AMERICAN BANKRUPTCY INSTITUTE

International European Insolvency Symposium

Liability Management Is Arriving in Europe

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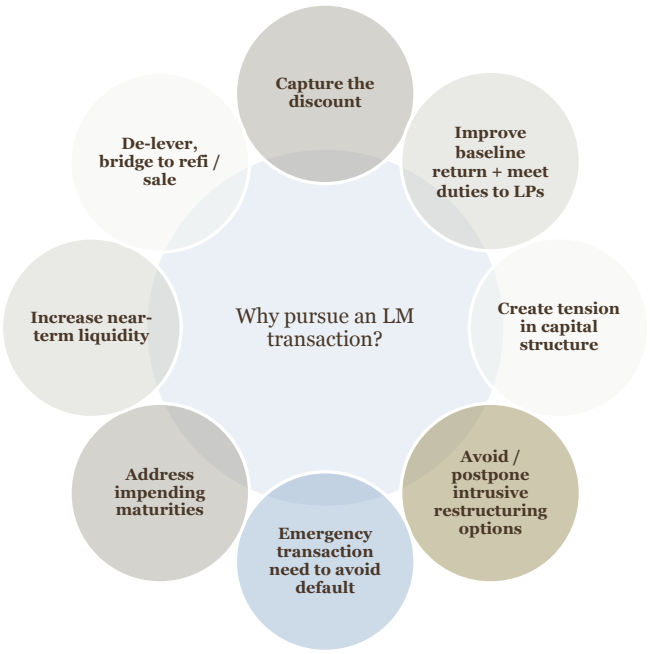
Liability management: what is it and why pursue it?

"Liability management" can mean different things to different people

It is an **umbrella term** that captures different ways of **managing debt profiles**, raising new money and/or achieving a balance sheet restructuring (in whole or part), within the context of the terms of the underlying finance contracts

It implies a transaction that is implemented **prior to financial maturities** and **without resorting to a court process**

The term is used to cover a wide variety of transactions, from more **vanilla amendments, exchanges and buybacks** through to more aggressive **exclusionary transactions** that exploit differences in ranking of debt instruments

