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# Full upgrade Luxembourg insolvency law

**On 19 July 2023, a new law was adopted by Luxembourg Parliament that entirely rewrites Luxembourg bankruptcy law as well as the preventative reorganisation procedures in place for a business to avoid bankruptcy (bill of law n°6539A) (the "New Law").**

## General

In order to increase Luxembourg legal competitiveness and its attractiveness for investors, the modernisation of Luxembourg insolvency law deemed necessary. In its previous state, it did little to promote the uniformity of Luxembourg business law and most of its preventive procedures had fallen into disuse.

The New Law provides for a four-pronged reform to address distressed companies and bankruptcies.

The preventive part aims to avoid that a company needs to file for bankruptcy automatically when it is in difficulty. In fact, the New Law provides for the introduction of new provisions designed to replace the largely underutilized previous tools.

With regard to the restorative aspect, the New Law intends to give unfortunate but *bona fide* merchants a second chance. In contrast, the repressive aspect is designed to prevent bad-faith players from simply walking away from their business and starting a new one. Finally, as far as the social aspect is concerned, the aim of judicial reorganisation measures and ex ante measures is to preserve the business and the jobs that go with it.

On July 16, 2019, Directive (EU) 2019/1023 of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 ("***Directive on Restructuring and Insolvency***") entered into force. The New Law also implements the provisions of the Directive on Restructuring and Insolvency.

The New Law, voted on 19 July 2023, is dated 7 August 2023 and was published on 18 August 2023.

## Scope

The New Law will apply to business persons (*commerçants personnes physiques*), commercial companies, including special limited partnerships (*sociétés en commandite spéciale*) artisans and non-trading companies (*sociétés civiles*). Credit institutions, investment firms, insurance and reinsurance

companies, most of the companies of the financial sector (investment funds included) are expressly excluded from the scope of the New Law.

## Preventative Measures

The New Law empowers the minister responsible for the economy and for small and medium-sized enterprises to set up a system to detect debtors in financial difficulties if the latter are likely to jeopardize the continuity of the debtor's business. Upon detection of such debtor, the minister may convene the debtor to obtain more information on the debtor's situation. At the same time, all necessary information on the new preventative procedures shall be given to the debtor.

Furthermore, the New Law also provides for three new preventive procedures, two of which are out-of-court proceedings. The latter do not require a formal application to a court and are entirely confidential.

### (1) Appointment of a mediator (conciliateur d'entreprise) (art. 9 of the New Law)

A debtor may request the minister responsible for the economy or the minister responsible for small and medium-sized enterprises, according to the competence of each, to appoint a mediator for the purpose of facilitating the reorganisation of all or part of the company's assets or activities.

The mediator's mission is to prepare and promote either (i) the conclusion and implementation of a settlement agreement in accordance with article 11 of the New Law, or (ii) obtaining of the approval of the creditors to a reorganisation plan in accordance with articles 38 to 45 of the New Law.

### (2) Appointment of a court-appointed agent (art. 10 of the New Law) (*nomination d'un mandataire de justice*)

When serious and characterised misconduct of the debtor or one of its governing bodies threatens the continuity of the debtor, and the measure requested is likely to preserve this continuity, the magistrate of the district court presiding over the division of the district court sitting in commercial matters and as for an urgent interlocutory application to whom the matter has been referred by the Public Prosecutor or any interested party may appoint one or more court-appointed agents. The mission of the latter shall be determined by the same judge appointing him or her.

### (3) Reorganisation via a settlement agreement (art. 11 of the New Law) (*accord amiable*)

The debtor may propose to all or at least two of his creditors to enter into a settlement agreement for the purpose of reorganizing all or part of its assets or activities. In the event a settlement is reached between the debtor and its creditors, the District Court dealing with commercial matters (*Tribunal d'Arrondissement siégeant en matière commerciale*) shall certify the settlement agreement. Once certified, the settlement agreement is enforceable and payments made in accordance with such agreement are enforceable towards the insolvency estate even if they are realised within the suspect period. This procedure is entirely confidential. The decision of the District Court will not be published or notified and is not subject to appeal. Third parties will only be notified with the express consent of the debtor.

## Judicial reorganisation procedures (art. 12 et seq. of the New Law)

When the viability of a debtor is threatened, such debtor may on a voluntary basis apply for a judicial reorganisation procedure with the competent district court.

