

Transposing the Directive (EU) 2019/1023: The new Luxembourg preventive restructuring law

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Abstract

The transposition of Directive (EU) 2019/1023 into Luxembourg law via the Law of 7 August 2023 marks a pivotal shift in the country's approach to preventive restructuring. Previously lacking adequate tools for early warning and restructuring, Luxembourg now boasts a comprehensive legal framework aligned with European standards. Key features include an early warning mechanism, two new amicable procedures, a judicial restructuring procedure, and the emergence of new practitioners. While the full impact remains uncertain due to the law's novelty and the absence of established doctrine and case law, this move enhances the efficiency of preventive restructuring in Luxembourg, fostering competitiveness of its marketplace.

1. Introduction

1.1 The European impetus for Luxembourg reform

1. Luxembourg preventive restructuring law has finally undergone modernisation with the adoption of the Law of 7 August 2023 relative à *la préservation des entreprises et portant modernisation du droit de la faillite*² (hereafter the "New Law"). This eagerly awaited law, initiated in the 1990s and based on Bill n° 6539 presented on 26 February 2013 marks a significant milestone. The

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2 Mémorial A, n° 521, 18 août 2023 (hereafter, in the footnotes, 'L. 07/08/2023'). – See Th. Mastrullo, 'La réforme du droit luxembourgeois des entreprises en difficulté à l'aune de la transposition de la directive 2019/1023/UE sur la restructuration et l'insolvabilité', Rev. proc. coll. 2023, étude 10.

impetus for this reform was notably driven by European Union law, specifically the obligation to transpose the Directive (EU) 2019/1023 of the European Parliament and of the Council 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 the Directive (EU) 2017/1132 (Directive on restructuring and insolvency)(hereafter “PRD”).³ That directive, which is a key driver for approximating Member States legislations in insolvency and restructuring to a European common standard, forced Luxembourg to act and no longer differ modernisation of its preventive restructuring law.

1.2 The need for Luxembourg reform

2. Modernising Luxembourg’s insolvency and restructuring law was inevitable for a number of reasons. Firstly, most of it was very old and obsolete. For example, before the New Law came into force on 1 November 2023, Luxembourg’s *faillite* [bankruptcy] procedure was regulated by the Law of 2 July 1870,⁴ which was codified in Luxembourg’s *Code de Commerce* [Commercial Code].⁵ Moreover, before their repeal by the New Law, its *concordat préventif de faillite* [preventative restructuring proceedings] and its *gestion contrôlée* [supervised management]⁶ – were governed respectively by the law of 14 April 1886⁷ (as amended by a law of 1 February 1911⁸ and by a Grand-Ducal Decree of 4 October 1934⁹) and by another Grand-Ducal Decree of 24 May 1935.¹⁰ Furthermore, Luxembourg law didn’t provide for any early warning tool or prevention mechanism.

3 [2019] OJEU L172/18. – See G. McCormak, *The European Restructuring Directive*, Edward Elgar Publishing, 2021.

4 Loi du 2 juillet 1870, portant révision de la législation sur les faillites, banqueroutes et sursis, Mémorial A, n°24, 8 août 1870 (hereafter, in the footnotes, ‘L. 02/08/1870’).

5 C. com. Lux., art. 437 and seq.

6 L. 07/08/2023, art 85.

7 Loi du 14 avril 1886, concernant le concordat préventif de la faillite, Mémorial A, n.°21, 15 avril 1886 (repealed) (hereafter, in the footnotes, ‘L. 14/04/1886’).

8 Loi du 1er février 1911 sur le concordat préventif de la faillite, Mémorial A, n°8, 12 février 1911 (hereafter, in the footnotes, ‘L. 12/02/1911’).

9 Arrêté grand-ducal [Grand-Ducal Decree (‘GDD’)] du 24 mai 1935 complétant la législation relative aux sursis de paiement, au concordat préventif de la faillite et à la faillite par l’institution du régime de la gestion contrôlée, Mémorial A, n.°35, 25 mai 1935 (repealed) (hereafter, in the footnotes, ‘GDD 24/05/1935’).

10 Arrêté grand-ducal du 4 octobre 1934, complétant et modifiant certaines dispositions du Code de commerce concernant les sursis de paiement et le concordat préventif de la faillite, Mémorial A, n°56, 6 octobre 1934 (hereafter, in the footnotes, ‘GDD 04/10/1934’).

3. The spirit of Luxembourg law then appeared outdated in many respects, particularly in its manifest distrust of the debtor and its ever-present preoccupation with the liquidation value of the debtor's assets for the benefit of the creditors rather than the preservation and the restructuring of the business in financial difficulties. Certain of its provisions even seemed anachronistic in the 21st century, particularly the criminal nature of *banqueroute frauduleuse* [fraudulent bankruptcy]¹¹ or its almost systematic divestment of the debtor, whatever the procedure concerned.¹²
4. This resulted in a lack of homogeneity in Luxembourg business law. On the one hand, it was modern, flexible, and forward-thinking in terms of banking and financial law (especially with regard to investment funds regulation¹³) to attract companies and capital. On the other hand, its antiquated approach to debtors in financial difficulties made Luxembourg law traditionally ineffective in aiding entrepreneurs to prevent their financial difficulties or to restructure their business when such difficulties have already occurred. In that respect, both of its procedures intended to restructure business in financial difficulties – i.e its concordat *préventif de faillite* and *gestion contrôlée* – were no longer used. And, of the five Luxembourg insolvency proceedings listed in Annex A of Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings (hereafter 'EIR Recast'),¹⁴ only the *faillite* [bankruptcy] procedure is currently being used. Luxembourg's law was therefore perceived as inadequate for insolvency prevention and debt and business restructuring, making its modernisation both inevitable and imperative. Indeed, the Grand Duchy is not immune to bankruptcies. From year to year a relatively consistent number of *déclaration de faillite* [declaration of bankruptcy] are issued,¹⁵ affecting a wide range of business sectors.¹⁶

11 C. com. Lux., art. 438.

12 See L. 14 apr. 1886, art. 6 (*concordat préventif de faillite*), GDD 24/05/1935, art. 3 (*gestion contrôlée*) et C. com. Lux., art. 444 (*faillite*).

13 See I. Riassetto, 'La flexibilité du droit des fonds d'investissement luxembourgeois', in *Les fonds d'investissement*, Th. Granier (dir.), Wolters Kluwer – Lamy, 2013, p. 47.

14 [2015] OJEU L141/15. See R. Bork and R. Mangano, *European Cross-Border Insolvency Law*, Oxford University Press, 2e éd., 2022. – M. Menjucq, *Droit international et européen des sociétés*, LGD, coll. 'Précis Domat', 6e éd., 2021, p. 511 and seq. – M. Brinkman, *European Insolvency Regulation*, Beck, 2019.

15 According to the latest data, 935 declarations of bankruptcy were issued in 2023. This figure is slightly down on previous years (1116 in 2022, 1291 in 2021, 1263 in 2020). But the number of salaried jobs lost as a result of bankruptcies in 2023 is up sharply on 2022 (+39%).

16 In 2023, the Luxembourg sectors most affected by bankruptcies were construction, trade, accommodation, and catering, and holding companies and investment funds.

5. The pressure to modernise Luxembourg insolvency and restructuring law also came from extrinsic factors. Insolvency and restructuring proceedings vary from country to country and, thus, affect the attractiveness of any particular country when competing for external capital investment and newly implanted business.¹⁷ In recognition of the international context of such legal competition, it is up to national lawmakers to shape their insolvency and restructuring proceedings to meet the needs of both enterprises and investors. These needs encompass preventing financial difficulties and, in particular, allowing debtors to negotiate amicable agreements or debt and business restructuring plans with their creditors. Before its New Law entered into force, Luxembourg law had significant gap in these areas and needed to be adapted to contemporary preventive restructuring challenges.

6. A second, more important, point of extrinsic pressure resulted from the Grand Duchy's relative tardiness in transposing the PRD¹⁸ when compared with most other Member States.¹⁹ France, for example, transposed the PRD through Ordinance n° 2021-1193 of 15 September 2021, which, among other things, made its *conciliation* more attractive and instituted a new preventive *sauvegarde accélérée* proceedings.²⁰ Germany also transposed the PRD much earlier, pursuant to its StaRUG,²¹ which came into force on 1 January 2021. It introduced a new confidential mediation procedure and a new stabilisation and restructuring framework.²² With effect as of 1 January 2021, the Netherlands adopted the *Wet Homologatie Onderhands Akkoord* (WHOA) that provides a mechanism for entrepreneurs, creditors and shareholders to conclude a

17 See the Doing Business reports published by the World Bank: *Doing Business 2020, Sustaining the pace of reforms*: <https://www.banquemondiale.org/fr/news/feature/2019/10/24/doing-business-2020-sustaining-the-pace-of-reforms>.

18 According to Article 34(1), the PRD had to be transposed by 17 July 2021 at the latest. Article 34(2) of the PRD allowed however Member States to apply for a further year to incorporate the text into their legal systems - i.e. 17 July 2022.

19 See *Directive (UE) 2019/1023 du 20 juin 2019 relative aux cadres de restructuration préventive - Commentaire article par article*, M. Menjucq (dir.), Larcier, 2023.

20 See Th. Mastrullo, 'Between modernity and prudence: the transposition into French law of Directive (UE) 2019/1023 of 20 June 2019 on restructuring and insolvency', EIRJ-2022-4. – N. Borga et J. Théron, 'Ordonnance du 15 septembre 2021 réformant le droit des entreprises en difficulté, un tournant ?', D. 2021. 1773. – 'Temps nouveaux pour l'entreprise en difficulté', L. Sautonie-Laguionie (dir.), JCP E 2021, 1523-1538.

21 Dec. 22, 2020, BGBl. I S. 3256.

22 E. Delzant, 'Le nouveau régime de la restructuration préventive en Allemagne', BJE mars 2021, n° 118n1, p. 64. – T. Pogoda & Ch. Thole, 'The new German 'Stabilisation and Restructuring Framework for Businesses'', EIRJ, 2021-6. – Ch. G. Paulus, 'The new German preventive restructuring framework', *Rivista Orizzonti del Diritto Commerciale*, 2021.

binding private plan with court approval.²³ Lastly, Belgium transposed the PRD by its law of 7 June 2023, which came into force on 1 September 2023.²⁴ Luxembourg's Law of 7 August 2023 law, which relied heavily on Belgium law for inspiration, was passed shortly thereafter, finally putting it on par with its neighbors and bringing Luxembourg preventive and restructuring law into line with the standards of EU law.²⁵

1.3 The history of Luxembourg reform

7. Luxembourg's reform process was rather complex, which explains why it took over a decade to come to fruition.

Bill n° 6539, initially deposited with the *Chambre des députés* in early 2013, was inspired by the Belgium's legislative reform adopted in 2009, which introduced a new restructuring procedure called *réorganisation judiciaire* [judicial reorganisation]. The initial draft was the object of a multitude of opinions (publicly available) from Luxembourg's various judicial and administrative institutions²⁶, foremost among the *Conseil d'État* [Council of State] whose task 'is to issue an opinion on all government and parliament bills and draft regulations'.²⁷ These opinions led to many amendments by the *Commission de la Justice de la Chambre des députés* [Justice committee] in 2018. This 2018 amendment was itself the subject of new opinions to be considered before the bill further amended, finalised, and adopted. The Covid-19 pandemic added to the delay.

8. In October 2021, noting that certain aspects of the bill could be adopted more quickly than others, the *Commission de la Justice* decided to split Bill No 6539

23 See H. Volberda, '2021. Crises, Creditors and Cramdowns: An evaluation of the protection of minority creditors under the WHOA in light of Directive (EU) 2019/1023', *Utrecht Law Review*, 17(3), pp.65–79. DOI: <http://doi.org/10.36633/ulr.638>.

24 Loi du 7 juin 2023 transposant la directive (UE) 2019/1023 du Parlement européen et du Conseil du 20 juin 2019 relative aux cadres de restructuration préventive, à la remise de dettes et aux déchéances, et aux mesures à prendre pour augmenter l'efficacité des procédures en matière de restructuration, d'insolvabilité et de remise de dettes, et modifiant la directive (UE) 2017/1132 et portant des dispositions diverses en matière d'insolvabilité, *Moniteur belge*, 7 juillet 2023, p. 59113. See *La nouvelle loi sur l'insolvabilité – Impacts et solutions pour l'entreprise et ses acteurs*, Y. Brulard et M. Marinx (coord.), Collection du jeune barreau de Namur, 2023.

