding-up request: “the CSSF does not provide a single document to detail and explain the financial situation of ABLV Bank Luxembourg. It merely submits findings and assessments which do not even show what factual elements they are based on”.<sup>98</sup> Following this legal setback, the CSSF was criticised by the opposition parties in the Chamber of Deputies for having prevented the bank from finding a buyer – all the more so as it was overcapitalised (€15.9 million in equity, i.e. double the legal minimum). Commentators were also surprised that the CSSF did not appeal against the ruling. During the debates, the Minister of Finance reiterated the autonomy enjoyed by the CSSF as a resolution authority: “I believe that the CSSF is working in an absolutely correct manner, and not only in this case. It acts completely autonomously [...] I am not the boss of the CSSF, I am the minister in charge of supervising it!”.<sup>99</sup>

<sup>95</sup> ECB, *ECB determined ABLV Bank was failing or likely to fail*, 24 February 2018.

<sup>96</sup> SRB, *The Single Resolution Board does not take resolution action in relation to ABLV Bank, AS and its subsidiary ABLV Bank Luxembourg S.A.*, 24 February 2018.

<sup>97</sup> At the end of 2021, the total amount repaid by the FGDL to holders of guaranteed deposits with ABLV Bank Luxembourg was €10 million (CSSF, 2022: 147).

<sup>98</sup> Tribunal d’arrondissement, *CSSF v ABLV Bank Luxembourg*, docket number: TAL-2018-01570, 9 March 2018.

<sup>99</sup> The quote reads in French: “Je suis d’avis que la CSSF travaille de manière absolument correcte et pas uniquement dans ce dossier-ci. Elle agit de manière complètement autonome [...] Je ne suis pas le patron

## Prospects for reform of the institutional framework for resolution in Luxembourg

A number of concerns have been expressed by the Chamber of Deputies regarding the CSSF's power to impose administrative sanctions, whether it is acting under its prudential supervision or resolution powers. Criticism focused on the inadequate procedural framework for the power to impose sanctions, particularly with regard to the rights of defence and respect for the adversarial principle. In the spring of 2021, the Ministry of Finance indicated that a "sanctions bill" was being prepared "but given the complexity of the subject, it is not possible for the time being to put forward a date for its introduction".<sup>100</sup> Three years later, no bill has been tabled in the Chamber of Deputies. The holding of a general election in the autumn of 2023 slowed down any plans for reform.

### **2. The legal regime for the independence and accountability of the resolution board**

In the event that resolution functions are assigned to an already existing authority (national central banks, competent ministries, or other administrative authorities), "[a]dequate structural arrangements shall be in place to ensure operational independence and avoid conflicts of interest between the functions of supervision pursuant to Regulation (EU) No 575/2013 and Directive 2013/36/EU or the other functions of the relevant authority and the functions of resolution authorities pursuant to this Directive".<sup>101</sup> The wording "Adequate structural arrangements" is unusual in EU law: it is used for the first time in the BRRD and is reproduced in Regulation (EU) No 2021/23 of the European Parliament and of the Council of 16 December 2020 on a framework for the recovery and resolution of central counterparties.<sup>102</sup> The opinions adopted by the ECB on Member States' draft laws on the institutional aspects of resolution provide little clarification on the nature of these "structural arrangements". For the most part, they refer to amendments to the national legislative framework or to the statutes of the authority responsible for resolution functions.<sup>103</sup> As for the independence regime detailed in BRRD, it is characterised by its modesty. Recital 15 of the BRRD insists on the sole requirement of guaranteeing the independence of the resolution authority from "economic actors", and Article 3(3) of the Directive limits the independence regime to the operational dimension, i.e. to the internal operating procedures, in order to avoid any conflict of interest between the resolution functions and

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de la CSSF, je suis le ministre de tutelle!" (ABLV: *les questions en suspens; la commission des finances s'est penchée sur le rôle de la CSSF dans la gestion du dossier*, Luxembourg Wort, 24 July 2018).

<sup>100</sup> Chamber of Deputies, Minutes of the meeting of the Committee on Finance and the Budget of 15 March 2021, P.V. FI 37, 19 March 2021.

<sup>101</sup> Article 3(3) BRRD.

<sup>102</sup> OJ L 22/1, 22.1.2021, spec Article 3(3).

<sup>103</sup> See for example: Opinion of the ECB of 20 July 2015 on recovery and resolution of credit institutions and investment firms (CON/2015/25), point 3.2.1.

the other functions that the competent authority performs.<sup>104</sup> In practical terms, operational independence is ensured if “the reporting lines for staff involved in carrying out resolution tasks are kept separate from those used by staff involved in supervision activities”.<sup>105</sup> Regulation (EU) No 806/2014 complements the BRRD independence regime: when performing the tasks entrusted by this regulation, the SRB and national resolution authorities “shall act independently and in the general interest”.<sup>106</sup> In order to ensure “the full autonomy and independence of the SRB”, Regulation (EU) No 806/2014 specifically provides for it to have its own budget, financed by mandatory contributions from institutions in participating Member States.<sup>107</sup> Similar requirements are not included in the BRRD. However, the issue of financial means is regularly addressed by the ECB in its opinions on national draft legislation, when resolution functions are assigned to a national central bank (NCB). The ECB approves the allocation of these additional functions to an NCB if “they do not interfere financially and operationally with the performance of the NCB’s ESCB-related tasks”.<sup>108</sup>

The Luxembourg Government and legislator have ensured that the independence of the Resolution Board goes beyond the requirements of the BRRD.

