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CHAMBRE DES SALARIÉS LUXEMBOURG

N°10 NOVEMBER 2023

SOCIONEWS

LAW

THE LAW DATED 7 AUGUST 2023 RELATING TO THE PRESERVATION OF BUSINESSES AND THE MODERNISATION OF BANKRUPTCY LAW ENTERS INTO FORCE ON 1 NOVEMBER 2023

This law[1] transposes Directive (EU) 2019/1023 on preventive restructuring frameworks.

The intention of the authors of this law is to detect companies in difficulty before they go bankrupt in order to protect employees.

This law has a preventive, remedial, enforcement and social component.

The preventive component is designed to ensure that a company in difficulty does not automatically lead to bankruptcy. New measures have therefore been introduced to replace the largely under-used tools of controlled management and the preventive composition agreement.

The remedial aspect is designed to give merchants acting in good faith a second chance, and to help create an environment more conducive to a fresh start. This involves individual merchants benefiting from an exoneration from paying the balance of their bankruptcy debts once a bankruptcy process is done.

In contrast, the repressive component is designed to prevent those acting in bad faith from simply getting away with dropping their business and starting a new one. Fraudulent bankruptcy has been decriminalized to facilitate the criminal prosecution process, avoiding the need for systematic investigation by an examining magistrate.

Finally, with regard to the social aspect, the purpose of the judicial reorganisation measures, like the preliminary measures, is to preserve the business and the jobs that go with it, in order to avoid the costs that bankruptcy would entail for the State.

This new law entered into force on 1 November 2023.

1 Loi du 7 août 2023 relative à la préservation des entreprises et portant modernisation du droit de la faillite, Mémorial A n° 521 du 18 août 2023 https://legilux.public.lu/eli/etat/leg/loi/2023/08/07/a521/jo

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1. EXTENDED SCOPE OF APPLICATION

In addition to individual merchants, commercial companies, special limited partnerships, craftsmen and civil partnerships are also covered by the business preservation measures.

In addition, any natural person engaged in a self-employed professional, commercial, industrial or craft activity may apply to the District Court dealing with commercial matters at the place of the registered office or principal place of business for bankruptcy proceedings to be opened.

In the judgment opening bankruptcy proceedings, the court shall rule on the applicable legal provisions relating to the liquidation of a bankruptcy, subject to any derogations provided for by the legislation governing the claimant's profession.

In the event of doubt as to the compatibility of a provision with an obligation arising from the legal status of a debtor holding a regulated liberal profession, the court may, at the request of the bankruptcy judge, solicit the opinion of the Order to which the incumbent of the liberal profession belongs.

The court appoints at least one receiver from the same Order as the debtor.

2. MEASURES TO PROTECT BUSINESSES

2.1 Detection of companies in difficulty by the Minister for the Economy or Small and Medium-sized Businesses

The task of the Minister for the Economy or the Minister for Small and Medium-sized Businesses is to detect debtors in financial difficulty when such difficulties are likely to compromise the continuity of the debtor's business.

They may request that the debtors concerned obtain information relating to the state of their affairs and inform them of available reorganisation measures.

To do this, they have access to diverse information sources: STATEC, rulings against a debtor, the table of protests drawn up by the registrars, redundancies for economic reasons, debtors who have not paid their social security, VAT and payroll deductions debts within three months, rulings ordering a commercial lease terminated, etc.

Debtors may inspect the data thus collected concerning them at any time and without having to leave the premises. Debtors have the right to obtain rectification of data collected concerning them by applications to the competent minister.

2.2 Detection of companies likely to be declared bankrupt

In addition, an assessment body for companies in difficulty (Cellule d'évaluation des entreprises en difficulté) has been set up to assess the appropriateness of bankruptcy petitions. It is made up of five civil servants appointed by the Minister for the Economy.

2.3 Appointment of a company conciliator

Where a debtor so requests, the Minister for the Economy or the Ministry of the Middle Classes may now appoint a company conciliator to facilitate the reorganisation of all or part of assets or operations.

The role of the company conciliator is to prepare and promote the conclusion and implementation of an amicable agreement, to obtain the agreement of the creditors on a reorganisation plan, or to transfer all or part of the assets or activities to one or more third parties by means of a court order, whether outside or as part of a judicial reorganisation procedure.