25 On the development of European restructuring and insolvency law: I.L. Fannon, J.L.L. Gant and A. Finnerty, *Corporate Recovery in an Integrated Europe – Harmonisation, Coordination and Judicial Cooperation*, Edward Elgar Publishing, 2022.

26 *Ordre du Barreau de Luxembourg, Ordre des experts-comptables, Parquet général, Chambre de commerce, Chambre des métiers, Commission nationale pour la protection des données, Institut des réviseurs d'entreprise, Chambre des salariés, Chambre des fonctionnaires et employés publics*, for instance.

27 Luxembourg's Constitution, ch VI, art. 95, sets out the role of the Conseil d'État <<https://legilux.public.lu/eli/etat/leg/constitution/1868/10/17/n1/consolide/20230701>>.

into two parts: Bill No 6539 A, entitled *Projet de loi relatif à la préservation des entreprises et à la modernisation de la faillite*, containing the core of the original bill, and Bill No 6539 B, entitled *Projet de loi portant creation de la procedure de dissolution administrative sans liquidation*.

9. Indeed, just a little over a year later, the latter became the Law on 28 October 2022 creating the procedure for administrative dissolution without liquidation.²⁸ This new procedure aims to efficiently and promptly purge Luxembourg's financial centre of 'empty shell' commercial companies (i.e those with no assets or employees) that fall in the scope of Article 1200-1 of the amended law of 10 August 1915 on commercial companies.²⁹
10. Bill No 6539 A, on the other hand, became the Law on 7 August 2023. As its title suggests, the New Law modernised Luxembourg's *faillite* [bankruptcy] procedure, best exemplified by its decriminalization of *banqueroute frauduleuse*.³⁰ Nevertheless, the '*préservation des entreprises*' component demands the most attention insofar as it introduces new preventive restructuring tools into Luxembourg law to comply with EU law requirements.³¹ Indeed, the New Law reflects a concerted effort to ensure that Luxembourg's modernised law, inspired by Belgium's law on *réorganisation judiciaire*,³² correctly transposes the PRD. That explains why new Luxembourg preventive and restructuring law must be analysed in the context of its transposition of the PRD, as over the course of its preparation, Bill No. 6539 A was amended to meet EU law requirements.

28 See Th. Mastrullo, 'Un nouvel instrument au soutien de la compétitivité de la place luxembourgeoise : la dissolution administrative sans liquidation des «coquilles vides»', *JurisNews Procédures d'insolvabilité*, Larcier, n° 2-3/2023, p. 193.

29 According to Article 1200-1 of the amended law of 10 August 1915 (hereafter, in the footnotes, 'L. 10/08/1915'), the *tribunal d'arrondissement* [district court] sitting in commercial matters may, at the request of the *procureur d'État* [public prosecutor], dissolve and order the liquidation of any company subject to Luxembourg law which pursues activities contrary to criminal law or which seriously contravenes the provisions of the Commercial Code or the laws governing commercial companies. The liquidation of such an illegal company often takes the form of a *faillite* [bankruptcy] procedure.

30 C. com. Lux., art. 438.

31 See Th. Mastrullo, 'La réforme du droit luxembourgeois des faillites en question: la perspective européenne', *JurisNews Procédures d'insolvabilité*, Larcier, n° 1-2/2022, p. 169.

32 Loi du 31 août 2009 relative à la continuité des entreprises ; *Moniteur belge*, 9 février 2009, p. 8436.

1.4 The scope of Luxembourg reform

11. At this juncture, it is useful to clarify the scope of the New Law in terms of the procedures, debtors and claims covered. Regarding the procedures, the *faillite* [bankruptcy] procedure doesn't fall within the 'preventive restructuring frameworks' mentioned in Article 1(1)(a) of the PRD, for the reason that it is a liquidation procedure which is not intended to prevent insolvency or ensure the viability of the business. Thus, in order to take advantage of the Luxembourg's new preventive and restructuring law, one may pursue one of the following procedures: the *conciliation d'entreprise*,³³ the *réorganisation par accord amiable*³⁴, and, above all, the *réorganisation judiciaire*.³⁵
12. Article 2 of the New Law defines the *débiteurs* [debtors] entitled to the benefits of the new law as: *commerçants personnes physiques* [natural persons who are traders] as defined in Article 1 of its Commercial Code³⁶; *sociétés commerciales* [commercial companies]³⁷ and *sociétés en commandite spéciale* [special limited partnerships]³⁸ included in Article 100-2 of the amended Law of 10 August 1915 on commercial companies (as amended); *artisans* [craftsmen]; and *sociétés civiles* [civil companies].³⁹
13. As for individual entrepreneurs, one might regret that, unlike France,⁴⁰ Luxembourg chose only to mention *commerçants personnes physiques* and *artisans*, thereby leaving individuals exercising an independent professional activity (eg, *professions libérales* [liberal professions]) without recourse to the preventive restructuring frameworks. Indeed, law firms are expressly excluded from

33 See below para. 36 and seq.

34 See below para. 49 and seq.

35 See below para. 58 and seq.

36 Article 1 of Luxembourg Commercial Code reads: 'Sont commerçants ceux qui exercent des actes de commerce, et en font leur profession habituelle.' [Traders are those who carry out commercial acts and make it their habitual profession].

37 These include the *société en nom collectif* (SNC), the *société en commandite simple* (SCS), the *société anonyme* (SA), the *société par actions simplifiée* (SAS), the *société en commandite par actions* (SCA), the *société à responsabilité limitée* (SARL) and the *société à responsabilité limitée simplifiée* (SARL-S), the *société coopérative* (SCOP) and the *société européenne* (SE).

38 A type of company without legal personality created to compete with English partnerships in the investment fund industry.

39 L. 07/08/2023, art 2.

40 See C. com. Fr, art L. 620-2, which states that the *sauvegarde* procedure is applicable 'to any person carrying on a commercial or craft activity or an agricultural activity (...) and to any other natural person carrying on an independent professional activity, (...) as well as to any legal person governed by private law'.

the benefits of the New Law.⁴¹ One might also regret that *associations sans but lucratif* (ASBLs) [nonprofit associations] are also excluded from the scope of the New Law, even though they are likely to have an economic activity and should, therefore, be able to benefit from a preventive restructuring procedure.

14. It is also appropriate to mention here that the New Law does not apply to natural persons or to those legal persons excluded by the PRD,⁴² either by express exclusion, for example, in the New Law's Article 3⁴³ or by failure to expressly include them in its Article 2, which positively defines the scope of Luxembourg's transposition.⁴⁴
15. Due to the importance of its financial centre, Luxembourg exercised the option, under the PRD's Article 1(3), to exclude certain financial entities that were not otherwise included in the PRD's Article 1(2).⁴⁵ Their exclusion is justified because such debtors are subject to special arrangements and the national supervisory and resolution authorities monitoring them already have wide-ranging power to intervene.⁴⁶
16. Finally, the New Law also does not apply preventive restructuring frameworks to insolvent natural persons who are not entrepreneurs as allowed by Article 1(4) of the PRD.
17. Concerning claims, several types of claims are not likely to be affected by Luxembourg preventive restructuring frameworks, in accordance with what Article 1(5) of the PRD allows.

41 L. 07/08/2023, art 3(14).

42 PRD, art. 1(2)(a)-(h).

43 Art 3 of L. 07/08/2023 contains express exclusions (eg, art 3(3) [insurance companies], art 3(1) [for credit institutions]; art 3(1), 3(2), and 3(4) [investment firms or collective investment schemes]; art 3(7) [central counterparties], art 3(8) [central securities depositories], and art 3(2) [other financial institutions]).

44 This applies to public bodies and individuals who are not entrepreneurs.

45 E.g., L. 07/08/2023, art. 3, nos 2, 3, 5, 6, and 9-13.

46 PRD, recital 19.

18. Article 1(c) of the New Law specifically carves out *créances salariales* [wage claims] from the definition of *créances sursitaires* [stayable claims]⁴⁷, ie, those claims subject to the *sursis* [stay]⁴⁸ ordered by the *tribunal d'arrondissement* [district court] when a *réorganisation judiciaire* is opened.
19. Moreover, its Article 44 expressly provides that no restructuring plan of *réorganisation judiciaire par accord collectif* [judicial reorganisation by collective agreement]⁴⁹ may contain any reduction or waiver of claims arising from work performed before to this judicial procedure opened, nor any reduction of maintenance obligations or compensation obligations arising from damage caused by the debtor that is linked to the death or physical injury of a person⁵⁰.
20. In that regard, Luxembourg's 7 August 2023 law clearly acknowledges society's need to protect the interests of employees, maintenance creditors, and victims of personal injury above the preservation of a business, which explains why those claims cannot be affected by its new, preventive restructuring frameworks.

1.5 General remarks on the Luxembourg reform

21. The New Law raises a number of questions and engenders certain reservations about its ultimate efficacy and efficiency as implemented. At the outset, its general inspiration, Belgium's 2009 reform may prove problematic. Given that Belgian law itself evolved since its initial adoption in 2009, it remains to be seen if Luxembourg's new rules, which rely heavily on Belgium's provisions before such evolution, will be sufficiently adapted to Luxembourg's entrepreneurial ecosystem. In that regard, Belgian post-2009 reform case law and

47 That is, claims 'nées avant le jugement d'ouverture de la procédure de réorganisation judiciaire ou nées en raison du dépôt de la requête ou des décisions prises dans le cadre de la procédure de réorganisation judiciaire' [arising before the *réorganisation judiciaire* procedure was opened, arose because of a request to open such a procedure, or decisions taken in the context of such procedure]; L. 7/08/2023, art. 1(c).

48 That is, 'le moratoire accordé par le tribunal au débiteur en vue de permettre la conclusion d'un accord amiable ou de réaliser une réorganisation judiciaire par accord collectif ou par transfert par décision de justice [a debt-collection moratorium granted to the debtor by the district court in order to permit an amicable agreement, to realise a *réorganisation judiciaire par accord collectif*, or to make a transfer by judicial decision]; L. 7/08/2023, art. 1(k).

49 See below para. 59 and paras. 101 and seq.

50 L. 7/08/2023, art. 44. – See below para. 118.

doctrine, is likely to prove useful in resolving the inevitable questions and ambiguities that will arise as Luxembourg's new law is put into practice.⁵¹

22. Moreover, as noted above, the New Law introduced several entirely new concepts and measures (e.g., a new early warning tool, new preventive restructuring proceedings, new practitioners, classes of creditors, a best-interests-of-creditors test, a cross-class cram-down, notably). Of course, it is impossible to predict exactly how the implementation of all of these new aspects of the procedures will play out, particularly as some provisions of the New Law may not be sufficiently precise to avoid ambiguity and there will be a need for additional interpretation thereof. And it should be added that Luxembourg suffers from a lack of established doctrine and case law on prevention and restructuring law, given the obsolescence of Luxembourg law in this realm before the reform.
23. Finally, one might legitimately regret that the provisions of the New Law pertain to prevention and restructuring were not immediately codified in Luxembourg's Commercial Code. Such inclusion might have made the new Luxembourg preventive restructuring law more accessible. Therefore, the sources of Luxembourg insolvency law appear divided: while the *faillite* [bankruptcy] procedure is ruled by Luxembourg's Commercial Code, prevention and restructuring proceedings (*conciliation d'entreprise*, *réorganisation par accord amiable* and *réorganisation judiciaire proceedings*) remain outside the Code, within the Law of 7 August 2023 which forms part of the Luxembourg insolvency regulation but is not codified.
24. Nevertheless, despite such legitimate questions and concerns, the New Law represents a significant, positive step forward in Luxembourg's legislation on preventive restructuring. With the reform, the debtor is given a more positive,

51 Luxembourg judges often refer to French and Belgian doctrine and case law in their rulings. – See for a general study in the field of civil law: S. Bouabdallah, 'La réception réciproque de la jurisprudence et de la doctrine dans les systèmes belge, français et luxembourgeois', Les cahiers du droit, Volume 60, n° 1, mars 2019, p. 95.