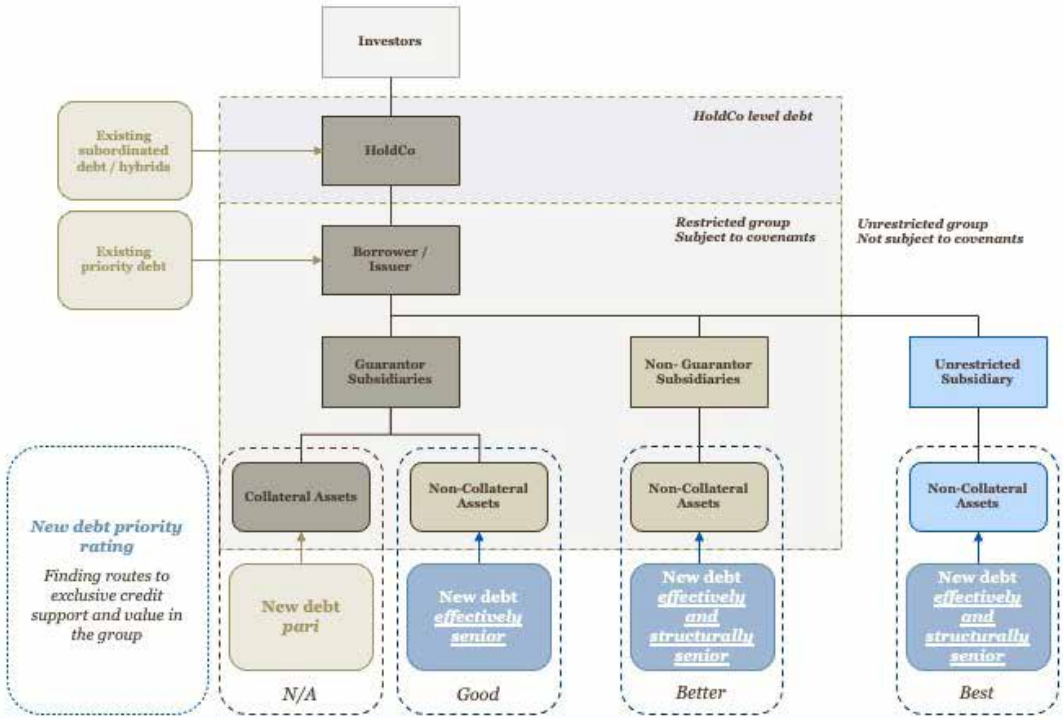


Liability management : reflections on European LevFin

Market factors that may impact appetite for liability management

1	**Documentary flexibility**	European deals may have (more) fulsome intercreditor agreements, but flexibility remains
2	**Directors' duties**	Landscape fragmented across Europe. In certain jurisdictions it may be harder to navigate more aggressive transactions, particularly if the solvency of the borrower is in question
3	**Litigation risk**	Balancing downside costs risk against the upside of the exercise
4	**Reputational risk and stakeholder motivations**	Is there less appetite to implement more aggressive transactions where there is less at stake (given the smaller capital structures in Europe)
5	**Legal uncertainty**	Under English case law around coercive exit consents and minority oppression

Liability management: the basics of priming



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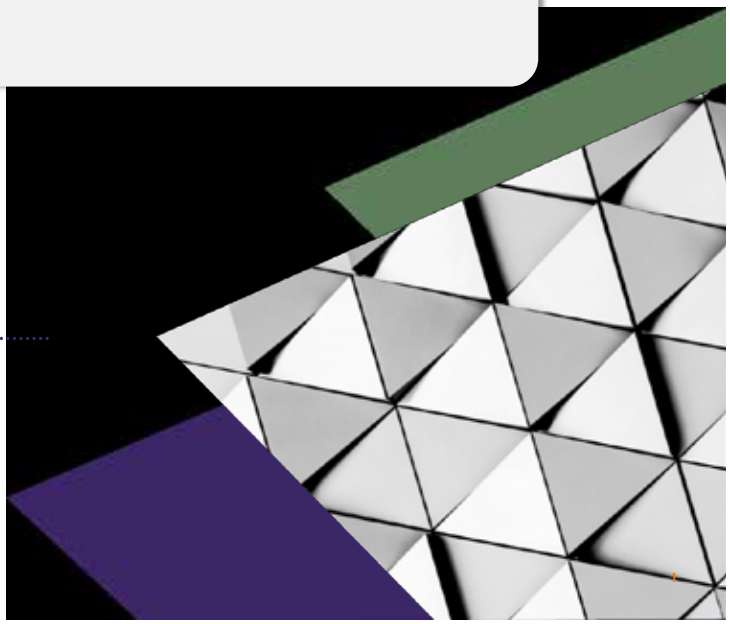
Liability Management is arriving in France

Presentation

October 2024



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Quick overview of LME (1/2)

Definition of LME

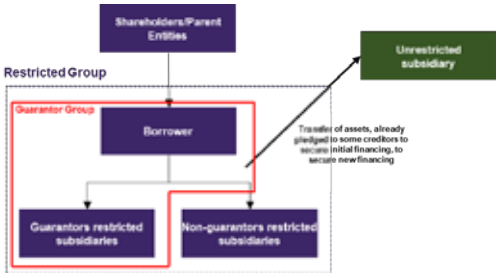
LME means **Liability Management Exercises**, some techniques that use existing financing documentation to restructure a company's financial debt, originated from the United States (consent solicitation, tender offer or exchange offer).

Types of LME

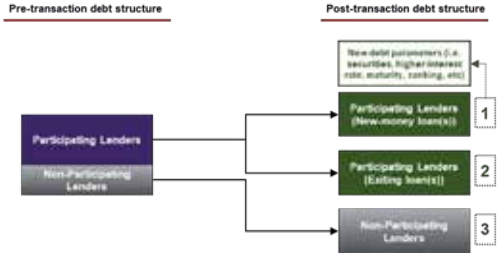
- **Drop-down**.
- **Uptiering** ► in France: Atalian and OGF (*slide 4*).
- **Double-dip and pari-plus double-dip** (*slide 3* - diagram).