The debtor may recommend a company conciliator.

There are no formal requirements for requesting the appointment of a company conciliator.

The Minister, in granting a debtor's request, determines the scope and duration of the company conciliator's mission within the limits of the debtor's request.

The company conciliator is chosen from among a group of sworn experts[2].

The mission of the company conciliator ends when the debtor or the company conciliator so decides and informs the Minister.

2 In application of the "Loi modifiée du 7 juillet 1971 portant, en matière répressive et administrative, institution d'experts, de traducteurs et d'interprètes, de conciliateurs d'entreprise et mandataires de justice assermentés et complétant les dispositions légales relatives à l'assermentation des experts, traducteurs et interprètes" - https://legilux.public.lu/eli/etat/leg/loi/1971/07/07/n2/consolide/20231101

2.4 Appointment of a legal representative

Where serious and proven breaches by the debtor or one of its organs threaten the continuity of the business and the measure requested is likely to preserve that continuity, the judge presiding the chamber of the District Court sitting in commercial matters and as in summary proceedings, to whom the matter has been referred by the Public Prosecutor or any interested party, may appoint one or more legal representatives chosen from among the sworn experts[3].

The order appointing the court-appointed representative shall specify the scope and duration of the representative's mission. Where a conciliator has previously been appointed, the court may decide that the conciliator's mission is to be terminated in whole or in part.

The opening of a judicial reorganisation procedure does not in itself put an end to the mission of the legal representative. The judgement initiating the judicial reorganisation or a subsequent judgement will decide the extent to which the mission is to be maintained, modified or terminated.

2.5 Reorganisation by mutual agreement

Debtors may submit an arrangement for the reorganization of all or part of their assets or activities to all or at least two of their creditors. To this end, a debtor may request the appointment of a company conciliator, whose mission may extend beyond the conclusion and approval of the agreement, with a view to facilitating the implementation of such a settlement.

In the event of a settlement, the court, ruling on a petition from the debtor, will approve the agreement after verifying that it has been concluded with the aim of reorganising all or part of the debtor's assets or business and make it enforceable.

This decision is not subject to publication or notification. It is not subject to appeal.

Third parties may only review the agreement with the express consent of the debtor.

The liability of creditors participating in a settlement agreement cannot be incurred by the debtor, another creditor or third parties for the simple reason that the settlement agreement did not effectively preserve the continuity of all or part of the business.

2.6 Judicial reorganisation

a. Objectives

The purpose of the judicial reorganisation procedure is to preserve, under the control of the judge, the continuity of all or part of the company's assets or activities.

Judicial reorganisation proceedings are initiated as soon as the company is in danger, either in the short or long term.

The fact that the debtor is bankrupt shall not impede the opening or continuation of the judicial reorganisation proceedings.

The purpose of initiating judicial reorganisation proceedings is to:

- obtain a stay of proceedings so that an out-of-court settlement can be reached
- obtain the agreement of creditors on a reorganisation plan
- to allow the transfer by court order, to one or more third parties, of all or part of the assets or activities

The objectives can be modified during the procedure.

The application to initiate a judicial reorganisation procedure may have a specific objective for each business or part of a business.

If the request comes from a debtor who has already requested and been granted the opening of a judicial reorganization procedure less than three years earlier, the judicial reorganization procedure can only be initiated if it is aimed at the court ordered transfer of all or part of the debtor's assets or activities.

A debtor applying to open a judicial reorganisation procedure must submit a petition to the court, together with a number of documents[4].

The petition is signed by the debtor or his lawyer. Within forty-eight hours of the filing of the petition, the court clerk notifies the State Prosecutor, who may be present at all stages of the judicial reorganisation procedure.

In all cases, as soon as the application is lodged, the judge presiding over the chamber of the court appoints a delegated judge to report to the court hearing the case on the admissibility and basis of the application and on any factor relevant to its assessment.

The delegated judge hears the debtor and any other person whose testimony he considers useful for his investigation.