Given that Luxembourg insolvency law finds much of its inspiration into Belgian insolvency law, Belgian doctrine and case law are often cited to support Luxembourg case law. – See, for instance: T. arr. Lux., 8/12/2023, TAL-2023-07915, regarding the definition of the *cessation des paiements* – one of the conditions which must be met to open a *faillite* procedure; CA Lux., 07/11/2023, CAL-2020-00330, arrêt n° 175/23, regarding the admissibility of the appeal against the judgement opening the *faillite*; CA Lux., 26/04/2022, CAL-2020-00977, arrêt n° 75/22, regarding the scope of the *faillite* procedure and of the insolvency judge jurisdiction; CA Lux., 11/07/2018, arrêt n° 147/18, about the netting of related claims.

active role and an opportunity to initiate dialogue on changes needed to keep the business alive. But creditors are not neglected: while certain creditors (eg, workers) are given particular protection, all creditors are given an opportunity to work with the debtor to help the business continue as a going concern as well as the ability to act if the debtor is at fault. Luxembourg law now supports and encourages productive dialogue and negotiation between a debtor and its creditors to prevent financial difficulties or to quickly resolve them in a way that avoids liquidating a business that would result job losses, losses of value for creditors in the supply chain and losses of know-how and skills, in line with PRD's objectives. In that regard, the New Law rebalances Luxembourg law on relationship between the debtor and the creditors, in compliance with the PRD according to which the right of parties involved in a restructuring framework should be protected 'in a balanced manner'.⁵²

25. As a sign that the reform has been eagerly anticipated by those wishing to take advantage of its new approach on prevention and restructuring, since it came into force on 1 November 2023, a number of applications to open *réorganisation judiciaire* proceedings have been submitted by both debtors and creditors. The first such procedure was opened at the debtor's *requête* [request], on 22 November 2023.⁵³
26. To understand the main features of the new Luxembourg preventive restructuring law, in light of the transposition of the PRD, we should analyse the Luxembourg's new preventive procedures (2) and the Luxembourg's new restructuring framework, namely the *réorganisation judiciaire* (3).

52 PRD, recital 3.

53 T. arr. Lux., 22/11/2023, TAL-2023-09252 (*réorganisation judiciaire par accord amiable*). – See also: T. arr. Lux., 15/12/2023, TAL-2023-09434 (*réorganisation judiciaire par accord amiable*); T. arr. Lux., 10/01/2024, TAL-2023-10048 (*réorganisation judiciaire par accord collectif*); T. arr. Lux., 22/03/2024, TAL-2024-01772 (*réorganisation judiciaire par accord collectif*); T. arr. Lux., 12/04/2024, TAL-2024-02787 (*réorganisation judiciaire par accord collectif*).

2. Luxembourg's preventive procedures

27. According to the PRD, preventive restructuring frameworks 'should, above all, enable debtors to restructure effectively at an early stage'.⁵⁴ In response to that encouragement, the New Law incorporate several procedures in order to improve the effectiveness of Luxembourg law in detecting and preventing debtors' financial difficulties.
28. Those detection and prevention procedures include an early-warning tool which takes the form of an alert mechanism (2.1) and two amicable procedures, namely the *conciliation d'entreprise* (2.2) and the *réorganisation par accord amiable* (2.3).

2.1 The Luxembourg's alert mechanism

29. In accordance with Article 3(2)(a) of the PRD and a 'proactive' approach to the early detection of debtor's financial difficulties, Article 5 through 7 of the New Law introduce an alert mechanism into Luxembourg law. Article 5 gives both the minister having the economy within his or her attributions ('Economy Minister') and the minister having the middle classes within his or her attributions ('Middle Classes Minister'),⁵⁵ within their respective attributions, the task of identifying '*débiteurs en difficulté financière*' [debtors facing financial difficulties] that '*risquent de compromettre la continuité de l'entreprise du débiteur*' [risk compromising the continuity of the debtor's business].
30. When the concerned minister considers that the continuity of the debtor's business is compromised, he 'may' invite the debtor to obtain any information relating to his financial situation and to inform him of all restructuring proceedings at his disposal.⁵⁶
31. Article 6(1) of the New Law gives said ministers access to several types of information, such as information provided by STATEC (*Institut national de la statistique et des études économiques*) and the list of debtors who failed to pay their social security debts and VAT debts in the previous three months. They also have access to certain judgments sentencing debtors and to notices of employee dismissals for economic reasons. The Luxembourg alert mechanism is therefore not based solely on an assessment of the debtor's accounting situation.

54 PRD, recital 2.

55 It is possible for one minister to have both the economy and the middle classes attributed to him or her, which is the case at the time of this writing.

56 L. 7/08/2023, art. 5.

32. Further, in compliance with Article 16 of the EU's General Data Protection Regulation (GDPR),⁵⁷ Article 6(2) of the New Law gives the debtor the right to review the collected information about him and the right, upon request addressed to the relevant minister, to have such information corrected.⁵⁸ Belgium has a similar rule.⁵⁹
33. Introducing a new alert mechanism intended to let debtors know when they are sliding into financial trouble obviously benefits both debtors and society-at-large and also transposed one of Luxembourg's obligations under the PRD. Nevertheless, the mechanism that the New Law ultimately created engenders two important reservations.
34. First, putting the exclusive onus of detection on the ministers to whom the economy and the middle class are attributed is disputable. It might have been more effective and efficient for Luxembourg to give other actors, such as other administrative or judicial authorities, licensed professionals, or even private-sector actors involved in the life of a debtor's business⁶⁰, a detection mission, as was done in French law,⁶¹ rather than limiting such mission to just those two ministers.
35. Moreover, the optional nature of the alert mechanism is equally problematic. The New Law does not oblige the authorized ministers to actually give a debtor

57 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) [2016] OJ L 119/1, as amended (art 16 establishes a data subject's right to rectify his or her personal data with regard to the party processing it).

58 L. 07/08/2023, art 6(2) specifically provides: 'Le débiteur peut à tout moment prendre connaissance sans déplacement des données ainsi recueillies le concernant. Ce dernier a le droit d'obtenir, par requête adressée au ministre compétent, la rectification, des données recueillies qui le concernent.' [The debtor may review the data collected about him at any time without moving it. The latter has the right, by request addressed to the competent minister, to have the collected data that concerns him corrected].

59 CDE, art. XX.21.

60 Eg, internal bookkeepers and external accountants, employees or their representatives, minority corporate shareholders representing a minimum number of voting rights, or limited partners or members in limited liability entities.

61 C. com. Fr., art. L. 234-1 to art. L. 234-3 (*commissaire aux comptes*), C. trav. Fr., art. L. 2312-63 (*comité social et économique*), C. com. Fr., art. L. 223-36 (non-managing partners of a SARL), C. com. Fr., art. L. 225-232 (shareholders representing at least 5% of the capital of a *société anonyme (SA)*), C. com. Fr., art. L. 611-2 and art. L. 611-2-1 (court president) and C. com. Fr., art. L. 611-1 (*groupements de prévention agréés*).

any early warning, *even if* the minister finds that the business' continuity is compromised. Surprisingly, the statutory language merely suggests that the minister *may* issue an alert.⁶² And if the minister has chosen to act, he has just to invite the debtor to review the state of the debtor's business and inform the debtor about the restructuring procedures available. The combination of an optional warning with nothing more than an 'invitation' to be informed hardly offers debtors access to an effective alert mechanism.

2.2 The conciliation d'entreprise

36. In line with Article 3(2)(b) of the PRD, Article 9 of the New Law introduces a new *conciliation d'entreprise* procedure. This procedure is presented as a *mesure conservatoire* [protective measure] by the New Law. Like French *conciliation*⁶³ and Belgium *mediation d'entreprise*⁶⁴, Luxembourg *conciliation d'entreprise* is an amicable preventive procedure which, through the intervention of a *conciliateur d'entreprise* [business conciliator], mainly aims to promote the conclusion of an agreement between the debtor and his creditors intended to put an end to the business's financial difficulties.
37. At the request of a debtor, either the Economy Minister or the Middle Classes Minister,⁶⁵ as the case may be, 'may'⁶⁶ appoint a *conciliateur d'entreprise 'en vue de faciliter la réorganisation de tout ou partie des actifs ou des activités'* [to facilitate the reorganisation of all or part of the debtor's assets and business activities].⁶⁷ The *conciliateur d'entreprise* is a new practitioner created by the New Law. He is chosen from among sworn experts⁶⁸. He will usually be a lawyer specialising in insolvency proceedings who is already practicing as *curateur de faillite* [trustee in bankruptcy].
38. Essentially, the *conciliateur d'entreprise's* role is to advise the debtor and to encourage negotiations with creditors to reorganise the business. More specifically, the New Law notes that the *conciliateur d'entreprise's* mission, whether undertaken within or without a *réorganisation judiciaire*, is to prepare and

62 L. 07/08/2023, art 5, uses the French verb *pouvoir*, ('*peut*') which translates as either 'can' or 'may' and is not obligatory, rather than *devoir*, which translates as 'must' or 'shall' and is obligatory.

63 C. com. Fr., art. L. 611-4 to art. L. 611-15 and art. R. 611-22 to art. R. 611-46-1.

64 CDE, art. XX 29/2.

65 See above para. 29.

66 Once again, L. 07/08/2023, art 9 uses the French verb *pouvoir*, such that neither Minister is obliged to appoint a *conciliateur d'entreprise*.

67 L. 7/08/2023, art. 9, subpara. 1.

68 L. 07/08/2023, art 9, subpara. 6.

promote one of three alternatives⁶⁹: the conclusion and implementation of an amicable agreement,⁷⁰ the obtaining of creditors' approval to a *plan de réorganisation* [reorganisation or restructuring plan],⁷¹ or the transfer by court order to one or more third parties of all or part of the assets or activities.⁷² It should be noted that the opening of the *réorganisation judiciaire* follows the same objective.⁷³

39. In that regard, the *conciliation d'entreprise* may be perceived as 'a bridge' between prevention and judicial restructuring. Indeed, a certain porosity exists between *conciliation d'entreprise* and *réorganisation judiciaire*, as the *conciliateur d'entreprise's* mission may take place outside or within the framework of the *réorganisation judiciaire*. Thus, as French *conciliation*, Luxembourg *conciliation d'entreprise* is an amicable procedure which is not limited to prevention but also may prepare a judicial restructuring procedure. More precisely, *conciliation d'entreprise* may play a significant role in preventive restructuring as it can provide the debtor with a confidential framework to prepare a draft restructuring plan before the opening of *réorganisation judiciaire* procedure in which the plan will be adopted.⁷⁴ For example, the *conciliation d'entreprise* may be used to prepare a restructuring plan or the transfer of debtor's assets or activities. If the *conciliateur d'entreprise* fails to obtain the creditors' approval on the plan or the transfer prepared within the *conciliation d'entreprise*, the said plan or transfer can be adopted within the *réorganisation judiciaire* – with the assistance of the cross-class cram-down if necessary. Accordingly, the combination between the *conciliation d'entreprise* and the *réorganisation judiciaire* may enable the practice of pre-pack plan or pre-pack cession in Luxembourg, as it is the case in France by means of the opening of a *sauvegarde accélérée* following a *conciliation*.⁷⁵
40. *Conciliation d'entreprise* is a voluntary procedure. To obtain the appointment of a *conciliateur d'entreprise*, the debtor must prove that the procedure will facilitate the reorganisation of all or part of his assets or business activities.⁷⁶ The

69 L. 7/08/2023, art. 9, subpara. 2.

70 L. 7/08/2023, art. 11.

71 L. 7/08/2023, art. 38 to art. 54. See para 101 and seq.

72 L. 7/08/2023, art. 55 to art. 67.

73 See below para. 59.

74 See below para. 121 and seq.

75 See Th. Mastrullo, 'Between modernity and prudence: the transposition into French law of Directive (UE) 2019/1023 of 20 June 2019 on restructuring and insolvency', EIRJ-2022-4.

76 See above para. 37.

New Law does not specify if a maximum level of distress – for example, likelihood of insolvency or even insolvency – could bar the appointment of a *conciliateur d'entreprise*. It doesn't seem to be the case, at least when the *conciliateur d'entreprise's* mission takes place within a *réorganisation judiciaire* procedure, given the fact that a debtor meets the conditions for opening a *faillite* [bankruptcy] procedure (i.e. *cessation des paiements* and *ébranlement du crédit*⁷⁷) does not hinder the opening of the *réorganisation judiciaire*. In any case, one should be kept in mind that the *conciliation d'entreprise* is a preventive amicable procedure which is not shaped to deal efficiently with the debtor's insolvency. Accordingly, a *conciliation d'entreprise* should not be opened if the business is not viable and there is no chance to reorganise of all or part of the assets or activities.