In accordance with Article 3(2) of the amended BRR Act, “the Resolution Board shall carry out the resolution functions independently from the supervisory functions of the CSSF”. This paragraph was absent from the initial draft law and was added following the opinion of the Conseil d’Etat. The latter wanted the operational independence of the Resolution Board from the CSSF’s general management and other departments, in particular those responsible for banking supervision, to be more clearly indicated. In the absence of any explicit mention, it was feared that the obligation for the Resolution Board to cooperate and exchange information would place the resolution authority at a disadvantage in its relations with the other internal bodies of the CSSF or the ECB.<sup>109</sup>

The independence of the Resolution Board is guaranteed in institutional, financial, personnel and operational terms.

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<sup>104</sup> This independence regime is also much more modest than that applied to the national authorities responsible for prudential supervision. Article 4(4) of Directive 2013/36/EU of the European Parliament and of the Council requires Member States to ensure that the competent authorities have the expertise, resources, operational capacity, powers and independence necessary to carry out the functions relating to prudential supervision, investigations and penalties set out in Directive 2013/36/EU and in Regulation (EU) No 575/2013.

<sup>105</sup> See Opinion of the ECB of 12 September 2014 on the implementation of the European Bank Recovery and Resolution Directive (CON/2014/67), point 4.

<sup>106</sup> Article 47(1) of Regulation (EU) No 806/2014.

<sup>107</sup> Recital (97) and Article 58 of Regulation (EU) No 806/2014.

<sup>108</sup> See for example: Opinion of the ECB of 26 February 2021 on the reform of Latvijas Banka (CON/2021/9).

<sup>109</sup> Council of State, Opinion on the draft law on measures for the resolution, reorganisation and winding-up of credit institutions, 10 December 2015, 6.

### *Institutional and financial independence*

The Resolution Board directly exercises the resolution tasks and powers conferred on the CSSF on the basis of the BRR law or the SRMR. The Resolution Board does not need to seek instructions from the management or the Board of the CSSF in order to decide on the measures to be implemented in the area of its competence. To this end, it has regulatory and instructional powers, as well as internal organisational powers.<sup>110</sup>

In order to carry out its tasks, the Resolution Board is responsible for drawing up its budget,<sup>111</sup> which covers staff costs and, in all likelihood, equipment costs and travel costs associated with carrying out its tasks, etc. The Resolution Board's budget is transmitted to the Executive Board of the CSSF to be included into the budget of the CSSF without any possible change.<sup>112</sup> The CSSF budget "which includes the budget drawn up by the Resolution Board" is then submitted by the Executive Board to the CSSF Board for approval.<sup>113</sup> Although presented together, the budget relating to resolution tasks is "specific"<sup>114</sup> and is not part of the CSSF's general budget. The expenditure appropriations provided for the execution of resolution tasks may not be reallocated to other tasks. Financial commitments relating to resolution tasks are decided by the Resolution Director. The financial independence of the Resolution Board and the Resolution department is without prejudice to the integration of the staff in charge of the resolution missions in the CSSF's organization chart, as decided annually by the CSSF Board when adopting the annual budget.<sup>115</sup>

The various tasks of the CSSF are financed by taxes levied on the financial sector.<sup>116</sup> In order to cover the expenses relating to resolution for the year 2023, credit institutions incorporated under Luxembourg law and branches of credit institutions in a third country which are located in Luxembourg must pay an annual lump sum equal to 40,000 euros, 72,000 euros and 160,000 euros, depending on the size of the balance sheet of the companies.<sup>117</sup> Each year, a Grand-Ducal regulation sets the amount of fees per task that the CSFF is authorised to levy on the financial sector.<sup>118</sup>

The budgetary autonomy of the CSSF in general and of the Resolution Board in particular must be considered in the light of the five-year contract

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<sup>110</sup> Article 12-1(1)-(3) of the CSSF Act.

<sup>111</sup> Article 12-1(4) of the CSSF Act.

<sup>112</sup> Article 12-6 of the CSSF Act.

<sup>113</sup> Article 22(1) of the CSSF Act.

<sup>114</sup> Article 12-6 of the CSSF Act.

<sup>115</sup> Article 13(4) of the CSSF Act.

<sup>116</sup> Article 24(1) of the CSSF Act.

<sup>117</sup> Point XXIX of the Grand-Ducal Regulation of 23 December 2022 on the fees to be charged by the CSSF. Mémorial A no. 662, 23 December 2022. When the Resolution Council was set up, the annual lump sum was set at 25,000 euros, 45,000 euros and 100,000 euros.

<sup>118</sup> Article 24(2) of the CSSF Act.

of objectives concluded between the CSSF and the Ministry of Finance. This contractual document establishes the objectives to be pursued by the authority and determines the progression of its financial resources over the period. It serves as a reference for the definition of the general policy, as well as the annual and multiannual investment programmes. When drawing up and adopting these documents, the CSSF Board must “take into account the needs of the Resolution department”.<sup>119</sup> In addition, the CSSF’s budget, financial accounts and management report must be approved by the Government following their adoption by the CSSF Board. Significant increases in the CSSF’s budget could give rise to debate if not duly justified (e.g. due to an increase in the number of tasks entrusted to the CSSF) – or even the budget could be rejected by the Government, thus requiring the CSSF to present a new budget. While such a possibility has not yet arisen, the increase in levies on the financial sector since 2014/2015 has led to regular criticism from the Conseil d’Etat<sup>120</sup> and parliamentary questions to the Government (Etgen, 2022). It is feared that the repeated increases in levies will affect or risk affecting the attractiveness of Luxembourg as a financial centre. At the same time, the Conseil d’Etat recognises that these increases reflect the multiplication of the tasks entrusted to the CSSF and the need to recruit more and more experienced staff to deal with the complexity of banking and financial regulation<sup>121</sup> (Paperjam, 2023). Incidentally, strengthening the CSSF’s human resources to guarantee credible and effective supervision of the financial centre was part of the Government’s 2018-2023 coalition agreement (Government, 2018: 125).