3 In application of the "Loi modifiée du 7 juillet 1971 portant, en matière répressive et administrative, institution d'experts, de traducteurs et d'interprètes, de conciliateurs d'entreprise et mandataires de justice assermentés et complétant les dispositions légales relatives à l'assermentation des experts, traducteurs et interprètes" - https://legilux.public.lu/eli/etat/leg/loi/1971/07/07/n2/consolide/20231101

4 Article 13 of the law of 7 August 2023.

A judicial reorganisation file is kept at the court registry, containing all the information relating to these proceedings and to the substance of the case.

The filing of a statement of claim by creditors in the judicial reorganisation file suspends the limitation period for a claim. It also serves as formal notice.

As long as the court has not ruled on the application for judicial reorganisation, whether the action was brought or the enforcement proceedings commenced before or after the application was filed:

- the debtor cannot be declared bankrupt, nor can a company be legally dissolved
- no sale of the debtor's personal property or real estate may take place as the result of an enforcement procedure

A petition for reorganisation shall have no suspensive effect if it is filed by a debtor who applied for judicial reorganisation proceedings less than six months earlier, unless the court rules otherwise in a decision stating reasons.

The court shall examine the application for judicial reorganisation within fifteen days of its filing with the clerk of the court's office.

Unless they waive the right to be summoned, debtors are summoned by registered letter with acknowledgement of receipt by the court clerk no later than three days before the hearing.

Debtors are heard in chambers, unless they expressly state a desire to appear in open court.

After hearing the report of the delegated judge, the court gives its decision by judgment within eight days of examining the application.

If the conditions appear to be met, the court declares the judicial reorganisation proceedings open and sets the duration of the stay, which may not exceed four months; failing this, the court rejects the application.

In the event of serious and flagrant misconduct on the part of a debtor or one of its organs, the court may, at the request of any interested party or the public prosecutor and in the judgment initiating the judicial reorganisation proceedings or in a subsequent judgment, after hearing the debtor and the delegated judge in his report, substitute a provisional administrator for the duration of the stay.

b. Effects of the reorganisation decision

A debtor's personal property or real estate may not be subject to enforcement proceedings during the stay. During the same period, a debtor who is a merchant may not be declared bankrupt, unless the debtor himself declares bankruptcy, and if the debtor is a company, the company may not be judicially dissolved or be subject to administrative dissolution proceedings without liquidation.

No seizure may be carried out in respect of surplus debts during the stay.

Seizures made previously retain their freeze status, but the court may, depending on the circumstances and insofar as such release does not cause significant prejudice to the creditor, grant release after hearing the delegated judge in his report, as well as the creditor and the debtor. The application for release is made by petition.

The stay does not prevent debtors from voluntarily settling overdue debts insofar as such payment is necessary to ensure the continuity of the business.

The debtor's spouse, ex-spouse, partner or ex-partner shall benefit from the stay, to the extent that they are personally and jointly liable for the debtor's professional contractual debts.

The stay does not apply to co-debtors or personal sureties.

The application for or commencement of judicial reorganisation proceedings does not terminate existing contracts or the terms and conditions of their performance.

c. Extension of suspended sentence

The court may extend the stay of execution granted, up to a maximum of twelve months from the date of the judgment granting the stay. The application must be filed no later than fifteen days before the expiry of the suspended sentence, failing which it will be inadmissible.

d. Judicial reorganisation by collective agreement

Where the purpose of the judicial reorganisation procedure is to obtain the agreement of creditors on a reorganisation plan, the debtor must file a plan with the court registry at least twenty days before the hearing.

Any additional creditor who disputes the amount or status of the claim indicated by the debtor, including the class of ordinary or extraordinary additional creditor to which he belongs according to the debtor, and any other interested party who claims to be a creditor may, in the event of persistent disagreement with the debtor, bring the dispute before the court which opened the judicial reorganisation proceedings.

e. Reorganisation plan

During the stay, debtors shall prepare a plan consisting of a descriptive part (information about a debtor, his situation, etc.) and a prescriptive part (measures to satisfy creditors; restructuring measures, etc.).

The reorganisation plan describes in detail the rights of all persons who are holders of outstanding claims and any modification of their rights as a result of the vote and approval of the reorganisation plan.

When the continuity of the business requires a reduction in the payroll, a social component of the reorganisation plan is provided for, insofar as such a plan has not yet been negotiated. In such cases, the plan may provide for redundancies.