41. The New Law's *conciliation d'entreprise* procedure offers debtors substantial flexibility, including the fact that the request for the appointment of a *conciliateur d'entreprise* is not subject to any formal rules⁷⁸, the possibility for the debtor to propose the name of a *conciliateur d'entreprise*⁷⁹, or the debtor's ability to terminate the *conciliateur d'entreprise's* mission at his discretion by giving notice to the relevant minister⁸⁰. Furthermore, the duration and scope of the practitioner's mission are determined 'within the limits of the debtor's request' by the minister who grants the request⁸¹.
42. To further encourage the use of *conciliation d'entreprise*, the *conciliateur d'entreprise's* claim (resulting from his remuneration and expenses) benefits from the preferential right to legal costs provided for in Luxembourg Civil Code⁸² in the event of a subsequent *concourse*, in a *faillite* [bankruptcy] procedure notably. Alternatively, it is treated as a *créance sursitaire extraordinaire*⁸³ in the context of a *plan de réorganisation* [reorganisation or restructuring plan].⁸⁴ The law also

77 C. com. Lux., art. 437. The *cessation des paiements* [cessation of payments] is defined as 'the impossibility' for the debtor 'to meet his commitments' and 'the purely material fact of the trader who no longer honours his certain, liquid, and due debts' (CA Lux., 5/01/2021, CAL-2019-00698, arrêt n° 1/21). The *ébranlement du crédit* [credit weakness] is 'the consequence of a lack of credit' and stems from 'the impossibility of obtaining new money to pay one's debts' (CA Lux., 13/11/2019, CAL-2019-00118, arrêt n° 150/19).

78 L. 07/08/2023, art 9, subpara. 4.

79 L. 07/08/2023, art 9, subpara. 3.

80 L. 07/08/2023, art 9, subpara. 7.

81 L. 07/08/2023, art 9, subpara. 5.

82 C. civ. Lux., art. 2101(1)(1°) and 2105(1°).

83 See below para. 102.

84 L. 07/08/2023, art 9, subpara. 8.

gives the *conciliateur d'entreprise* the same right as the debtor to terminate the mission.⁸⁵

43. *Conciliation d'entreprise* is neither a collective nor a judicial procedure. Therefore, the debtor is less protected than in a *réorganisation judiciaire*. For example, a *conciliation d'entreprise* procedure does not stay individual enforcement actions. Moreover, acts performed while the *conciliation d'entreprise* procedure is pending are not protected against possible avoidance actions in subsequent judicial proceedings. Nothing in the New Law prevent the creditors who support the debtor via the *conciliation d'entreprise* procedure to be held liable for providing 'undue' support.⁸⁶
44. If not terminated earlier by the debtor or *conciliateur d'entreprise*, the most logical termination of a *conciliation d'entreprise* procedure must occur when the negotiations have been successful, and the debtor and relevant creditors have entered into an amicable agreement or the *conciliateur d'entreprise* has obtained the creditors' approval on a restructuring plan or a transfer of assets or activities. Either of these alternatives might also be part of a *réorganisation judiciaire* procedure. If a *réorganisation judiciaire* is opened, the New Law allows an extension of *conciliateur d'entreprise's* mission to finalise and complete the agreement, plan or transfer prepared within the *conciliation d'entreprise*.⁸⁷
45. Lastly, the *conciliateur d'entreprise's* mission may come to an end when *manquements graves et caractérisés*⁸⁸ [serious and obvious misconducts] by the debtor or one of its bodies threaten the continuity of the business. In such a case, Article 10 of the New Law allows the presiding judge of the chamber of the relevant district court sitting in commercial matters to appoint *comme en matière de référé* [as in expedited proceedings], one or more *mandataires de justice* if this measure is likely to preserve the continuity of the business. Like *conciliateurs d'entreprise*, *mandataires de justice* are new sworn experts created by the New Law and will usually be lawyers specialising in insolvency proceedings. The decision appointing the *mandataire de justice* determines 'precisely' the scope and duration of his mission. The debtor then loses the control of his business. If a *conciliateur d'entreprise* has been appointed, it is up to the court

85 L. 07/08/2023, art 9, subpara. 7.

86 To compare with *réorganisation par accord amiable*, see para. 54 and 55.

87 L. 07/08/2023, art 9, subpara. 2.

88 See below para. 87.

to decide whether the *conciliateur's* mission is to be terminated in whole or in part. If the *conciliateur d'entreprise's* mission is maintained, he will have to work with the *mandataire de justice* to find a restructuring solution for the business in difficulty.

46. While the flexibility and initiative left to the debtor make *conciliation d'entreprise* a promising tool, several criticisms are in order. One aspect of the *conciliation d'entreprise* is difficult to determine and will be decisive for its success: the cost of the *conciliateur d'entreprise's* remuneration, which must be borne by the debtor. The principle is that the fee of the *conciliateur d'entreprise* is determined and modified as legal costs in accordance with Article 98 of the amended Law of 7 March 1980 *sur l'organisation judiciaire*.⁸⁹ However, Luxembourg regulations are complex in this area. Article 98 of the Law of 7 March 1980 itself refers to the provisions of a Grand Ducal regulation of 28 November 2009, Article 4 of which states that the fees paid to sworn experts are calculated on an hourly basis⁹⁰, which the judicial authority may exceed. Article 8 of the Grand-Ducal regulation of 28 November 2009 adds that services whose cost cannot be calculated according to the hourly rate system and whose duration will exceed one month are accepted by the Minister of Justice on the basis of an estimate submitted by the service provider. In these conditions, one might think that the cost of *conciliation d'entreprise* will be calculated on the basis of an hourly rate set by the practitioner and negotiated with the debtor according to the scope and duration of the *conciliateur's* mission, under the supervision of the court. But there is little certainty on this subject.
47. Moreover, one might regret that the New Law does not expressly provide for the confidentiality of the *conciliateur d'entreprise's* mission, as is the case in French⁹¹ and Belgian⁹² laws. Confidentiality is indeed a key element in the success of this procedure: publicising a business's difficulties is obviously likely to have a negative impact on the smooth progress of negotiations between the debtor and creditors. However, confidentiality will certainly be respected by the *conciliateur d'entreprise* due to his professional ethics duties as a sworn

89 L. 7/08/2023, art. 79.

90 71 euros per hourly session.

91 C. com. Fr., art. L. 611-15: 'all persons involved in the conciliation procedure (...) or who, by virtue of their duties, have knowledge thereof are bound by confidentiality'. – See Cass. com. Fr., 5/10/2022, n° 21-13.108, according to which the obligation of confidentiality applies not only to third parties but also between the parties to the conciliation.

92 CDE, art. XX.29/2(1), subpara. 3.

expert. One also may assume it would be possible to hold liable the creditor for breaching the *conciliation d'entreprise's* confidentiality, at least on the basis of the common civil liability law. And confidentiality will be required when the *conciliateur d'entreprise's* mission will be carried out within the *réorganisation par accord amiable* procedure which is expressly confidential.⁹³

48. Given its characteristics – confidentiality (in principle) and lack of collective nature, it is doubtful whether *conciliation d'entreprise* can be considered as an insolvency proceeding within the meaning of the EIR Recast and be included in its Annex A. In that respect, French *conciliation* and Belgian *médiation d'entreprise* are not mentioned in Annex A of the EIR Recast.

2.3 The *réorganisation par accord amiable*

49. The last innovation introduced by Article 11 of the New Law in terms of prevention is the *réorganisation par accord amiable* procedure. It should be noted, however, that this amicable procedure is not easy to classify. Indeed, it is connected to *conciliation d'entreprise* procedure, as a *conciliateur d'entreprise* may be appointed within the *réorganisation par accord amiable* procedure. But *réorganisation par accord amiable* is also connected to *réorganisation judiciaire* procedure which refers to the *réorganisation par accord amiable's* regime when aiming to reach an amicable agreement.⁹⁴ Thus, there are three ways to obtain an amicable agreement under Luxembourg preventive restructuring law: by means of a *conciliation d'entreprise*, in compliance with Article 9 of the New Law; by means of a *réorganisation par accord amiable* procedure, in compliance with Article 11 of the New Law; and by means of a *réorganisation judiciaire* procedure in compliance with the rules applicable to the *réorganisation par accord amiable* procedure, except for the stay which is only provided within the judicial procedure. Finally, the *réorganisation par accord amiable* is an 'in-between' procedure: the *réorganisation par accord amiable* is not open by a court and is amicable in essence, such as the *conciliation d'entreprise*, but the judicial *homologation* [confirmation] provided for the amicable agreement⁹⁵ brings this procedure closer to the *réorganisation judiciaire*, which explains some protections granted to the debtor and the creditors that do not exist within the *conciliation d'entreprise*.⁹⁶

93 See below para. 53.

94 L. 7/08/2023, art. 12. See below para. 59 and 64.

95 See below para. 52.

96 See below para. 54 and 55.

50. According to Article 11, subparagraph 1, of the New Law, the debtor may propose to all its creditors or to at least two of them (the Luxembourg lawmaker feared that the procedure would be a way for the debtor to favour one of its creditors) an amicable agreement '*en vue de la réorganisation de tout ou partie de ses actifs ou de ses activités*' [with a view to the reorganisation of all or part of its assets or activities]. The amicable agreement may, for example, cover the granting of payment deferral or debt relief, or provide for a debt-equity swap.⁹⁷ It should be noted that the New Law does not specify if a maximum level of distress could prevent the opening of the *réorganisation par accord amiable* procedure; the same conclusions as for the *conciliation d'entreprise* should be drawn.⁹⁸
51. The *conciliation d'entreprise* can be used to encourage negotiations with creditors and the conclusion of an amicable agreement. The New Law allows debtors to request the appointment of a *conciliateur d'entreprise* for the purpose of the *réorganisation par accord amiable*.⁹⁹ The *conciliateur's* mission may also extend beyond the conclusion and approval of the amicable agreement, with a view to facilitating the implementation of the said agreement.
52. A specific feature of Luxembourg law is that the *homologation* [confirmation] of the amicable agreement is mandatory, in any case. The *homologation* is granted by the court, on the debtor's request.¹⁰⁰ The *homologation* ensures legal certainty and obliges the court to confirm the respect of the amicable procedure's aim by verifying that the amicable agreement has been concluded with a view to reorganise all or part of the business's assets or activities. *Homologation* confers enforceability on the amicable agreement.
53. The New Law contains several provisions designed to encourage use of *réorganisation par accord amiable* by the debtor with the participation of creditors. Firstly, the procedure is confidential. The court's decision on the *homologation* of the *accord amiable* is not to be published, notified, or appealed.¹⁰¹ And third parties may be made aware of *accord amiable* only with the debtor's express consent.¹⁰²

97 On the last point, see F. Lemoine and O. El Hammani, 'Les augmentations de capital par compensation de créances dans les sociétés à responsabilité limitée', ACE 2023/9, Wolters Kluwer, p. 18.

98 See above para. 40.

99 L. 7/08/2023, art. 11, subpara 1.

100 L. 7/08/2023, art. 11, subpara 2.

101 L. 7/08/2023, art. 11, subpara 3.

102 L. 7/08/2023, art. 11, subpara 5.

54. Secondly, as a result of the mandatory *homologation*, the debtor and the creditors participating in the amicable agreement benefit from several protections. On the one hand, Luxembourg Commercial Code's avoidance actions of the suspect period provided for in articles 445(2) (compulsory nullity of payments of unmatured debts or payments other than in cash) and 446 (optional nullity of payments received by a creditor with knowledge of the debtor's cessation of payments or acts for valuable consideration entered into by the debtor with a person with knowledge of his cessation of payments) are not applicable to the *accord amiable homologué* [confirmed amicable agreement] or to acts performed in execution of the said agreement.¹⁰³ Luxembourg law thus complies with the provisions of Article 18(1) and (5) of the PRD on the protection of other restructuring related transactions.
55. On the other hand, the creditors participating in the amicable agreement cannot be held liable by the debtor, another creditor or third parties for the sole reason that the amicable agreement did not effectively preserve the continuity of all or part of the assets or activities.¹⁰⁴ This limitation of liability obviously encourages creditors to financially support the debtor during the amicable procedure, in line with Article 17(1)(b) of the PRD.
56. As it is not a collective procedure open by a court, the *réorganisation par accord amiable* does not imply a stay of individual enforcement actions. And acceleration clauses are not neutralised in this procedure, as is the case in the *réorganisation judiciaire* procedure.¹⁰⁵
57. As *réorganisation par accord amiable* is a confidential and non-collective procedure, one may think that it might not be considered as an insolvency proceeding within the meaning of the EIR Recast, nor might it be included in the Annex A of the said European regulation.