The success of these operation hinges on several factors, some of which may be addressed **in the relevant financial documentation**. Therefore, critical first step for determining the feasibility of a LME will be **a review of the covenant flexibility (and basket capacity)** under the indentures / credit agreements.

Drop-down



Uptiering



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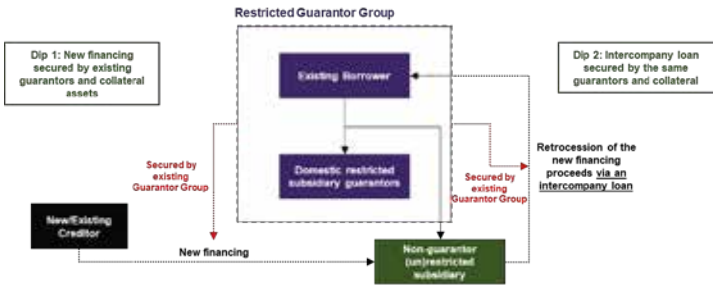
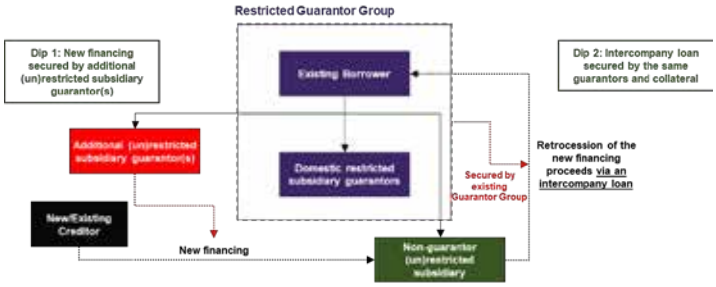
Quick overview of LME (2/2)

"*True*" Double dip



"*Pari-Plus*" Double dip



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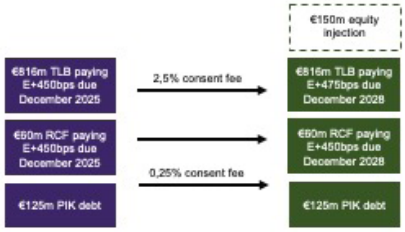
French Case Studies: OGF & Atalian

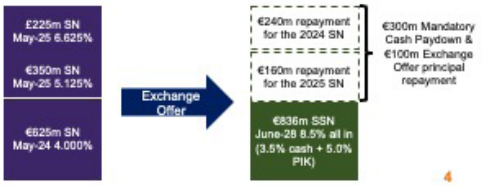
OGF's case (similarity to *uptiering*):

- **Debts**: €941M
  - €125m PIK debt,
  - €816m TLB paying E+450bps due December 2025,
  - €60m RCF paying E+450bps due December 2025
- Credit agreements amended to **(i) extend maturity to 2028, (ii) raise new senior financing and (iii) include adjustments in the EBITDA definition of the SFA.**
- **Exchange offer**:
  - Equity injection (€150m) from OTPP,
  - TLB: 2.5% consent fee; 0.25% margin uplift,
  - PIK: 0.25% consent fee; no margin uplift,
  - Total net leverage decreasing to 5.5x from 6.3x.

Atalian's case (similarity to *uptiering*):

- **Debts**: €1286M
  - €625 million 4.000% SNs due May 2024,
  - €350 million 5.125% SNs due May 2025,
  - £225 million 6.625% SNs due May 2025.
- **Consensual refinancing transaction with an exchange offer, supported by 98% of noteholders**:
  - A mandatory cash redemption of €300 million in respect of the notes,
  - An additional cash redemption of €100 million in respect of the Exchange Offer principal repayment,
  - A reinstatement of remaining amounts under the notes denominated senior secured notes due June 2028 with enhanced economics and in an aggregate amount of approximately €836 million 8,5% (3,5% cash + 5% PIK).





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French Case Studies: Accelerated safeguard proceedings

In France, however, operations similar to *uptiering* are often implemented as part of accelerated safeguard proceedings.