Staff representatives on the Board of Directors or Supervisory Board, or failing that, the staff delegates, will be heard when this plan is drawn up.

The articles of the Labour Code concerning the job retention plan are applicable.

The period for implementing the plan may not exceed five years from the date of approval.

Any creditor may, by writ of summons served on the debtor, request that the reorganisation be revoked plan where the debtor is manifestly no longer able to implement it and the creditor suffers prejudice as a result.

If the debtor is declared bankrupt, the reorganisation plan is automatically revoked.

f. Judicial reorganisation through transfer by court order

The transfer by court order of all or part of the business or its activities may be ordered by the court with a view to ensuring their continuance where the debtor consents thereto in its application for judicial reorganisation or subsequently during the course of the judicial reorganisation proceedings.

If the debtor consents to a transfer by court order during the judicial reorganisation procedure, the employees' representatives on the Board of Directors or Supervisory Board, or failing that the competent staff delegation, will be heard.

The same transfer may be ordered at the request of the State Prosecutor or by subpoena from a creditor or any person with an interest in acquiring all or part of the business.

Obligations to consult and inform employees or their representatives on transfers of businesses must be complied with.

The judgment ordering the transfer appoints a court-appointed agent chosen from among the sworn experts.

g. Current employment contracts

The transferor's rights and obligations under employment contracts existing at the time of the transfer of the undertaking are assumed by the transferee as a result of the transfer.

The transferor or the court-appointed agent shall inform the prospective transferee in writing of all obligations relating to the employees affected by the transfer and of any pending actions that these employees may have brought against the employer.

At the same time, it shall notify the individual employees of their obligations and send a copy of this notification to the transferee.

The transferee may not be held to any obligations other than those thus communicated in writing. If the data is incorrect or incomplete, employees have the right to request rectification of the incorrect or incomplete data and to claim damages from the transferor. The Labour Court hears such claims and makes rulings as a matter of urgency.

Where the transfer is carried out at the request of a third party or the public prosecutor, the debts existing on the date of the transfer and arising from the employment contracts existing on that date are not transmitted to the transferee, provided that the payment of these debts is legally guaranteed by the Employment Fund (Fonds pour l'Emploi) which guarantees the employee's claims in the event of the employer's insolvency proceedings within the limits of article L. 126-1 of the Labour Code[5].

5 (1) (L. 12 April 2019) In the event of an employer's insolvency, the Employment Fund guarantees the claims arising from employment contracts and those arising from the liquidation of time savings accounts under the terms and conditions and within the limits set out in this article.
The same shall apply where the competent court has either decided to open collective proceedings based on an employer's insolvency or has declared the definitive closure of an employer's business or establishment.
(2) Claims arising from the liquidation of time savings accounts are guaranteed up to a ceiling equal to twice the reference minimum social wage, and claims for wages and compensation of any kind due to employees at the date of the bankruptcy judgment for the last six months of work and arising from the termination of employment contracts are guaranteed up to the ceiling referred to in Article 2101(3) of the Civil Code.
(3) Should a company continue to be managed by the receiver in bankruptcy, the guarantee referred to in this Article shall apply, within the limits specified in paragraph 2, to claims arising from the liquidation of time savings accounts and salaries and allowances of any kind due to employees on the date of termination of the employment contract and to claims arising from the termination of the employment contract.
(4) Claims arising from the liquidation of time savings accounts and wages and allowances shall be taken into account for the purposes of paragraphs 1 to 3, less statutory tax and social security deductions in respect of wages.
(5) Employees are entitled to a guarantee if the claims referred to in this article cannot be paid, in whole or in part, from the funds available within ten days of the declaration of bankruptcy.
(6) (L. 19 April 2012) At the receiver's request, the Employment Fund shall pay to the employees unpaid sums shown on the statement of claims presented by the receiver, within the limits referred to in this article and, where applicable, taking into account the advances paid under the following paragraph, which have been approved by the bankruptcy judge and verified by the Employment Development Agency (Agence pour le développement de l'emploi). The statement provided for in this paragraph may be presented by the receiver before the close of the statement of claims.
For any wage claim referred to in paragraph (2), employee creditors may, if their claim represents more than half of monthly wages, calculated on the average of the last three months preceding the month in which bankruptcy was filed, submit a copy of a claim submitted to the Commercial Court concerning wage arrears to the Employment Development Agency. After verification by the Employment Development Agency of such documents, the Employment Fund will make an advance payment relating to the wage arrears, up to a maximum of seventy-five per cent of the ceiling referred to in paragraph (2).
(7) The Employment Fund may pay the sums guaranteed by this Article even in the event of a dispute by a third party.
(8) The Employment Fund is subrogated to the rights of the employee to whom it has paid the claims under the conditions set out in this Article.
(9) The provisions of the preceding paragraphs also apply to apprentices.