The aim of initiating judicial reorganisation proceedings is to obtain a suspension (*sursis*) of payment **(i)** for the purpose of either reaching a settlement agreement (accord amiable) under the conditions set out in article 11 (see above), or **(ii)** to obtain the agreement of the creditors (*accord collectif*) in accordance with articles 38 to 45 of the New Law, or **(iii)** to enable all or part of the assets or activities to be transferred by court order (*transfert par décision de justice*) to one or more third parties in accordance with articles 55 to 64 of the New Law.

## Common rules once a request to open a judicial reorganisation procedure has been filed

As a general rule, the filing of a request to open a judicial reorganisation proceeding by a debtor prevents bankruptcy, judicial dissolution, enforcement measures (with certain exceptions) or administrative dissolution until the District Court shall have rendered a judgement on such request. Financial collateral arrangements under the Luxembourg law of 5 August 2005 on financial collateral arrangements, as amended, remain unaffected by the stay of proceedings.

The filing of the request to open a judicial reorganisation procedure also suspends the obligation to file for bankruptcy.

The court shall approve the opening of a judicial reorganisation procedure if it finds the debtor in an endangered state. Whether or not the debtor qualifies for bankruptcy is not an obstacle to the opening or continuation of the judicial reorganisation proceedings.

Once a judicial reorganisation procedure has been opened by approval of the request by a Luxembourg court:

- a suspension of payment of maximum 4 months may be granted – no enforcement measures against the debtor's movable or immovable property may be exercised;
- no bankruptcy, judicial dissolution or administrative dissolution;
- existing agreements remain valid and enforceable (with exceptions);
- payments remain valid insofar as they are necessary for the continuity of the business; and
- New liabilities are considered as debts of the insolvency estate.

The Luxembourg court may decide to appoint a court-appointed agent (*mandataire de justice*) as insolvency practitioner or an interim administrator (*administrateur provisoire*). In case a mediator was appointed, the court may decide to end his or her mission partially or entirely.

(ii) Judicial reorganisation by agreement of the creditors (accord collectif) (art. 38 et seq. of the New Law)

Where the purpose of the judicial reorganisation is to obtain the agreement of the creditors, the debtor shall file a reorganisation plan with the court and shall notify each of its secured creditors. The latter have the possibility to dispute the amount or quality of their claims as indicated by the debtor. In this case, the court determines the amount and status of the disputed claims. The creditors will then vote on the reorganisation plan, which is deemed to have been approved upon reception of a favourable vote from a majority of the creditors in each class, representing by their uncontested or provisionally admitted claims, half of all sums due in principal, in which case the reorganisation plan shall be enforceable against all creditors, including those who have opposed it. The final step required for this procedure is the homologation of the reorganisation plan by court.

(iii) Judicial reorganisation through transfer by court order (***transfert par décision de justice***) (art. 55 et seq. of the New Law)

The court may order the transfer of all or part of the business or its activities in order to ensure their continuance, in case the debtor consents to such transfer in its petition for judicial reorganisation or at a later date during the course of the judicial reorganisation proceedings. The same may be requested by the public prosecutor, a creditor or any other person with an interest in acquiring all or part of the business.

The judgement ordering the transfer shall appoint a court-appointed agent, who shall be responsible to organise and realise the transfer through the sale or transfer of the movable or immovable assets necessary or useful to maintain all or part of the debtor's economic activities, or through a merger.

## Second chance for the debtor

Any debtor, natural persons only, whose business has failed may request the competent court to be discharged from the receivables balance upon being declared bankrupt. Such discharge will not be granted, or only partially granted, if the debtor has committed serious misconduct or gross negligence that has contributed to the bankruptcy, or has knowingly provided inaccurate information at the time of the admission of bankruptcy or, subsequently to requests made by the court or the bankruptcy administrator (curateur).

When a debtor benefits from such discharge, any prohibition on access to a commercial, industrial, artisanal or liberal activity, or on exercising such activity for the sole reason that the debtor is insolvent, is automatically terminated on expiry of the discharge period.

## Entry into force

The new law has come into force on November 1, 2023.

## Your contact persons

**Mathieu Laurent**
Avocat à la Cour, Partner
Luther S.A. Luxembourg
T +352 27484 1
mathieu.laurent@luther-lawfirm.com

**Anneleen Hofkens**
Avocat à la Cour, Counsel
Luther S.A. Luxembourg
T +352 27484 1
anneleen.hofkens@luther-lawfirm.com

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