At the level of the CSSF itself, the right of the Resolution Board to draw up its budget is limited by the power of the CSSF Board to adopt annually the general budget, “including the budget of the resolution board”. Although neither the CSSF law nor the internal rules of the CSSF board and the resolution board refer to this hypothesis, the CSSF Board retains the right to oppose the budget prepared by the Resolution Board. In such an eventuality, the resolution board and the CSSF board will have to cooperate to find an agreement.

*Personal independence: rules for appointing and dismissing members of the Resolution Board*

The Resolution Board has five members, three of whom are appointed *ex officio*: the Director of the Treasury, the Director General of the BCL and the CSSF Director responsible for banking supervision. The appointment of the other

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<sup>119</sup> Article 5 of the CSSF Act.

<sup>120</sup> Council of State, Opinion on the draft grand-ducal regulation on the fees to be charged by the CSSF, no. CE 52.560, 15 December 2017; also: Opinion on the draft grand-ducal regulation on the fees to be charged by the CSSF, no. 53.211, 15 February 2019, and Opinion on the draft grand-ducal regulation on the fees to be charged by the CSSF, no. 60.973, 22 April 2021.

<sup>121</sup> 80% of the budget corresponds to staff costs (*CSSF watchdog in massive fee hike to cover deficit*, Luxembourg Times, 23 December 2021.).

two members of the Resolution Board, the Resolution Director and a magistrate, follows two separate procedures defined in the CSSF Act.

In accordance with Article 35 of the Constitution, the power of appointment to civil posts lies with the Grand Duke.

The appointment and dismissal of the Resolution Director are governed by the rules applicable to the members of the CSSF's Executive Board.<sup>122</sup> The Resolution Director is appointed by the Grand Duke on the proposal of the Government in Council, for a renewable term of five years. He takes up his duties after having sworn, before the Minister of Finance, "an oath of loyalty to the Grand Duke and obedience to the Constitution and the laws of the State", and having "promised to fulfil his duties with integrity, thoroughness and impartiality and to preserve the secrecy of the deliberations".<sup>123</sup> His dismissal is decided by the Grand Duke, acting on a proposal from the Government, after consultation with the CSSF Board. Dismissal is pronounced in cases where the director "no longer fulfils the conditions necessary for his duties" or if he is "guilty of serious misconduct".<sup>124</sup> These conditions are taken from those applicable to the Director General of the BCL,<sup>125</sup> pursuant to Article 14(2) of the Statute of the ESCB.<sup>126</sup> In the event of non-renewal or revocation of his mandate, the Resolution Director (like the members of the CSSF management) becomes a general adviser to the CSSF, maintaining his status and level of remuneration. This statutory and salary guarantee reduces the negative effect of non-renewal or dismissal and helps to strengthen the independence of the Resolution Director.

The representative of the Ministry of Finance is appointed by Grand Ducal decree adopted by the Government in Council.<sup>127</sup> No specific conditions are imposed on the appointment or dismissal of the Director of the Treasury.

The appointment and dismissal of the Director General of the ECB are governed by the Law of 23 December 1998 on the BCL. Once again, the power of appointment lies with the Grand Duke acting on a proposal from the Government in Council. The term of office is six years, renewable. Removal from office is decided by the Grand Duke on a proposal from

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<sup>122</sup> Article 10(2), (3) and (5) and Article 11, by reference to Article 12-7(3) of the CSSF Act. All civil servants must swear an oath before the Minister or his delegate before taking up their duties. The oath taken is valid for the entire career of the official, unless the law expressly prescribes the oath for special functions, as is the case for appointment to a management function within the CSSF.

<sup>123</sup> Article 10(5) of the CSSF Act.

<sup>124</sup> Article 10(3) of the CSSF Act.

<sup>125</sup> Council of State, Opinion on the draft law on monetary status and the Banque centrale du Luxembourg, 1 December 1998, 4.

<sup>126</sup> These conditions are enshrined in Luxembourg law in Article 12(3) of the Law of 23 December 1998 on monetary status and the BCL. *Mémorial A* no. 112, 24 December 1998; last amended by the law of 21 July 2021. *Mémorial A* no. 563, 26 July 2021.

<sup>127</sup> Article 6 of the law of 16 April 1979 establishing the general status of civil servants. *Mémorial A* no. 31, 17 April 1979; last amended by the law of 6 January 2023. *Mémorial A* no. 16, 12 January 2023.

the Government, after consultation with the BCL Board, if the Managing Director no longer fulfils the conditions required for his duties (i.e. long-term physical or mental incapacity) or if he is guilty of a serious misconduct. In both cases, there must be sufficient evidence that one or other of these conditions has been met.<sup>128</sup>

Finally, the director of the CSSF in charge of banking supervision is appointed and dismissed according to the same procedure and conditions as the Resolution Director. His term of office is also five years, renewable.<sup>129</sup> The same applies to the appointment of a magistrate to the Resolution Board.<sup>130</sup>

A fundamental disagreement between the Government and the management of the CSSF on the policy and the execution of the mission of the CSSF constitutes grounds for dismissal of the entire management. This possibility is not included in the case of the Resolution Board: although the conditions for the appointment and dismissal of the Resolution Director refer to those applicable to the CSSF's Executive Board, the Resolution Director is not a member of the Executive Board.<sup>131</sup> Furthermore, the collective dismissal procedure of the Resolution Board is incompatible with the *ex officio* participation of the Director of the Treasury and the General Manager of the BCL and the specific rules governing their dismissal conditions.