103 L. 7/08/2023, art. 11, subpara 4.

104 L. 7/08/2023, art. 11, subpara 6.

105 See below para. 94.

3. Luxembourg's restructuring framework: the *réorganisation judiciaire*

58. Inspired by the Belgian law, the New Law has introduced a new *réorganisation judiciaire* [judicial reorganisation] procedure into Luxembourg law.¹⁰⁶ This procedure is the reform's main contribution to restructuring: *réorganisation judiciaire* is presented by the *Commission de la Justice* as the Luxembourg preferred framework for preventive restructuring within the meaning of the PRD. The *concordat préventif de faillite* and the *gestion contrôlée* procedures, which had fallen into disuse, are both repealed by the New Law.¹⁰⁷ They should be removed from Annex A of Regulation (EU) 2015/848 in the near future.
59. The new *réorganisation judiciaire* is a collective and judicial procedure which aims to 'preserve, under the supervision of the judge, the continuity of all or part of the business's assets or activities.'¹⁰⁸ *Réorganisation judiciaire* is likely to pursue three alternative objectives, which recall the aims of the *conciliation d'entreprise* procedure:¹⁰⁹
- obtain a stay (*sursis*) to enable an amicable agreement to be reached (*réorganisation judiciaire par accord amiable*¹¹⁰ [judicial reorganisation by amicable agreement]),
 - obtain the agreement of creditors on a *plan de réorganisation* (*réorganisation judiciaire par accord collectif*¹¹¹ [judicial reorganisation by collective agreement]) or
 - allow the transfer, by court order, of all or part of the debtor's assets or activities to one or more third parties (*réorganisation judiciaire par transfert par décision de justice*¹¹² [judicial reorganisation by transfer by court order]).
60. Regarding its purpose, the *réorganisation judiciaire* procedure is characterized by its flexibility. According to the option provided for in Article 4(5) of the PRD, the request to open the *réorganisation judiciaire* can pursue a specific objective

106 L. 7/08/2023, art. 12 and seq.

107 L. 7/08/2023, art. 85.

108 L. 7/08/2023, art. 12: 'La procédure de réorganisation judiciaire a pour but de préserver, sous le contrôle du juge, la continuité de tout ou partie des actifs ou des activités de l'entreprise'.

109 L. 7/08/2023, art. 12.

110 L. 7/08/2023, art. 11. See T. arr. Lux., 15/12/2023, TAL-2023-09434.

111 L. 7/08/2023, art. 38 to 54.

112 L. 7/08/2023, art. 55 to 67.

for each activity or part of an activity,¹¹³ and at any time during the stay, the debtor can ask the court to modify the objective of the procedure.¹¹⁴

61. If it follows the example of the Belgian *réorganisation judiciaire* procedure, Luxembourg *réorganisation judiciaire* should be included in Annex A of EIR Recast, whether its objective is the conclusion of an amicable agreement, the adoption of a restructuring plan (*accord collectif* [collective agreement]) or a transfer by court order.
62. We will first examine the general features of *réorganisation judiciaire*¹¹⁵ (3.1) before delving into the main aspects of *réorganisation judiciaire par accord collectif* (3.2), as it is primarily on these aspects that the Luxembourg lawmaker has sought to fulfill the objective of restructuring plans promoted by the PRD.
63. Indeed, *réorganisation par transfert par décision de justice* marks a break between the debtor and its business and does not directly pertain to the adoption of a restructuring plan.
64. As for *réorganisation judiciaire par accord amiable*, the law refers to the regime of *réorganisation par accord amiable* provided for by Article 11 of the New Law.¹¹⁶

3.1 The general features of the *réorganisation judiciaire*

3.1.1 Request and procedure

65. In accordance with Article 4(7) of the PRD, the *réorganisation judiciaire* procedure is a voluntary procedure: its opening results from a request lodging by the debtor before the court.¹¹⁷ The debtor is required to attach a wide range of information to its request, including:
 - a factual statement showing that the business' continuity is at risk in either the short- or long term;
 - the debtor's objective(s) in seeking a *réorganisation judiciaire* procedure;

113 L. 7/08/2023, art. 12, subpara 3.

114 L. 7/08/2023, art. 34.

115 L. 7/08/2023, art. 12 to 37.

116 See above para. 49 and seq.

117 L. 7/08/2023, art. 13(1).

- the debtor's last two annual financial statements approved according to applicable law,¹¹⁸ as well as the business's books and yearly financial statements (or, if an individual, the debtor's last two income tax returns);
 - a list of current assets and liabilities and a profit and loss statement no more than three months old, drawn up with the assistance of an accounting professional (eg, auditor, chartered accountant, or accountant);
 - a budget estimating income and expenses for the minimum duration of the requested stay (prepared with an accounting professional's assistance);
 - a complete list of all of debtor's affected *créanciers sursitaires* [creditors to be subjected to the stay], recognized or claiming as such, noting those constituting *créanciers sursitaires extraordinaires*,¹¹⁹ together with their personal information and claimed amount;
 - a statement of the measures and proposals envisaged to restore the business's profitability and solvency, to implement any social plan and to satisfy creditors;
 - a description of how the debtor has fulfilled its legal and contractual obligations to inform and consult employees;
 - if the debtor is a legal entity, a list of shareholders, partners, members, or other types of associates.¹²⁰
66. Consequently, the request must be meticulously justified and well-prepared. The assistance of a lawyer will often be essential for the debtor in drafting the request. The New Law explicitly states that the request must be signed by the debtor or his lawyer.¹²¹
67. To give debtors greater flexibility, the New Law states that if the debtor is unable to include all these documents with his request to open *réorganisation judiciaire*, he must submit them to the court no later than two days before the hearing at which the court will rule on the request to open the procedure. Moreover, if despite this deadline, the debtor is still unable to provide the requested documents, they must provide a detailed explanation in a note. The lack of certain documents doesn't prevent the court from ruling, but the court's decision will be based solely on the elements submitted to it.¹²²

118 Interestingly, by requiring debtors to attach certain types of accounting documents, the New Law exercises indirectly the option provided by PRD's Article 4(2).

119 See below para. 102.

120 L. 7/08/2023, art. 13(2).

121 L. 7/08/2023, art. 13(4).

122 L. 7/08/2023, art. 13(3).

68. The debtor must file his request with the relevant *greffe du tribunal* [district court clerk's office] which will acknowledge receipt thereof. Within 48 hours of its receipt, the *greffier* [court clerk] must advise the *procureur d'État* [public prosecutor] of the debtor's request, who may then participate in any of the *réorganisation judiciaire* proceedings. Moreover, as soon as the debtor's request is received, the relevant Presiding District Court Judge is obliged to appoint a *juge délégué* [delegated judge] to report to the court on the admissibility and basis of the debtor's request together with any elements useful to the assessment thereof.¹²³ In that regard, the delegated judge hears the debtor and anyone else the judge believes would be useful in the investigation,¹²⁴ keeps the court informed of the debtor's situation, ensures the proceeding comply with certain formalities and, except in case of application of Article 54 EIR Recast on duty to inform creditors in cross-border insolvency proceedings, may also dispense with any debtor obligation to provide any individual notices to creditors and, by order, specify an alternative equivalent notice to be given.¹²⁵
69. A *réorganisation judiciaire* file, containing all information relating to the procedure and the merits of the case, is maintained at the district court clerk's office.¹²⁶ The delegated judge may decide that all or part of the file will be accessible remotely by electronic means.¹²⁷ Creditors may file a claim declaration to be included in the court file, which suspends the creditor's statute of limitations for making such a claim and serves as formal notice thereof.¹²⁸ Any creditor or, with the authorization of the delegated judge, any person able to demonstrate a legitimate interest, may inspect and obtain copies of the documents attached to the request for *réorganisation judiciaire*, free of charge, with the exception of personal data. The debtor or a creditor may petition the delegated judge to render data inaccessible for the purpose of safeguarding business secrecy. Prior to issuing a ruling on the petition, the delegated judge must allow the debtor or creditor who initiated the petition, as well as the public prosecutor, to be heard. An order that renders certain data inaccessible is

123 L. 07/08/2023, art 14.

124 The delegated judge may also ask the debtor for any additional information the delegated judge deems relevant. *ibid.*

125 L. 07/08/2023, art 15.

126 L. 7/08/2023, art. 16, subpara 1.

127 L. 7/08/2023, art. 16, subpara 7.

128 L. 07/08/2023, art 16, subpara 2.

open to appeal *comme en matière de référé* [as in expedited proceedings]; the ruling on this appeal is not subject to further appeal.¹²⁹

70. The request for *réorganisation judiciaire* entails an automatic stay.¹³⁰ Indeed, until the court rules on this request, the debtor cannot be declared *en faillite* [bankrupt]. Consequently, creditor's bankruptcy petitions are suspended, whether the action was brought before or after the filing of the request.¹³¹ Besides, the New Law inserted a new provision in the Luxembourg Commercial Code¹³² that suspends the debtor's obligation to make an *aveu de faillite* [admission of bankruptcy]¹³³. Similarly, in the case of a debtor company, filing a request for *réorganisation judiciaire* prevents it from being judicially dissolved, subject to the application of article 1200-1 of the amended law of 10 August 1915 on commercial companies,¹³⁴ until any stay granted in *réorganisation judiciaire* is lifted.¹³⁵ Therefore, the New Law aligns with the requirements of Article 7(1) and (2) of the PRD.
71. Furthermore, the request for *réorganisation judiciaire* includes a stay of individual enforcement actions. During this period, no realization of the debtor's movable or immovable property can in principle occur following the exercise of an enforcement measure until the court makes a ruling on the request.¹³⁶

3.1.2 Opening conditions and anti-abuse mechanisms

72. The New Law's Article 19 provides that the *réorganisation judiciaire* procedure is to be opened as soon as the business is in short- or long-term peril¹³⁷ and the debtor's request is filed with the district court clerk's office.¹³⁸ Moreover, it notes that the debtor's status as *failli* [bankrupt] poses no obstacle to filing such a request. One may reasonably ask, however, if all of this is too late. A 'business in peril' already requires a highly compromised financial and economic situation and the fact a debtor already declared bankrupt can still use the procedure sharply contrasts with PRD's Article 4, which speaks of a

129 L. 7/08/2023, art. 16, subparas 3 to 5.

130 L. 7/08/2023, art. 18(1).

131 Ibid.

132 C. Com. Lux., art 440, subpara. 2.

133 L. 07/08/2023, art 75(4).

134 See above para. 9 and the footnote 29.

135 L. 7/08/2023, art. 18(1).

136 L. 7/08/2023, art. 18(1). Some exceptions are provided for by Article 18(2).

137 Article 19 of the New Law reads 'dès mise en péril de l'entreprise, à bref délai ou à terme'.

138 See above para. 65 and seq.

'likelihood of insolvency' and 'preventive restructuring'. A favourable outcome through a *réorganisation judiciaire* initiated by a debtor already declared bankrupt makes no logical sense and appears hypothetical or even illusory.¹³⁹

73. In Belgian law, which serves as inspiration for the Luxembourg lawmaker, the transposition of the PRD by the Law of 7 June 2023 provided an opportunity to reformulate the conditions for the opening of *réorganisation judiciaire*. It states that the procedure is initiated if the continuity of the debtor is *threatened* (rather than *in peril*) in the short or medium term.¹⁴⁰ This revised wording appears slightly better adapted to the spirit of the PRD.
74. One hopes that, when ruling on opening a *réorganisation judiciaire* procedure, Luxembourg's relevant district court judge will interpret Luxembourg's in peril criterion in a way that allows the *réorganisation judiciaire* procedure to be opened early enough to be effective. Indeed, there is hope, as Luxembourg's first district court to rule on opening a *réorganisation judiciaire* under the New Law stressed that a procedure is properly opened if 'the continuity of the business is threatened', which reflects a broad interpretation of term 'peril', one that comes closer to the Belgian law's choice of the term 'threatened'.¹⁴¹ Additionally, in that same decision, the Luxembourg judge specified, in compliance with the wording of the law which doesn't provide for such a condition, that the opening of the procedure is 'not conditional on the debtor's good faith'.¹⁴² But it doesn't mean that the debtor's bad faith cannot be considered in the context of the *réorganisation judiciaire* procedure.¹⁴³
75. The second decision which opened a *réorganisation judiciaire par accord amiable* underlined that the continuity of the debtor company was at risk, but also that its viability and its prospects for reorganisation was conceivable. In this ruling

139 See T. arr. Lux., 22/11/2023, TAL-2023-09251 and T. arr. Lux., 8/12/2023, TAL-2023-07915. The former found a debtor's application for *réorganisation judiciaire* inadmissible due to an irregularity in the mandate given to the lawyer by the managers, while the latter found the same company bankrupt and initiated bankruptcy proceedings.