Failure of LME and opening of accelerated safeguard proceedings

Restructuring of Orpea

- Lock-up agreement (14 February 2023) with a steering committee of financial unsecured creditors and a consortium of French long term investors, led by CDC;
- Agreement with G6 bank providing for the **rescheduling and other adjustment of credit A, B and C** and the provision of a new financing of €600m;

➢ Given the significant number of its creditors, opening of accelerated safeguard proceedings and implementation of the plan *via* a **cross-class cram-down**.

Restructuring of Atos

- Aim of pushing back the maturities to 2028 in order to win time to conduct asset sales and reorganize.
- Reinstatement of the RCF, and an **exchange of the rest of the debt** (loans and shorter dated bonds) for other instruments with longer dated maturities and more securities.
- On 25 March 2024, conciliation proceedings are opened. Atos entered into a lock-up agreement (14 July 2024) with unsecured financial creditors (62,6%).

➢ On July 2024, Atos decided to open accelerated safeguard proceedings. Main terms of the restructuring are: (i) **€2,9bn equitization of existing unsecured debt and the reinstatement of €1,95bn of residual unsecured debt** and (ii) **€1.5m to €1.675m of new money**.

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A propitious environment for LMEs in France? (1/3)

There have not yet been many cases of LMEs in France. The question is whether the French legal and economic environment would allow them to be used more often. There are a number of factors that could encourage greater use of LMEs.

1 Avoiding insolvency proceedings to impose changes in the debt instruments

- Debtor: consensual exchanges to pressure creditors into accepting the negotiation and avoid entering into insolvency proceedings.
- Creditors: less likely to lose part of their debt due to the loss of value of a company in insolvency proceedings, avoid risk of cross-class cram-down (and reputational risk).

2 Bypassing majorities in conciliation proceedings

- Modification of financial documentation (i.e. extension of maturity in exchange for higher remuneration): unanimous consent of creditors (or a reinforced majority).
- LMEs enable creditors to exchange their debt instruments without unanimous agreement, relying only on a reinforced majority.
- Not participating in the transaction can be risky: original instrument loses its contractual guarantees,.
- A significant divergence in recovery rates.

3 Development of cooperation agreements in France

- Cooperation agreements are beginning to be used.
- Cooperation agreements are highly effective in facilitating LMEs: drag-along clause.

4 Parallel Restructuring

- Good results and cash flow in short term.
- Restructuring in parallel of a LME.

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A propitious environment for LMEs in France? (2/3)

However, there are also a number of factors that could hinder the development of LMEs in France.

Subsequent insolvency/bankruptcy	• In the USA: likely subject to Chapter 11 or bankruptcy. It could be the same in France.
Challenges	• LME transactions could be challenged by non-participating lenders, on several grounds. • The debtor and its participating creditors may, however, pressure the creditors by arguing that they could initiate insolvency proceedings and its non-participating lenders be crammed down, to make the creditors abort the challenges. • Management liability risks: liability of directors in the event of the opening of insolvency proceedings. ✓ Liability for asset shortfall based on mismanagement. ✓ This sanction could be combined with professional or even criminal penalties ► Appendix (*slide 9*). ✓ Corporate law prevents decisions being taken that are contrary to the corporate interest.
Lack of legislation and legal uncertainty	• No regulation in France and in Europe about LMEs. • Need to legislate on it?

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A propitious environment for LMEs in France? (3/3)

Financial Documentation limitations	• Contracts, under French law, can generally only be amended by unanimous consent of the creditors. The existence of an ICA should also be considered. • However, in most of the cases mentioned, and in major financial restructurings, the financial documentation is in the form of High Yield Bonds governed by New York law, and therefore this limit does not apply.
Small quantity of creditors in Europe/France	• European creditors, who are fewer in number, may be more inclined to remain aligned. In this context, creditors and sponsors are less likely to carry out LMEs.
European Restructuring Proceedings	• In the USA: Chapter 11 proceedings in the United States are known to be long and costly, the alternative of LMEs offers a more favorable framework to restructure debt more quickly. • In France: insolvency proceedings offer a flexible framework, within a time limit set by the court and generally limited costs. Releasing managers, with some exceptions, from liability related to their involvement in the restructuring (*a contrario* for LME transactions).