Table 2

### Members of the Board of Directors at 31 December 2022

Chair			
Romain Strock	Resolution Director	01.04.2021-31.03.2026	5 years (2 <sup>nd</sup> mandate)
Members			
Anne-George Kuzuhara	Ministry of Finance	01.11.2024-30.10.2029	5 years (1 <sup>st</sup> mandate)
Gaston Reinesch	Director General of the BCL	01.01.2019-31.12.2025	6 years (2 <sup>nd</sup> mandate)
Claude Wampach	Director of the CSSF in charge of banking supervision	01.01.2019-31.12.2024 <sup>p</sup>	5 years (1 <sup>st</sup> mandate)
Karin Guillaume	President of Chamber at the Court of Appeal	01.04.2021-31.03.2026	5 years (2 <sup>nd</sup> mandate)

Source: CSSF's website, List of members, updated on 12 November 2024.

<sup>128</sup> Court of Justice, *Ilmārs Rimšēvičs v Latvia*, joined cases C-202/18 and C-238/18, ECLI:EU:C:2019:139, 26 February 2019.

<sup>129</sup> Article 10(2), (3) and (5) of the CSSF Act.

<sup>130</sup> Article 12-2(1) and (2) of the CSSF Act.

<sup>131</sup> Article 12-7(1) of the CSSF Act.

*Operational independence: internal operating rules of the Resolution Board*

The BRR Act and the CSSF Act give the Resolution Board the power to define its internal organization.<sup>132</sup> The internal operating rules are defined in its rules of procedure. The Resolution Council is run by a Resolution Department made up of staff with financial expertise.

Resolution Board meetings

The Resolution Board meets “at least” once every six months. A provisional annual calendar of meetings, drawn up at the beginning of the calendar year, is proposed by the secretariat and sent to the members of the Resolution Board for approval. The Resolution Director chairs the Resolution Board. If he is unable to attend, the duties associated with chairing the Resolution Board (convening meetings, drawing up the agenda, organising debates) are carried out by the Director of the Treasury.

The Resolution Director convenes meetings either on his own initiative or in the following circumstances. One on hand, the Minister of Finance, the Director General of the BCL, the Director General of the CSSF or the Resolution Director may refer the situation of an institution to the Resolution Board with a view to the possible adoption of resolution measures. The other circumstance occurs when the Resolution Board is seized or warned by the ECB, the SRB or the European Commission about the situation of an institution – this was the case when the ECB informed the Resolution Board of the moratorium it had decided on with regard to ABLV Bank in February 2018.

Meetings are convened with due diligence and within a sufficient time frame, in principle 30 calendar days prior to the meeting, except in urgent cases to be assessed by the Resolution Director. As a general rule, meetings are held at the CSSF’s registered office. In case of urgency identified by the Resolution Director, the Resolution Board may hold a meeting using a voice telecommunication system or take a decision using a written procedure.

The Resolution Director sets the agenda for Resolution Board meetings. It is approved by the Resolution Board at the beginning of the meeting. Although neither the CSSF Act nor the rules of procedure mention this, it must be assumed that one or more members of the Resolution Board may request that additional items be added to the agenda.

The agenda for a meeting and the related meeting documents are sent to the members of the Resolution Board – preferably by e-mail – in principle at least eight calendar days before the date set for the meeting, except in cases of urgency to be determined by the Director of Resolutions.

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<sup>132</sup> Article 12-1(1)-(3) of the amended CSSF law.

The agenda for meetings convened following a referral to the Resolution Board due to the situation of a credit institution shall contain the items indicated by the person requesting that the meeting be convened.

The agenda distinguishes between general issues and individual issues, and divides each of these categories into “A” and “B” items, depending on the nature and, where applicable, the importance of the issue. “A” items will be discussed at the meeting and may be the subject of a decision, whereas “B” items will only be the subject of a decision without prior discussion, unless a member of the Resolution Board so requests. The agenda may also include “C” items which are notified to the Resolution Board for information purposes.

Table 2

List of meetings over the period 2016-2021						
	2016	2017	2018	2019	2020	2021
Number of meetings	[n/a]	5 (+decisions by written procedure)	6 (+decisions by written procedure)	4 (+decisions by written procedure)	2 (+decisions by written procedure)	4
Meeting dates	[n/a]	[n/a]	[n/a]	25/2/2019 13/5/2019 30/9/2019 [n/a]	15/6/2020 14/12/2020	09/11/2021 [n/a] [n/a] [n/a]

Source: Frédéric Allemand. Data: CSSF annual reports; diaries of the BCL’s Chief Executive Officer.

### Decision-making at the Resolution Board

The Resolution Board takes its decisions as a college.<sup>133</sup> The rules governing decision-making within the Resolution Board are defined in article 12-4 of the CSSF Act, and detailed in article 2.6 of the Resolution Board’s rules of procedure. The deliberations of the Resolution Board, at physical meetings or at meetings held using a voice telecommunication system, are valid if the majority of the members are present or represented by their substitute. If the quorum is not reached at the beginning of the meeting, the Chairman shall suspend the meeting and convene a new meeting with the same agenda within a reasonable time frame.