The transferee, the transferor or the court-appointed agent must apply to the labour court at the location of the transferor's registered office or principal place of business for approval of the planned transfer, insofar as the transfer agreement concerns employees' rights.

In this article, planned transfer means – in addition to the transfer itself – a list of the employees to be transferred or who have been transferred, the status of their employment contracts, the terms and conditions of employment and liabilities.

The Labour Court will rule as a matter of urgency, after hearing the employee representatives and the petitioner.

Employees who contest the transfer are summoned by the transferor or the court-appointed agent to appear before the employment tribunal at the same hearing.

If approval is granted, a transferee cannot be bound by obligations other than those set out in the deed for which approval has been applied.

3. DECRIMINALISATION OF FRAUDULENT BANKRUPTCY

Fraudulent bankruptcy was very rarely prosecuted, as it was classified as a "crime" punishable by five to ten years' imprisonment.

This criminal penalty has been decriminalised and, like simple bankruptcy, is now a criminal infraction.

Simple bankruptcy is now punishable by a prison sentence of between one month and two years, and a fine of between €251 and €25,000, while fraudulent bankruptcy is punishable by a prison sentence of between 6 months and 5 years, and a fine of between €500 and €50,000.

4. AUTOMATIC WINDING UP OF THE COMPANY

It is now stipulated that the judgment closing the bankruptcy proceedings entails the dissolution and liquidation of a legal entity.

5. THE "NEW CHANCE" PRINCIPLE

One of the main ideas of this law is also to promote the "new chance", so that failure is no longer stigmatised and honest managers who have gone bankrupt are given a new opportunity to do business.

5.1 Remission of pre-bankruptcy debts

This law provides for the bankrupt individuals an opportunity to be granted discharge by the court of all or part of the balance of their claims arising prior to the bankruptcy judgment.

Directive 2019/1023 requires the introduction of a debt write-off scheme applicable to all insolvent businesses, with the concept of a business defined by the directive as encompassing natural persons engaged in a commercial, industrial, craft or self-employed occupation.

Insofar as the existing over-indebtedness procedure does not cover business debts and the bankruptcy procedure only covers traders and does not provide a mechanism that corresponds exactly to the requirements of the directive, new provisions need to be introduced.

Discharge is only granted by the court at the request of persons in bankruptcy, who must add this request to their admission of bankruptcy or file it before the closure of the bankruptcy or within one month of the closure of the bankruptcy, if the bankruptcy is declared closed less than six months after it was opened. The clerk of the court notifies the receiver of the request.

The court will rule on the request for cancellation within eighteen months of publication of the bankruptcy judgement.

Any interested party, including the liquidator and the State Prosecutor, may, by petition notified to the bankrupt by the Registrar, as from the publication of the bankruptcy judgement, request that the write-off be granted only in part or refused in its entirety by reasoned decision, if the debtor has committed serious and proven faults that have contributed to the bankruptcy, or has knowingly provided inaccurate information at the time of the admission of bankruptcy or subsequently to the requests made by the official receiver or the liquidator. The same request may be made by way of third party opposition by petition no later than three months from the publication of the judgment granting the discharge. The court makes its decision after hearing the receiver and the State Prosecutor in his opinion and on the report of the delegated judge.

Discharge of debt has no effect on the bankrupt party's alimony debts or debts arising from the obligation to compensate for damage caused by the bankrupt party's fault in the death or physical injury of a person.

A spouse, ex-spouse, partner or ex-partner who is personally liable for the debt incurred during the marriage or partnership is released from this obligation by the discharge.