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Appendix – Applicable corporate liabilities

Directors' duties regimes in Europe are different, and directors can be personally liable (including on a criminal basis) for transactions while an entity is near insolvency. Given the lack of significant LME precedent in Europe, directors here feel more cautious than in the U.S. when considering the implementation of a LME.

1) Liability for asset shortfall (*pour insuffisance d'actif*)

Pursuant to Article L. 651-2 of the French Commercial Code

"*Where the liquidation of a legal entity reveals an asset shortfall, the court may, in the event of mismanagement having contributed to this shortage of assets, decide that the amount of this shortage of assets will be borne, in whole or in part, by all the de jure or de facto managers, or by some of them, who contributed to the mismanagement. In the event of multiple managers, the court may, by reasoned decision, declare them jointly and severally liable*".

Conditions : (i) mismanagement (not a simple negligence) before the proceedings (ii) prejudice (asset shortfall), (iii) causal link (attenuated evidence) of *de facto* or *de jure* managers (iv) opening of a liquidation proceedings.

Assigned action : creditors judicial representative and public prosecutor

Prescription : 3 years as from the opening of the liquidation proceedings
Financial Penalty that could be combined with professional or even criminal penalties

2) Professional offence of *faillite personnelle*

Article L. 653-1 and seq. of the French Commercial Code provides that in case of a reorganization and liquidation proceedings, the act of, among others "*Having abusively continued a loss-making business which could only lead to insolvency*" or "*Having misappropriated or dissimulation all or part of the company's assets or fraudulently increased one's liabilities"* is a professionnal offence designated as *faillite personnelle*. *faillite personnelle* is incurred by *de jure* as well as *de facto* manager.

Assigned action : creditors judicial representative and public prosecutor

Prescription : 3 years as from the opening of the liquidation proceedings

Penalties: management ban (up to 15 years), dispossession of voting rights, inability to hold elected office.

3) Criminal offence of *banqueroute*

Article L. 654-2 of the French Commercial Code provides that in case of a reorganization and liquidation proceedings, the act of, among others "*misappropriation or dissimulation of all or part of the debtor's assets*" is a criminal offence designated as *banqueroute*. *Banqueroute* is incurred by *de jure* as well as *de facto* manager.

The *banqueroute* offence seems designed to protect the creditors' interest rather than the corporate interest.

Assigned action : creditors judicial representative, public prosecutor and employees' representative

Prescription : 6 years as from the opening of the liquidation proceedings (L. 654-16 FCC)

Penalties for bankruptcy offenders and accomplices include five year imprisonment and a fine of €75,000 for natural persons and €375,000 for legal entities. The judge may also pronounce personal bankruptcy (*faillite personnelle*) and a prohibition from managing a company. In addition, this condemnation could probably be a sufficient ground for a liability for assets shortfall.

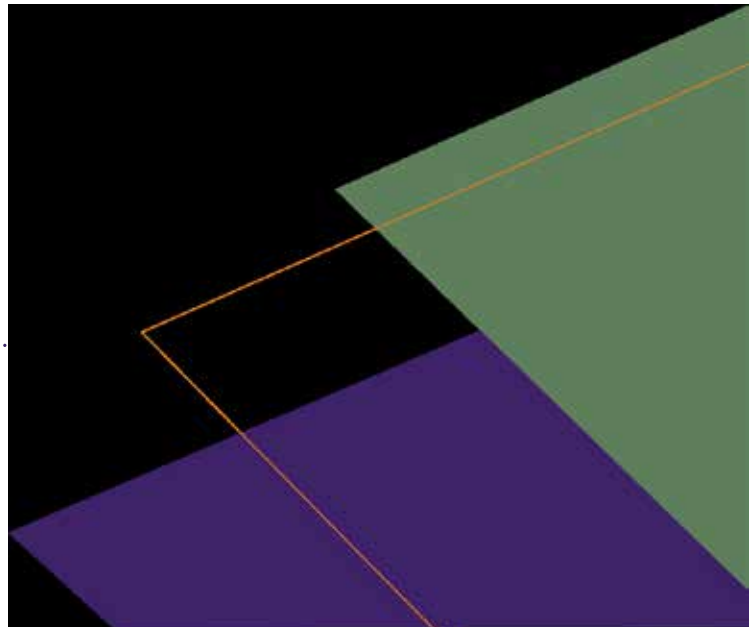
4) Fraudulent use of company assets (*abus de biens sociaux*) (outside the scope of insolvency proceedings)