Voting is by show of hands, unless at least one member requests a secret ballot. Decisions of the Resolution Board are taken by a majority of the votes cast, except for the decisions on information requests addressed to the BCL, which shall be taken unanimously – this guarantees the right of veto of the Director General of the monetary authority. Abstentions are not taken into account when determining the majority of votes cast. Each member has one vote. In the event of

<sup>133</sup> Article 12-4(1) of the CSSF Act.

a tie, the Chairman of the Resolution Board has the casting vote, or if he is unable to attend, the Director of the Treasury.

A member of the Resolution Board who, in the performance of his duties, is called upon to give an opinion on a matter in which he may have a direct or indirect personal interest such as to compromise his independence, must inform the Resolution Board and may not take part in the deliberation or decision in question.

If a decision is taken by voice telecommunication, the decision is adopted by a majority of the votes cast, provided that the voice telecommunication procedure allows real-time communication and collegial deliberation involving the majority of the members of the Resolution Board.

If a decision is taken by written procedure, the draft decision is approved by the Resolution Board if, within the time limit specified in the communication, a majority of the members have given their agreement in writing. Any member who fails to express his or her opinion within the time limit specified shall be deemed to have abstained.

#### Operational support for the Resolution department

The day-to-day operation of the Resolution Board is carried out by the staff of the Resolution department (16 employees at 31 December 2022). Although operating under the aegis of the CSSF, this department is detached from the other departments from an operational point of view: it is headed by the Resolution Director.

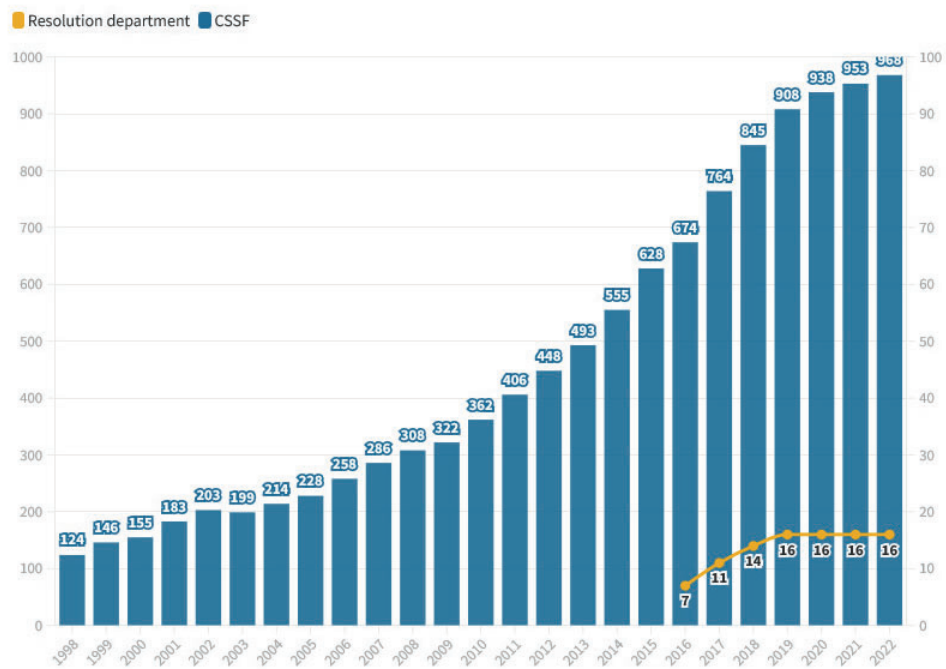
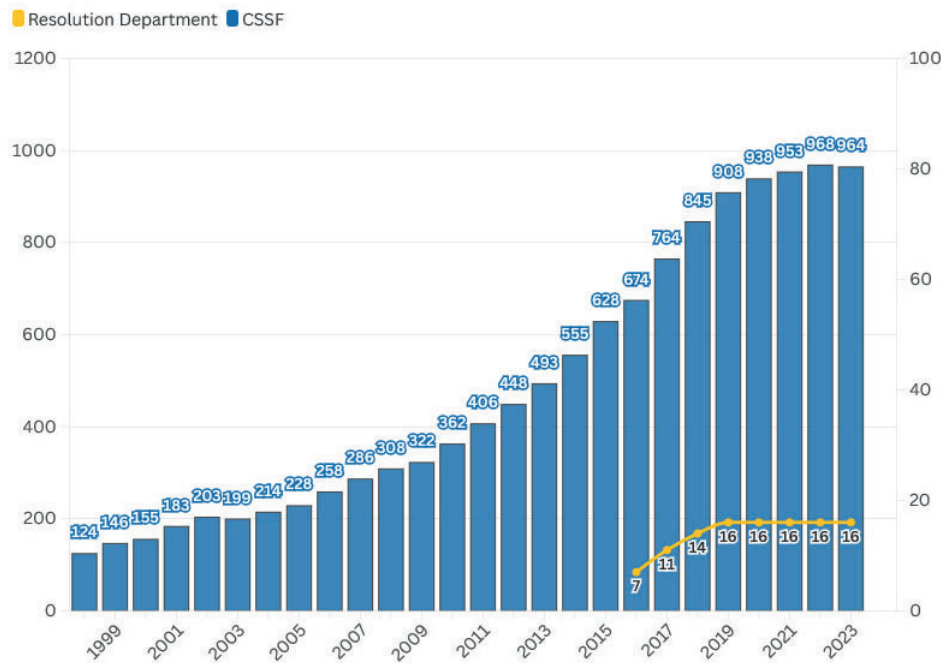
The Resolution Director recruits, appoints, promotes, changes the assignments of and dismisses the agents of the Resolution department.<sup>134</sup> Each member of staff recruited takes an oath before the Resolution Director and reports directly to him. This operational independence does not exclude cooperation with other CSSF departments – in particular the departments in charge of support functions (resources department, legal department, IT department, communication).