140 CDE, art. XX.45(1): 'La procédure de réorganisation judiciaire est ouverte si la continuité du débiteur est menacée à court ou moyen terme'.

141 T. arr. Lux., 22/11/2023, TAL-2023-09252. See also T. arr. Lux., 10/01/2024, TAL-2023-10048; T. arr. Lux., 12/04/2024, TAL-2024-02787. However, some decisions make no reference to the threat to the continuity of the business and simply state that the business is in peril: T. arr. Lux., 22/03/2024, TAL-2024-01772.

142 T. arr. Lux., 22/11/2023, TAL-2023-09252.

143 See below paras. 76 to 79 and 87.

of 15 December 2023, the Luxembourg district court observed that the debtor company's balance sheets reflected a deficit over three financial years. Additionally, the significance of the number of creditors and the total amount of claims were noted (86 creditors with a combined debt of nearly 830,000 euros, not including the bank creditor). But the Luxembourg judge also pointed out that an investor had proposed an investment of 6,000,000 euros to pay the bank creditor and suppliers, renew the technical installations and increase the company's cash flow. In addition, the investor had outlined the current situation of the debtor company and a '*plan de redressement*'. This led the court to consider that the conditions of the law had been met, and to declare the procedure open, 'having regard to the investor's intention' and 'insofar as the investments described by the investor, and by the company, are such as to open up the prospect of profitable operation of the company, in addition to allowing the current creditors to be paid in full if not to a very large extent.'¹⁴⁴

76. Exercising the option provided for by Article 4(4) of the PRD, the New Law limits the number of times a debtor can access a *réorganisation judiciaire* procedure within a specified period. Several anti-abuse mechanisms are thus introduced to prevent debtors in bad faith from exploiting the *réorganisation judiciaire* procedure for dilatory purposes or to the detriment of creditors' interests.
77. The first limitation addresses the objective of the procedure¹⁴⁵: if a debtor who has previously obtained the opening a *réorganisation judiciaire* procedure within the past three years seeks to open another *réorganisation judiciaire*, the procedure may only be opened if its purpose is to transfer the business by court order. This rule acknowledges that if the first procedure did not extricate the business from its financial difficulties, the business's continuity could only be protected by transferring all or part of its assets or activities to a third party.
78. Another limitation pertains to the request's effect¹⁴⁶: if a debtor seeks the opening of a *réorganisation judiciaire* procedure less than six months after a previous request (unless the court provides a reasoned decision), the new request will not have the suspensive effect provided for in Article 18 and relating to the declaration of bankruptcy and the enforcement measures.¹⁴⁷

144 T. arr. Lux., 15/12/2023, TAL-2023-09434.

145 L. 7/08/2023, art. 19, subpara 3.

146 L. 7/08/2023, art. 19, subpara 4.

147 See above paras. 70 and 71.

This provision aims to prevent the procedure from being used solely to stay creditors' enforcement measures.

79. Another of its anti-abuse limitation protects creditors' rights acquired in a *réorganisation judiciaire* that took place between 3 and 5 years prior to the current request,¹⁴⁸ such that a debtor cannot use a second *réorganisation judiciaire* to avoid its obligations under that prior procedure.

3.1.3 Judgement on the request

80. Within fifteen days¹⁴⁹ after the debtor files request with the relevant district court clerk's office, the New Law requires the district court to hold a hearing to examine whether or not to open a *réorganisation judiciaire*¹⁵⁰ at which both the debtor and the delegated judge are heard.¹⁵¹ The district court must then render its decision within the following eight days. If the court finds that conditions for opening the procedure¹⁵² have been met, it declares the *réorganisation judiciaire* open and sets the duration of the stay.¹⁵³ In line with the PRD,¹⁵⁴ the stay cannot exceed four months,¹⁵⁵ unless it is extended.¹⁵⁶
81. In a judgment of 15 December 2023, the Luxembourg judge specified that the duration of the stay must be determined 'in such a way as to maintain as far as possible a balance between the necessary protection of the debtor and the rights of the creditors', which led him to set the period of the stay at four months on the grounds that 'a calm conduct of the negotiations with the investor is in the interest of both the {debtor} company and the existing creditors.'¹⁵⁷ In addition, the duration of the stay must be determined taking into

148 L. 07/08/2023, art 19, subpara 5.

149 Under Luxembourg law, any procedural time limit is calculated from midnight on the day of the act, event or decision and expire at midnight on the last day (NCPC Lux., art. 1256). Public holidays are counted in the time limit. Any time limit that would normally expire on a Saturday, Sunday or public holiday is extended until the first business day thereafter, given that Saturday is counted as a public holiday (NCPC Lux., art. 1260).

150 L. 07/08/2023, art 20(1).

151 The hearing is to be held in the district court judge's chambers, unless the debtor expressly agrees to a public hearing. *ibid.*

152 See above para. 72.

153 L. 7/08/2023, art. 20(2).

154 PRD, art 6(6).

155 L. 07/08/2023, art 20(2).

156 See below para. 97.

157 T. arr. Lux., 15/12/2023, TAL-2023-09434. See also T. arr. Lux., 10/01/2024, TAL-2023-10048; T. arr. Lux., 22/03/2024, TAL-2024-01772.

account notably the complexity of the case or the characteristics of the relevant sector of activity.¹⁵⁸

82. If the debtor seeks a *réorganisation judiciaire par accord collectif*¹⁵⁹, the district court must set, either in the opening judgment or a subsequent one, the place, day, and time for the hearing on the restructuring plan at which the creditors will vote thereon and the district court will rule on its *homologation* [confirmation].¹⁶⁰
83. The judgment declaring the *réorganisation judiciaire* open is notified to the debtor by the district court clerk's office¹⁶¹ and published in the *Recueil électronique des sociétés et des associations (RESA)*.¹⁶² Within fourteen days of its pronouncement, the debtor is responsible for individually notifying of its creditors that a *réorganisation judiciaire* has been opened via either registered letter or electronically.¹⁶³
84. The opening of a *réorganisation judiciaire* is likely to be accompanied by the appointment of two practitioners created by the New Law: a *mandataire de justice* and/or an *administrateur provisoire*. Firstly, the court may appoint a *mandataire de justice* chosen from a list of sworn experts in the opening judgment or at any time thereafter during the procedure.¹⁶⁴ The *mandataire de justice* is appointed when the debtor so requests, and when such an appointment is useful in achieving the procedure's objectives.¹⁶⁵ The *mandataire de justice* must assist the debtor in the *réorganisation judiciaire*, his mission being determined by the court based on the debtor's request. As the *conciliateur d'entreprise*, the *mandataire de justice* will usually be a lawyer specialising in insolvency proceedings and practicing as a trustee in bankruptcy.
85. The first *mandataires de justice* appointed under the New Law was given the task of preparing and facilitating the conclusion and implementation of an amicable agreement with the debtor company's creditors, in compliance with

158 See T. arr. Lux., 12/04/2024, TAL-2024-02787.

159 See below para. 101 and seq.

160 L. 07/08/2023, art 20(3).

161 The same applies to a judgment rejecting the request (L. 7/08/2023, art. 21(3)).

162 L. 7/08/2023, art. 21(1).

163 L. 07/08/2023, art 21(2).

164 L. 7/08/2023, art. 22(1).

165 *Ibid.*

Article 11 of the New Law.¹⁶⁶ Despite the law's silence on this point, the costs were logically charged to the debtor, which was ordered to pay (or deposit with the *Caisse des dépôts et des consignations*) the sum of 5,000 euros to cover the initial costs of the proceedings and the *mandataires de justice's* fees.¹⁶⁷

86. The appointment of a *mandataire de justice* may also be requested by a third party with an interest in the matter.¹⁶⁸ The request is notified to the debtor by the court clerk's office, which specifies the mission proposed by the petitioner. In this case, the *mandataire de justice's* costs and fees are borne by the requester. When a *conciliateur d'entreprise* had been appointed,¹⁶⁹ the New Law Law permits the district court to terminate all or part of that *conciliateur d'entreprise's* mission.¹⁷⁰ Granting such faculty makes sense, given the potential for overlapping responsibilities and increased costs.
87. An *administrateur provisoire* may also be appointed. In the event of *manquements graves et caractérisés* [serious and obvious misconducts] on the part of the debtor or one of its bodies, the court may, at the request of any interested party or of the public prosecutor – with the debtor and the delegated judge being heard – substitute an *administrateur provisoire* for the duration of the stay.¹⁷¹ In principle, the *administrateur provisoire* is a *mandataire de justice* chosen from a list of sworn professionals. The *administrateur provisoire* is appointed by the opening judgment or any subsequent judgment. His appointment may also be accompanied by the termination of all or part of the *conciliateur d'entreprise's* mission, where applicable. The *manquement grave* [serious misconduct] is defined as 'that which a reasonably diligent and prudent manager would not have committed, and which offends against the essential norms of business life,¹⁷² and the *manquement caractérisé* [obvious misconduct] is that which is 'incontestable.'¹⁷³ Therefore, the appointment of an *administrateur provisoire* is mainly justified by the debtor's dishonesty or bad faith or the debtor's serious incompetence. For instance, in a ruling of 22 November 2023 which opens a *réorganisation judiciaire par accord amiable*,

166 T. arr. Lux., 22/11/2023, TAL-2023-09252. – T. arr. Lux., 15/12/2023, TAL-2023-09434.

167 T. arr. Lux., 15/12/2023, TAL-2023-09434.

168 L. 7/08/2023, art. 22(2).

169 See above para. 37.

170 L. 07/08/2023, art 22(3).

171 L. 7/08/2023, art. 23.

172 CA Lux., 11/07/2012, n° 35838, 35930, 36069 et 36076.

173 *Ibid.*

the Luxembourg district court decided to appoint an *administrateur provisoire* at the request of the public prosecutor, on the grounds that the annual accounts of the debtor company were not published within the legal deadlines, the director owed a large sum of money to the debtor company and he had been granted a large dividend despite the existence of unpaid debts.¹⁷⁴ The *administrateur provisoire*'s appointment puts a highly qualified professional at the helm, one who will not only take control of the business' day-to-day operations, but will also steer its reorganisation, both of which are intended to restore the creditors' confidence in the business's viability as a going concern. In this regard, Luxembourg was again inspired by its neighbors: Belgium's law has an identical provision,¹⁷⁵ while France has a similar one in the context of its *redressement judiciaire*.¹⁷⁶

It should be noted that the functions of *administrateur provisoire* and *mandataire de justice*¹⁷⁷ may be combined.¹⁷⁸

88. Although no one is entitled to oppose the court's judgement opening or rejecting a *réorganisation judiciaire* procedure, it appears that any interested party can appeal that judgement within eight days after its notification.¹⁷⁹ The appeal must be lodged *comme en matière de référé* [as in expedited proceedings], in which the appellate court will hold a hearing and render its decision within a short period of time. An appeal only has suspensive effect if the debtor appeals a judgment that rejects the debtor's request. If the appellate court overturns the district court's judgment, that appellate court decision must also be published in the *RESA*.

3.1.4 Effects of the opening decision

89. Article 5(1) of the PRD obliges the Member States to allow debtors seeking access to their respective preventive restructuring procedures to 'remain totally, or at least partially, in control of their assets and the day-to-day operation of their business' while the procedure is pending, except in certain limited circumstances. Luxembourg's *réorganisation judiciaire* transposes that

174 T. arr. Lux., 22/11/2023, TAL-2023-09252.

175 CDE, art XX.49/1.

176 C. com. Fr., art L. 631-12 (allows a court to entrust all or part of a debtor's business activities to an appointed administrator).

177 See above para. 84.

178 See T. arr. Lux., 22/11/2023, TAL-2023-09252.

179 L. 07/08/2023, art 24. Note that the article is silent as to whom may file an appeal, implying anyone interested can do so.

obligation. However, echoing Article 5(2) and (3) of the PRD, the New Law also sets out a number of circumstances in which one or more practitioners may be appointed either to assist the debtor, such as a *conciliateur d'entreprise*¹⁸⁰ or a *mandataire de justice*¹⁸¹, or to replace him, such as the *administrateur provisoire*.¹⁸² Any appointment is made on a case-by-case basis.