A partner whose declaration of partnership was made in the six months preceding the opening of the bankruptcy proceedings cannot benefit from the discharge.

The discharge has no effect on the personal or joint debts of the spouse, ex-spouse, partner or ex-partner, arising from a contract concluded by them, whether or not they were contracted alone or with the bankrupt party which are unrelated to the bankrupt party's professional activity.

5.2 Forfeiture

Where an insolvent individual has had his debts written off, any disqualification from taking up or pursuing a commercial, industrial, craft or self-employed activity solely on the grounds that the entrepreneur is insolvent is automatically terminated on expiry of the debt write-off period (18 months).

5.3 Authorisation to obtain a business permit after bankruptcy

This law, combined with the recent reform of the right to set up a business by the law dated 26 July 2023 amending the amended law dated 2 September 2011 regulating access to the professions of craftsman, trader, industrialist and certain liberal professions, will help to promote the "new chance" principle[6].

Before 1 September 2023, two cumulative conditions were imposed in order to regain a business permit following bankruptcy.

These two conditions have been modified as follows:

	Before 1 September 2023	After 1 September 2023
Scope of application	Executive with an authorisation for the granting of a new business authorisation	All persons subject to the requirement of professional integrity
1st condition	Completion of a training course in business management	Proof that the bankruptcy was directly caused by one of the following events 1° a natural disaster which has been recognised as such by the Government in Council 2° involuntary destruction of a production site or production equipment; 3° the loss of a key customer 4° a large-scale public work site 5° medically certified partial or total incapacity for work 6° a pandemic recognized as such by the Government in Council
2. condition	No breach of professional integrity. In practice, business owners could not have the benefit of a new chance if they had major debts with public creditors where bankruptcy or judicial liquidation occurred.	Stipulate debt thresholds with public creditors below which a repayment agreement is not required for a new chance: 1° concerning value added tax, the threshold is set at 1% of net amounts actually paid to the VAT administration over the last five financial years 2° concerning direct taxes, the threshold is set at 1 per cent of amounts actually paid in the last five years financial years, to the direct contributions. The threshold does not does not apply to payroll deductions 3° concerning social contributions, the threshold is set at the equivalent of four months of contributions, calculated by the Social Security administration on the basis of the average monthly contributions for the last twenty-four bv months

6 Mémorial A No. 552 dated 28 August 2023 https://legilux.public.lu/eli/etat/leg/loi/2023/07/26/a552/jo

6. IMPROVED TREATMENT OF GUARANTEES

If bankruptcy or reorganisation proceedings are opened, a natural person who is a guarantor free of charge may petition to submit a declaration that, at the time the stay was granted, the amount guaranteed had become manifestly disproportionate to this person's ability to repay the debt.

7. USE OF ELECTRONIC RESOURCES

7.1 Access to the file

The delegated judge may decide that all or part of the file relating to the judicial reorganisation procedure will also be accessible remotely by electronic means.

7.2 Publication

The judgment declaring the judicial reorganisation procedure open is notified to the debtor by the court registry and published in the electronic compendium (Recueil électronique des sociétés et associations).

The decision to close the court-ordered reorganisation proceedings is also published in the Recueil électronique des sociétés et associations.

8. REGULATIONS GOVERNING RECEIVERS, CONCILIATORS AND COURT-APPOINTED AGENTS

8.1 The receivers

Bankruptcy receivers are chosen from among lawyers or persons appearing on the list of court-appointed representatives pursuant to the above-mentioned law dated 7 July 1971.

Where the nature and scope of a liquidation procedure so require, this Law allows for the appointment of receivers who are not on this list from among persons offering guarantees of competence in insolvency and liquidation procedures.

8.2 Conciliators and legal representatives

The Minister of Justice may appoint company conciliators and judicial representatives to carry out the tasks entrusted to them by the judicial authorities pursuant to this 7 August 2023 law.

The Minister may dismiss them in the event of a breach of duty or professional ethics or for other serious reasons.

Any person holding a Luxembourg university diploma in law, economics or management corresponding to a recognised master's degree or an equivalent foreign diploma and who can provide guarantees of knowledge and competence in the area of insolvency proceedings may be admitted as a company conciliator or court-appointed agent.