The CSSF's staff, all departments taken together, is composed of civil servants, possibly supplemented by employees assimilated to State employees ('employés d'Etat'), as well as salaried employees ('salariés'). The staff is characterised by its very high national diversity: more than half of the CSSF's staff (51.2%) are nationals of other Member States, representing a total of 17 nationalities. The average age is constantly rising and was almost 41 at the end of 2021. The ageing of the staff reflects both the strategy of recruiting experienced staff and a high level of retention within the authority. At the end of November 2023, there were 19 vacancies: 47% of them (9) were for candidates with 5 years' experience or more and at least a Master's degree. Women account for 45.75% of the total workforce; however, only 31.5% of them hold positions of responsibility.

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<sup>134</sup> Articles 12-6 and 14(2) of the CSSF Act.

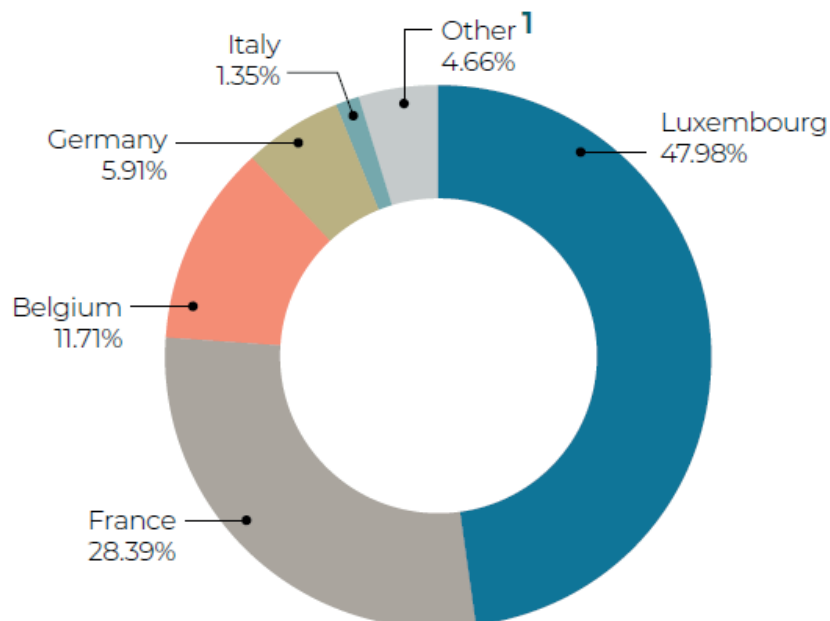
## Movements in staff number: CSSF vs Resolution department



Source: Frédéric Allemand. Data: CSSF, Annual Report 2023.

Figure 2

## Breakdown of staff by nationality

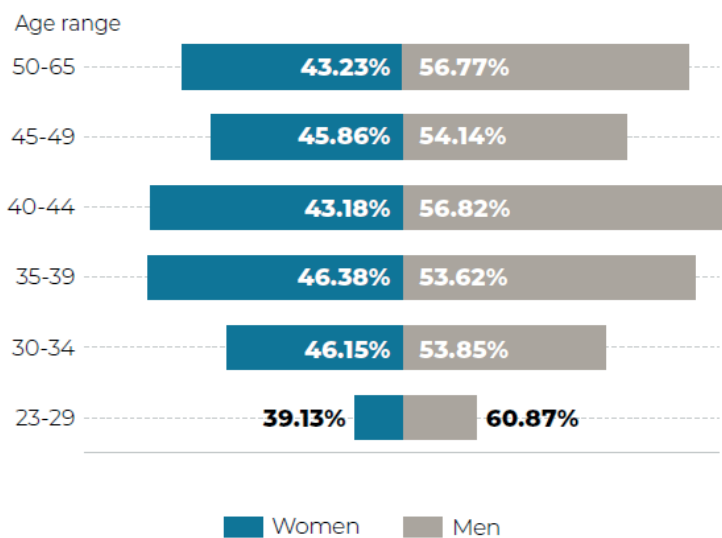


Source: CSSF, Annual Report 2023.

(1) Others: Portugal (0.83%), Spain (0.74%), Austria (0.62%), the Netherlands (0.52%), Poland (0.41%), Romania (0.41%), Bulgaria (0.31%), Greece (0.31%), Ireland (0.21%), Finland (0.10%), Sweden (0.10%) and Slovakia (0.10%).

Figure 3

## Breakdown of staff by age



Source: CSSF, Annual Report 2023.

Table 4

CSSF hierarchy structure			
	Women	Men	Total
Director general	0	1	1
Directors	1	3	4
Resolution director	0	1	1
Heads of Department	12	19	27
Deputy heads of Department	19	22	41
Heads of division	20	67	87
<b>Total</b>	<b>52</b>	<b>113</b>	<b>165</b>
<b>In % of</b>	<b>31.52%</b>	<b>68.48%</b>	<b>100%</b>

Source: CSSF, Annual Report 2023.

The CSSF does not produce detailed data by department. However, the analysis of six profiles of Resolution department agents on professional social networks provides some information. Their professional experience at the time of recruitment averages over twelve years. All had previously worked in the private sector, either in a banking institution or a law firm. One agent had worked for the SSM for two years. Five of them had a master's degree.