90. Similarly, the PRD's Article 6 obliges the Member States to ensure that a debtor can benefit from total or limited stay of individual enforcement actions, including secured and preferential claims, while the restructuring procedure is pending, with certain limited exceptions.¹⁸³ Luxembourg transposed its obligations by providing that the opening of the *réorganisation judiciaire* entails a general *sursis* [stay], applicable to all *créances sursitaires* [stayable claims]¹⁸⁴, including secured and preferential claims. Thus, Luxembourg transposed the PRD's Article 7 via the New Law's Article 25,¹⁸⁵ which provides that, while the *sursis* is pending (a) individual actions enforcing *créances sursitaires* cannot proceed or be exercised against the debtor's moveable or immovable property, (b) if the debtor is a *commerçant* [trader]¹⁸⁶, that debtor cannot be declared bankrupt without the debtor's agreement, and (c) corporate debtors cannot be dissolved judicially or administratively.¹⁸⁷
91. The stay applies to payments due under the debtor's *créances sursitaires*. However, the New Law's Article 27, in line with the PRD's Article 18, allows the debtor to make voluntary *créance sursitaire* payments insofar as such payments are necessary to maintain the continuity of the debtor's business activity.¹⁸⁸ That exemption from the stay encourages creditors to continue to work with debtors and to accept such payments therefrom without fear of reprisals in a subsequent bankruptcy procedure. Indeed, the avoidance actions of the

180 See above paras. 37 and 49.

181 See above paras. 45 and 84.

182 See above para. 87.

183 PRD, art 6.

184 L. 07/08/2023, art 1(c). See below para. 102.

185 Indeed, L. 07/08/2023, art. 25 is quite similar to L. 07/08/2023, art. 18.

186 This limitation is difficult to understand, whereas the New Law is also applicable to craftsmen. One could assume it is an error, inaccuracy, or omission in the text. This may be one of the things the *Chambre des Députés* may want to reconsider when making any corrections to the New Law.

187 L. 07/08/2023, art 25.

188 L. 07/08/2023, art 27.

suspect period provided for in Luxembourg Commercial Code¹⁸⁹ do not apply to payments made during the stay.¹⁹⁰

92. Moreover, the New Law's Article 28(1) expands the scope of the stay to include a debtor's spouse, former spouse, civil partner, or former civil partner, as appropriate,¹⁹¹ if such individuals are co-obligors for the debtor's contractual obligations relating to the debtor's 'economic activity'.¹⁹² The use of the expression 'economic activity' seems too imprecise; the expression 'business activity' would have been more appropriate because it undoubtedly and exclusively pertains to the debtor's professional activity. Interestingly, co-debtors and individual guarantors are *not* covered by the stay.¹⁹³ However, Article 28(3) provides some degree of relief for individuals – who may be a director or a shareholder of the debtor company¹⁹⁴ – who acted as the debtor's guarantor free of charge. Once a judgment opens the *réorganisation judiciaire*, such guarantors may ask the court to rule that the amount secured by their *gratis* guaranty is 'manifestly disproportionate' to the guarantor's current ability to repay the debt,¹⁹⁵ which request must be accompanied by a number of supporting

189 C. com. Lux., art. 445(2) and art. 446. See above para. 54.

190 L. 7/08/2023, art. 27, subpara 3.

191 Such a civil partner or former civil partner is defined in the amended Law of 9 July 2004 *relative aux effets légaux de certains partenariats du débiteur* (Mémorial A, n° 143, 6 août 2024) provided that, to benefit from the stay, the partnership must have been declared at least six months prior to the debtor's request for a *réorganisation judiciaire*. Interestingly, a similar six-month requirement does not apply to marriages.

192 L. 07/08/2023, art. 28(1).

193 L. 07/08/2023, art. 28(2).

194 See however footnote 195.

195 This provision is a specific application of Article 2016, subparagraph 3, of the Luxembourg Civil Code (to which Article 28(2) of the New Law refers), according to which '*a professional creditor may not rely on a contract of guarantee entered into by a natural person whose commitment was, at the time it was entered into, manifestly disproportionate to his assets and income, unless the assets of that guarantor, at the time when he is called upon, enable him to meet his obligation*'. Therefore, in case of 'manifest disproportionality', the court can reduce the personal security obligation in proportion to the 'disproportionality'. Case law considers that there is a 'manifest disproportionality' when 'the performance of the guarantor's undertaking, whatever its size, does not leave him with the minimum subsistence necessary to meet his needs and those of his dependents' (see T. arr. Lux., 28/10/2022, n° 183291 – T. arr. Lux., 28/04/2017, n° 170823). It should be noted that a company director and/or a shareholder, who has the information necessary to assess the scope of his commitments and the company's financial situation, is considered as a *caution avertie* [informed guarantor] and doesn't benefit from the protection of this rule (T. arr. Lux., 28/10/2022, n° 183291). More generally, Luxembourg case law is much more reluctant to protect the guarantor than the French case law, considering that it is above all up to the guarantor to assess whether, in the light of his financial resources, he can commit himself or not (see CA Lux., 17/06/2020, CAL-2018-00747, arrêt n° 82/20).

documents demonstrating the personal guarantor's current financial situation as well as the *gratis* nature of the guaranty undertaken.¹⁹⁶

93. Moreover, as the PRD's Article 7(6) gives the Member States the option to exempt so-called netting arrangements from the stay, Luxembourg chose to permit such netting arrangements between the *créances sursitaires* [stay-able claims] and the claims arising during the stay, but only if those claims are related and without prejudice to the application of the amended Law of 5 August 2005 on financial collateral arrangements.¹⁹⁷
94. To ensure the continuity of the debtor's business activity during the restructuring procedure, the PRD's Article 7(4) and (5) obliges the Member States to prevent the debtor's creditors from withholding performance, or otherwise terminating, accelerating, or modifying executory contracts while the procedure is pending. Luxembourg transposed that obligation in the New Law's Article 30. Article 30(1), for example, states that, notwithstanding any contractual terms or conditions to the contrary, a debtor's request to open a *réorganisation judiciaire* procedure or the opening of the procedure do not terminate executory contracts or modify the performance of executory contracts.¹⁹⁸ Thus, acceleration clauses are neutralised within *réorganisation judiciaire*. Article 30(2) allows a debtor who has filed a request for *réorganisation judiciaire*, as soon as the procedure is opened, to unilaterally suspend performance of its contractual obligations under its executory contracts, *except* employment contracts, by giving notice of its decision to the other contracting party, with any claim for damages accruing to that other contracting party for such suspension being subject to the stay. But technically, the debtor's unilateral suspension is only justified if it is imperative to the business' reorganisation.¹⁹⁹ And, finally, Article 30(3) declares penalty clauses to be ineffective during the period of the stay and until the restructuring plan has been fully implemented as far as the creditors included in the plan are concerned.

196 L. 07/08/2023, art. 28(3). The ability to repay the debt is assessed at the time the stay is granted, in relation to the personal guarantor's assets (movable and immovable) and income.

197 L. 7/08/2023, art. 29. – See below para. 106.

198 PRD, art 7(4) gave the Member States the option to exclude non-essential executory contracts; Luxembourg chose not to exercise that option.

199 L. 7/08/2023, art. 30(2). It will be interesting to see how Luxembourg's courts interpret the phrase 'lorsque la réorganisation de l'entreprise le requiert impérativement' [when the reorganisation imperatively requires it].

95. Nevertheless, the New Law also incorporates provisions intended to soften the potentially harsh impact of those measures on the debtor's creditors, as suggested by the PRD's Article 7(4).²⁰⁰ Article 30(1), for example, provides that, if the debtor breached the terms of an executory contract *before* the stay is granted by the court, the *créancier sursitaire* cannot terminate the breached executory contract if the debtor rectifies its breach within fifteen days after the *créancier sursitaire* gives formal notice of the executory contract's termination, which notice may only be given after the stay has been granted. Inspired by Article XX.56 of the Belgian *Code de droit économique (CDE)*, this provision allows a creditor to terminate an executory contract with the debtor for breach thereof if the debtor does not fix its default within the specified time period after receiving the creditor's formal termination notice; that offers some creditors protection, as contemplated by the PRD.²⁰¹ Moreover, in an effort to reduce the potentially substantial prejudice to the other contracting party when a debtor exercises its right, under Article 30(2), to unilaterally suspend its performance of executory contracts when such suspension is imperative, the New Law allows the other contracting party to suspend its own performance; it is still not permitted to terminate the contract.²⁰²
96. In accordance with Article 17(1)(a) of the PRD, the New Law aims to protect new financing and interim financing. Accordingly, the New Law's Article 31 states that the stay does not extend to debts accrued under executory contracts that require successive performance, including any contractual interest payable thereunder, to the extent the debt relates to services provided after the judgment opening the *réorganisation judiciaire* procedure. Moreover, the New Law's Article 32 allows claims relating to *prestations* [services] provided to the debtor during the *réorganisation judiciaire*, whether arising from new commitments or from pre-filing executory contracts at the time the procedure was opened, are considered *dettes de la masse* [insolvency estate's debts] in a *faillite* [bankruptcy] procedure, a liquidation, or in the distribution following a court-ordered transfer of the business, so long as there is a close link between the end of the *réorganisation judiciaire* and those collective proceedings.²⁰³ A 'close link' will be characterized in particular if the collective proceeding is opened within twelve months of the end of the *réorganisation judiciaire*.

200 PRD, art 7(4) allows Member States to give creditors bound to the debtor through executory contracts 'appropriate safeguards with a view to preventing unfair prejudice being caused to such creditors'.

201 *Ibid.*

202 L. 07/08/2023, art 30(2), subpara 4.

203 L. 07/08/2023, art 32.

3.1.5 Extension of the stay

97. The duration of the stay of individual enforcement actions is, in principle, four months.²⁰⁴ The New Law allows, however, an extension of the stay, in accordance with Article 6(7) and (8) of the PRD. At the request of the debtor (filed no later than fifteen days before the expiry of the stay granted, on pain of inadmissibility) and on the report of the delegated judge, the court may thus extend the stay for a maximum period of twelve months from the judgment granting the stay.²⁰⁵ Furthermore, in exceptional circumstances²⁰⁶ and if the interests of the creditors so permit (Luxembourg has here exercised the option under Article 6(7)(b) of the PRD), the maximum duration of the extended stay referred to above may be extended by a maximum of six months, knowing that the total duration of the stay may not exceed twelve months from the judgment granting the stay.²⁰⁷ No objection or appeal may be lodged against a decision to extend the stay.²⁰⁸ The judgment extending the stay is published in the *RESA*.²⁰⁹

3.1.6 Early termination and closure of the procedure

98. By transposing Article 6(9) of the PRD, the new law provides that the court may terminate the *réorganisation judiciaire* procedure and the stay prior to the expiry of its term. In accordance with Article 6(9)(b) of the PRD, the debtor may, at any stage of the procedure, withdraw all or part of its request for *réorganisation judiciaire*.²¹⁰ At the debtor's request, and after hearing the delegated judge, the court then terminates the *réorganisation judiciaire* in whole or in part. The debtor may ask the court to record in the judgment any agreement reached with the creditors affected by the termination of the procedure.

99. Echoing Article 6(9)(a) of the PRD, the New Law also allows the court to order the early termination of the *réorganisation judiciaire* by judgment where the debtor is 'manifestly no longer capable of ensuring the continuity of all or part of its assets or of its business activities having regard to the objective of the *réorganisation judiciaire* procedure' or where the information provided by the

204 See above para. 80.

205 L. 7/08/2023, art. 33(1).

206 For example, the size of the business, the complexity of the case or the importance of the jobs that can be safeguarded (L. 7/08/2023, art. 33(2), subpara 2).

207 L. 7/08/2023, art. 33(2).

208 L. 7/08/2023, art. 33(3).

209 L. 7/08/2023, art. 33(4).

210 L. 7/08/2023, art. 35.

debtor to the delegated judge, the court or the creditors at the time of filing the request or subsequently is 'manifestly incomplete or inaccurate.'²¹¹ Since the aim here is either to recognise that the debtor's financial situation does not allow the *réorganisation judiciaire* to succeed, or to sanction the debtor for failing in his duty to provide information, the *réorganisation judiciaire* is then terminated *in toto*. The court will decide *ex officio* or at the request of the debtor, the public prosecutor, or any interested party, after hearing the report of the delegated judge and the opinion of the public prosecutor.²¹² In this case, the court may, in the same judgment, declare the debtor bankrupt or, if the debtor is a legal entity, liquidate it where the conditions are met. Luxembourg law thus reverses the option provided for in Article 7(3) of the PRD. The judgment is published in the *RESA*, notified by registered mail to the debtor and communicated to the creditors concerned.²¹³

100. As soon as the judgment ordering the early termination of the *réorganisation judiciaire* and closing the proceedings is delivered, the stay is terminated, and the creditors regain full exercise of their rights and actions.²¹⁴ The same applies if the stay expires without having been extended.