Pursuant to Article L. 242-6(3°) of the French Commercial Code

"*It is punishable by five years' imprisonment and a fine of 375,000 euros for the chairman, directors or managing directors of a société anonyme to make, in bad faith, use of the company's assets or credit that they know to be contrary to the company's interests, for personal purposes or to favor another company or business in which they have a direct or indirect interest*".

Conditions : (i) A material element, namely the use of assets contrary to the company's interests. French criminal courts usually assess the legal conformity of the usage (here, the disposal) of the relevant assets from an economic perspective. (ii) A mental element (mens rea), namely (1) the knowledge of the conflict with the company's interests (2) as well as the purpose (aim) of satisfying personal objectives and/or favoring another company in which the perpetrator is directly or indirectly interested.

If an *abus de biens sociaux* is characterized, any and all entities and individuals within a group that are knowingly involved in the underlying transaction (irrespective of whether the said entity or individual is a party to the transaction) may be prosecuted.



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Faculty

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Stephanie Wickouski is a partner with Locke Lord LLP in New York, where her practice includes representing clients in both the litigation and transactional aspects of bankruptcy, restructuring and insolvency matters, with measured experience in indentured trusts. She advises companies and financial institutions on the insolvency implications of commercial transactions and on credit defaults, including bond, bilateral and syndicated loan defaults, as well as disputes under credit facilities and indentures. With more than 40 years of experience handling complex reorganization cases through-

out the country, Ms. Wickouski has served as lead bankruptcy counsel in multiple high-profile cases in numerous industries, including retail, energy, oil and gas, shipping, manufacturing, automotive, hospitality, casinos, real estate and health care. She also frequently advises clients on distressed-asset sales, including § 363 sales, and provides comprehensive legal services to effectively position buyers in the process. Ms. Wickouski has authored three books: *Indenture Trustee Bankruptcy Powers & Duties*, an essential guide to the legal role of bond trustee; *Bankruptcy Crimes*, an authoritative resource on bankruptcy fraud; and her most recent book, *Mentor X – The Life-Changing Power of Extraordinary Mentors*. Prior to entering private practice, she was a trial attorney with the Civil Division of the U.S. Department of Justice, where she received awards for her handling of litigation in airline bankruptcies. Ms. Wickouski is a panel mediator for the U.S. Bankruptcy Court for the Southern District of New York and has taught creditors' rights at the Catholic University School of Law. She previously clerked for Hon. Roger M. Whelan, a former U.S. Bankruptcy Judge for the District of Columbia. Ms. Wickouski received her A.B. from the College of William and Mary and her J.D. from Franklin Pierce Law Center.

John Willcock is the editor and publisher of *Global Turnaround*, the leading magazine focusing on international restructurings, insolvencies, turnaround and distressed investing. Since its launch in 2000, *Global Turnaround* has become a leading independent source for news, analysis and comment on international and large-scale corporate crises and rescues, who is doing the deals, and how they are doing them. Throughout the present global economic downturn, from the first signs of the credit crunch through the financial meltdown that saw Lehman Brothers fail, *Global Turnaround* has featured the turnaround managers, financial advisers and lawyers at the forefront of the rescue culture. Mr. Willcock set up *Global Turnaround* after working for 15 years as a financial journalist writing for a range of newspapers in the U.K., including *The Times*, *The Guardian* and *The Independent*. He has also written and broadcast about insolvency and restructuring for the BBC, Eurofenix, *INSOL World* and *Recovery* magazine, and he is a regular speaker at international restructuring and turnaround conferences around the world. Mr. Willcock graduated from the University of Birmingham in 1982.