Table 5

Profile of the Resolution Department staff				
Gender	Function	Diploma	Professional experience	Previous occupation
M	Economist	Master Wealth Management	6	Banking sector SSM ECB (2 years)
Me	Lawyer	Master in Law	14	Law firm Banking sector
M	Economist	BA in Banking and Finance	23	Banking sector
F	Lawyer	Master in Banking law	6	Law firm
M	Economist	Master in Finance & Banking	13	Banking sector
M	Finance	Master in Accounting and Finance	11	Banking sector

Source: Frédéric Allemand. Data source: LinkedIn.com.

### *The Resolution Board's democratic accountability obligations*

As a standard practice, Luxembourg law limits the *accountability* obligations of public institutions to the submission of an activity report on the essential aspects of their operation to their supervisory ministry.<sup>135</sup>

<sup>135</sup> Instruction of the Government in Council of 11 June 2004, cited above; Chapter 4, point 4, of the Decision of the Government in Council of 10 February 2017, cited above.

### General accountability obligations

According to Article 5 of CSSF Act, the CSSF Board submits the CSSF's financial accounts (balance sheet, profit and loss account) and the management report to the Government for approval on an annual basis. In addition, the management submits the report of the external auditor ('réviseur d'entreprises agréé'). In the light of these documents, the Government is called upon to decide on the budgetary discharge to be given to the CSSF bodies. In addition, each year, the Executive Board of the CSSF sends the Minister of Finance a report on developments in the part of the financial sector.<sup>136</sup> In practice, the CSSF's annual activity report includes a two-page chapter on resolution, drafted under the responsibility of the Resolution department. It presents the institutional aspects of the Resolution board and the activities carried out over the past year. The annual activity report is published on the CSSF website.

The organic law of the CSSF does not provide for any obligation to submit the annual report to the Chamber of Deputies. The only obligations to submit an annual activity report concern the CPDI and the FRL, taking into account their possible impact on the budget of the Luxembourg State and on the financial sector. Thus, during the discussion of the bill concerning the annual budget, the Director General of the CSSF, accompanied by the Director in charge of the supervision of the financial sector, are invited to present the evolution of the financial sector.

The Chamber of Deputies has the power to invite extra-parliamentary persons or bodies to hearings and discussions.<sup>137</sup> In fact, since the Resolution Board was set up (2016), a representative of the CSSF has been invited on sixteen occasions to exchange views with parliamentarians. Banking resolution policy has never been discussed and the Resolution Director has never been invited to a debate. The CSSF is represented either by its Director General or by the Director responsible for banking supervision, or by both.

Actually, the CSSF's accountability obligations are similar to those applied to other public bodies, such as the Commissariat aux Assurances.<sup>138</sup> Conversely, each year, the FGDL's Management Committee must send a report on its activities over the past year to the Government in Council and to the Chamber of Deputies.<sup>139</sup> The Systemic Risk Committee is also required to send a report on its activities over the past year to the Government Council and the Chamber of

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<sup>136</sup> Article 9(3) of the CSSF Act.

<sup>137</sup> Article 29(1) of the Rules of Procedure of the Chamber of Deputies (updated to 22 March 2023).

<sup>138</sup> Articles 27 and 28 of the law of 7 December 2015 on the insurance sector. Mémorial A no. 229, 9 December 2015; last amended by the law of 30 March 2022 on dormant accounts. Mémorial A no. 149, 1<sup>er</sup> April 2022.

<sup>139</sup> Article 154 of the BRR Act.

Deputies. In addition, at the request of the Chamber, the Committee presents the report to the relevant committee of the Chamber.<sup>140</sup>

#### Audit by the Court of Auditors

According to Article 105 of the Constitution, the Court of Audit is responsible for auditing the financial management of State bodies, administrations and departments; the law may entrust it with other tasks of auditing the financial management of public funds. Legal entities governed by public law may be subject to audit by the Court of Audit,<sup>141</sup> provided that they are not already subject to audit by their supervisory ministry.<sup>142</sup> Article 23(5) of the CSSF Act expressly provides that the CSSF is subject to audit by the Court of Auditors as to the proper use of the public funds allocated to it. No reservation is made with regard to the budget of the resolution service: all the tasks entrusted to the CSSF are therefore subject to the control of the Court of Auditors. At the end of 2022, the CSSF had not been subject to any recurring or special audit by the Court of Auditors.

#### *Resolution litigation*

Pursuant to Article 118 of the BRR Act, the Administrative Court (‘Tribunal administratif’) has jurisdiction to hear appeals against crisis prevention measures,<sup>143</sup> decisions relating to the reduction or removal of obstacles to the resolvability of a credit institution,<sup>144</sup> resolution measures,<sup>145</sup> administrative sanctions and other administrative measures.<sup>146</sup> Appeals must be lodged within one month of notification or publication of the measure, otherwise they will be time-barred. Appeals do not have suspensive effect.

The number of administrative appeals remains very low compared to the importance of Luxembourg as a financial centre. Questioned on this subject in the Chamber of Deputies, the Director General of the CSSF justified the rarity of appeals against CSSF decisions by the meticulousness and seriousness demonstrated by CSSF staff and, secondly, by the possible impact of appeals on the reputation of institutions.<sup>147</sup> Between 2016 and 2022, the administrative courts (Administrative Court and Administrative Court of Appeal) handed down 20 judgments following appeals against the CSSF. None of them concerned the CSSF’s tasks or the exercise of its resolution powers.

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<sup>140</sup> Article 9 of the law of 1<sup>er</sup> April 2015 establishing the Systemic Risk Board. Mémorial A no. 64, 3 April 2015.

<sup>141</sup> Article 2(3) of the law of 8 June 1999 on the organisation of the Court of Audit. Mémorial A no. 68, 11 June 1999; last amended by the law of 26 July 2010. Mémorial A no. 125, 30 July 2010.

<sup>142</sup> Council of State, Opinion on the draft law revising article 105 of the Constitution, 2 March 1999.

<sup>143</sup> Article 59-48 of the BRR Act.

<sup>144</sup> Article 29(6) of the BRR Act.

<sup>145</sup> Article 118(1) of the BRR Act.

<sup>146</sup> Article 119 of the BRR Act.

<sup>147</sup> Chamber of Deputies, Minutes of the meeting of the Committee on Finance and the Budget, cit., 4.

Table 6

**Judgments handed down by the administrative courts  
concerning the CSSF (2016-2022)**

	2016	2017	2018	2019	2020	2021	2022	2023	2024	Total
Administrative court of Appeal	1	1	-	1	-	1	1	2	4	11
Administrative tribunal	3	1	4	4	2	2	-	4	2	22
<b>Grand total</b>	<b>4</b>	<b>2</b>	<b>4</b>	<b>5</b>	<b>2</b>	<b>3</b>	<b>1</b>	<b>6</b>	<b>6</b>	<b>33</b>

Source: Frédéric Allemand. Data: CSSF annual reports; diaries of the BCL's Chief Executive Officer.

The justiciability regime for CSSF acts does not distinguish according to the origin of the rules implemented by the Resolution Board. In the *ABLV Bank Luxembourg* case decided in March 2018, the CSSF argued that, as the Luxembourg resolution authority, it was obliged to implement the SRB's decision at national level on the basis of the SRMR. The *Tribunal d'arrondissement de Luxembourg* ruled that the question of whether or not the CSSF was obliged to refer a request for dissolution or liquidation to the Luxembourg courts was irrelevant to the resolution of the dispute.<sup>148</sup>

**The civil liability regime of the CSSF in respect of its resolution functions**

The ordinary law governing the civil liability of public bodies is set out in the Act of 1<sup>er</sup> September 1988.<sup>149</sup> As a matter of principle, the State and other legal persons governed by public law must be held liable, each within the scope of its public service missions, for any damage caused by the defective operation of their services, whether administrative or judicial, subject to *res judicata*. The faulty operation that caused the damage may be the result of a fault or minor negligence on the part of the public authorities.

The CSSF Act derogates from ordinary law. It provides in article 20(2) and (3) that the civil liability of the CSSF or of its officials and agents intervening in the exercise of its missions, may only be engaged for individual damages suffered by supervised undertakings or professionals, by their clients or by third parties, provided that it is proved that the damage was caused by gross negligence in the choice and application of the means implemented for the accomplishment of the CSSF's public service mission. The requirement of "gross negligence" rather than minor negligence reduces the possibilities of the CSSF incurring civil liability in an area marked by its complexity. This derogatory liability regime is extended to the operation of the CSSF as a resolution authority. Article 12-5 of the CSSF Act specifies that this regime applies to the Resolution Board, its members, their deputies and the staff of the Resolution department. Defence

<sup>148</sup> Tribunal d'arrondissement, *CSSF v ABLV Bank Luxembourg*, docket number: TAL-2018-01570, 9 March 2018.

<sup>149</sup> Mémorial A no. 51, 26 September 1988.

costs are borne by the CSSF, which may claim reimbursement in the event of a final conviction for gross negligence.

This choice of limited liability is understandable in the light of the debates that accompanied, in the early 1990s, the liquidation of the *Bank of Credit and Commercial International* (BCCI), whose holding company and the headquarters of one of the group's banks are in Luxembourg. The opening of a drug money laundering investigation by the US authorities against a Florida-based subsidiary of the group revealed an elaborate system of large-scale fraud over several years through the group's various banks. The weak effectiveness of banking supervision and the fight against money laundering practised by the supervisory authorities in the United Kingdom and Luxembourg was highly criticized.<sup>150</sup> Given the financial stakes at play and the risk of litigation that threatened the Institut Monétaire Luxembourgeois – the authority responsible for supervising banks at the time – the Government and the legislature decided to tighten up the conditions under which the Institut could incur civil liability.<sup>151</sup> When the BCL and the CSSF were set up in 1998, this derogatory regime was adopted in identical terms and applied to these two new public institutions, against the advice of the Chamber of Commerce.

### 3. Concluding remarks

The Resolution Board is a young structure in Luxembourg's institutional environment. It remains difficult to assess its performance. With the exception of the ABLV Luxembourg case, the Resolution Board did not really have the opportunity to make full use of its procedures and powers to intervene in the resolution of credit institutions, nor of its ability to coordinate its action effectively with the other structures concerned with the stability of the Luxembourg financial system (other CSSF departments, the BCL, the Ministry of Finance, the FRL, the FGDL and the CPDI). However, the limited human resources allocated to the Resolution Council raise questions about its ability to react should a major banking crisis strike the Luxembourg financial center.

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<sup>150</sup> French National Assembly, Rapport d'information par la mission d'information commune sur les obstacles au contrôle et à la répression de la délinquance financière et du blanchiment de capitaux en Europe, by Mr Arnaud MONTEBOURG, vol. 5: *The Grand Duchy of Luxembourg*, no. 2311, 30 March 2000, 48-52.

<sup>151</sup> Article 65 of the law of 5 April 1993 on the financial sector. This provision introduces two new paragraphs to article 30 of the Organic Law establishing the Institut Monétaire du Luxembourg of 20 May 1983.