3.2 *The restructuring plan: réorganisation judiciaire par accord collectif*

101. The *réorganisation judiciaire par accord collectif* is the preferred framework under Luxembourg law for the adoption of restructuring plans in accordance with the PRD. The purpose of this procedure is to obtain the agreement of creditors on a restructuring plan, known in Luxembourg law as a '*plan de réorganisation*'.²¹⁵ The debtor is required to file a plan with the court registry at least twenty days before the hearing at which the vote on the plan is to be taken and a decision is to be taken on its *homologation* [confirmation].²¹⁶

3.2.1 *Classes of creditors*

102. The New Law transposes *a minima* Article 9(4) of the PRD, which provides for the introduction of classes of creditors into the law of the Member States.

211 L. 7/08/2023, art. 36(1).

212 L. 7/08/2023, art. 36(2).

213 L. 7/08/2023, art. 36(4).

214 L. 7/08/2023, art. 37.

215 See the first opening judgement of a *réorganisation judiciaire par accord collectif*: T. arr. Lux., 10/01/2024, TAL-2023-10048.

216 L. 7/08/2023, art. 38.

Luxembourg law provides for only two classes of creditors: a class of *créanciers sursitaires ordinaires* and a class of *créanciers sursitaires extraordinaires*.²¹⁷ It is important to note that *créances sursitaires* [stayable claims] are claims subject to the *réorganisation judiciaire* procedure and particularly to the *sursis* [stay] resulting from the opening of this procedure.²¹⁸ Although the New Law is silent on that point, we can reasonably assume that only monetary claims are concerned here, given the law's many references to the 'amount' of claims.²¹⁹ The New Law defines *créances sursitaires* as 'claims other than wage claims arising prior to the opening judgment of the *réorganisation judiciaire* procedure or arising as a result of the filing of the request or decisions taken in the context of the *réorganisation judiciaire* procedure.' *Créances sursitaires extraordinaires* include claims secured by a special lien or mortgage, claims by owner-creditors (*créancier-proprétaire*),²²⁰ and *créances sursitaires* of tax and social security authorities. This class therefore includes creditors with very diverse profiles. The category of *créances sursitaires ordinaires* is a residual category that includes *créances sursitaires* other than *créances sursitaires extraordinaires*.²²¹ It should be noted that the debtor is not free to create additional classes or to decide that he will leave some classes unimpaired: the creditors must necessarily be classified into one of the two classes provided for by the New Law. Indeed, the New Law defines the classes of creditors as 'all creditors, divided into *créanciers sursitaires ordinaires*, on the one hand, and *créanciers sursitaires extraordinaires*, on the other hand'²²². Finally, one can regret that the New Law does not contain specific provisions on contingent or conditional claims, although the court's leeway to determine the amount and the quality of claims could be of interest to such claims.²²³

103. There are questions about the sufficiency of these classes, particularly about the necessarily 'catch-all' nature of the class of the *créances sursitaires ordinaires*. How will the two Luxembourg classes always be able to reflect the

217 L. 7/08/2023, art. 1(b).

218 See above para. 18.

219 See above para. 65 and below paras. 108, 109, 115 and 128.

220 An owner-creditor is defined as 'a person who is simultaneously the holder of a secured claim and the owner of a tangible asset which is not in his possession and which serves as collateral' (L. 7/08/2023, art. 1(f)).

221 L. 7/08/2023, art. 1(e).

222 L. 7/08/2023, art. 1(b): 'l'ensemble des créanciers sursitaires regroupés en créanciers sursitaires ordinaires d'une part et en créanciers sursitaires extraordinaires d'autre part'.

223 See below para. 109.

'sufficient commonality of interest based on verifiable criteria'²²⁴ sought by the PRD between creditors in the same class? In fact, it should be noted that the expression 'sufficient commonality of interest' is totally absent from Luxembourg law. However, the New Law admits that there may be several categories of claim within the same class. Indeed, the descriptive part of the *plan de réorganisation* must mention 'the different categories of claims or interests concerned by the plan, where applicable, the classes into which the creditors have been grouped for the purposes of adopting the plan, and the respective value of the claims and interests in each class'.²²⁵ The New Law thus seems to create a link between 'categories of claims' and 'interests'. This is understandable insofar as, given that the number of classes of creditors is limited to two, the classes of creditors in Luxembourg are necessarily heterogeneous. It therefore seems that 'sufficient commonality of interest' should be assessed at the level of 'categories' rather than 'classes' of creditors under Luxembourg law. The problem however is that the New Law is very imprecise on that point and don't give many clues on the essence of the categories and the criteria for composing them, except that the creditors concerned must be 'treated equally' within the same category and 'in proportion to the amount of their claim'²²⁶. The equal treatment then appears to be the essence of the category. But should a category be based on a 'sufficient commonality of interest'? And if yes, how to define this 'sufficient commonality of interest' inside each category? The entry into force of the law is still too recent to reach definitive conclusions on this subject. Finally, set aside the equal treatment, we can wonder about the scope of the 'category' which do not have voting rights as such.

104. The descriptive part of the *plan de réorganisation* must also mention 'where applicable, the categories of creditors not affected by the plan and a description of the reasons why it is proposed not to include them among affected parties'.²²⁷ Once again, it is regrettable that the law does not specify more precisely who are the 'creditors non affected by the plan'. One however may assume that the holders of 'small claims' are concerned. Indeed, the plan may contain a list of creditors whose claims are minimal and whose inclusion in the plan would constitute an 'unjustifiable administrative and financial burden'.

224 PRD, art. 9(4).

225 L. 7/08/2023, art. 41(2)(5°).

226 See L. 7/08/2023, art. 43, subpara 2.

227 L. 7/08/2023, art. 41(2)(6°).

The plan then indicates the reasons why these claims have to be dealt with outside the restructuring plan.²²⁸

105. For the rest, the New Law does not exercise either the option of allocating employees' claims to a separate class, as employees' claims are not considered to be *créances sursitaires* [stayable claims] affected by the procedure, or the option allowing small and medium-sized enterprises (SMEs) not to allocate the affected parties to separate classes.²²⁹ Furthermore, since only two classes of creditors are provided for and the debtor does not have the option of creating additional classes,²³⁰ the New Law did not consider it useful to implement Article 9(4), subparagraph 4, of the PRD, which requires measures to be put in place to protect vulnerable creditors (such as small suppliers) in the context of the division into classes. Vulnerable creditors are therefore in the same position as all creditors in the same class.
106. The situation of several types of creditors not covered by the New Law raises questions. This is first and foremost the case for creditors holding financial collateral arrangements within the meaning of the amended Law of 5 August 2005 on financial collateral arrangements. These financial collateral arrangements are a key factor in the legal attractiveness of the Luxembourg financial centre. Article 20(4) of the Law of 5 August 2005, which is an overriding mandatory provision, aims to 'immunize the execution of financial collateral arrangements' by protecting this execution 'against all effects' of Luxembourg or foreign insolvency proceedings²³¹ in order to 'render the financial collateral arrangement unassailable.'²³² However, the New Law does not refer to creditors holding such financial collateral arrangements at any point, except as an exception to the principle of netting related claims.²³³ In particular, they are not mentioned among the class of *créanciers sursitaires extraordinaires*. It must be certainly deduced that these creditors are not affected, as they are 'immune' from the *réorganisation judiciaire*. But given the silence of the law, doubts remain and will have to be clarified by Luxembourg judge.

228 L. 07/08/2023, art 43, subpara 6. See below para. 117.

229 French law rules out the creation of classes of creditors for SMEs: C. com. Fr., art. L. 626-29 to R. 626-52.

230 See above para. 102.

231 CA Lux., 19/01/2023, CAL-2020-00840, arrêt n° 8/23.

232 CA Lux., 15/02/2017, arrêt n° 25/17 – VII – REF, nos 43925 et 44011 du rôle. – T. arr. Lux. (commercial), 7/04/2017, n° 178052.

233 See above para. 93.

107. The situation of equity holders is also special: they are not taken into consideration by the New Law, the Justice Committee having indicated that ‘they have no say as shareholders and therefore have no possibility of interfering with the adoption of the plan.’²³⁴ Shareholders are therefore not treated as a voting class as such. The choice not to provide a class for equity holders is remarkable, especially in comparison with French and Belgian law, which both provide that equity holders may be grouped into a separate class.²³⁵ The absence of a class for equity holders might raise difficulties in practice. It is true that equity holders could be grouped in the same ‘category’, inside the class of *créanciers sursitaires ordinaires* for example.²³⁶ But the scope of such a grouping would be very uncertain, in particular because the categories do not have voting rights as such. Moreover, the plan may provide for a debt-equity swap.²³⁷ In this case, the situation of the shareholders is also unclear, given the silence of the New Law. It should be noted that, for *sociétés anonymes (SA)* [public limited companies], Luxembourg law defines the netting of claims by increase capital as ‘a contribution in cash’ subject to the same conditions as such a contribution.²³⁸ According to some authors,²³⁹ the same qualification should be applicable to *sociétés à responsabilité limitée (SARL)* [private limited companies]. In that respect, under Luxembourg company law, a capital increase is decided by the general meeting under the conditions required for amending the articles of association.²⁴⁰ Therefore, it can be assumed that, if a debt-equity swap was provided for in the plan, it would certainly have to be authorised by the general meeting under such conditions. Besides, within the *réorganisation judiciaire procedure*, the netting of claims by increase capital should only be possible if the claims are related.²⁴¹
108. Within fourteen days of delivery of the judgment declaring the *réorganisation judiciaire par accord collectif* open, the debtor shall notify each of its *créanciers*

234 Bill n° 6539 A, p. 34.

235 CDE, art. XX.83/9 (for Belgian law). – C. com. Fr., Art. L. 626-30, III, 3° (for French law).

236 See above para. 103.

237 See below para. 115.

238 L. 10/08/1915, art. 420-23(5) (increase capital in the public limited company) and art. 420-27, subpara. 3 (conversion of convertible bonds in the public limited company).

239 F. Lemoine and O. El Hammani, ‘Les augmentations de capital par compensation de créances dans les sociétés à responsabilité limitée’, ACE 2023/9, Wolters Kluwer, pp. 8 and 9.

240 L. 10/08/1915, art. 420-22(1) (public limited company) and art. 710-26 (private limited company).

241 See above para. 93. In this sense, see F. Lemoine and O. El Hammani, ‘Les augmentations de capital par compensation de créances dans les sociétés à responsabilité limitée’, ACE 2023/9, Wolters Kluwer, pp. 18 and 19.

sursitaires of the amount of the claim for which that creditor is entered in its books together with, 'as far as possible', the security securing the claim and the class to which the creditor belongs.

109. In response to Article 9(5) of the PRD, the New Law allows any *créancier sursitaire* to dispute the amount or quality (the quality of unsecured or secured claim, for instance) of the claim indicated by the debtor, including the class of creditor to which the debtor believes it belongs.²⁴² In case of persistent disagreement on this point, the dispute is brought before the court that opened the *réorganisation judiciaire*. The court may then, no later than fifteen days before the hearing at which the vote on the plan is to be taken, decide to amend the amount and quality of the claim initially set by the debtor, including the class to which the creditor belongs. Conversely, any claim included in the list of the request to open a *réorganisation judiciaire* may be contested in the same way by any interested party.²⁴³ The action is brought against the debtor and the disputed creditor and the court rules on the report of the delegated judge, after hearing the interested third party, the disputed creditor and the debtor. If the claim's contestation does not fall within its jurisdiction, the court determines the amount and the quality for which the claim is provisionally admitted into the *réorganisation judiciaire* and refers the parties back to the competent court for a decision on the merits. If the contestation falls within its jurisdiction but a decision on the said contestation may not be taken within a sufficiently short period of time, the court may also determine the amount and status of the provisionally admitted claim.²⁴⁴ Moreover, on the report of the delegated judge, the court may at any time, 'in cases of absolute necessity' and at the request of the debtor or a creditor, amend the decision determining the amount and quality of the *créance sursitaire* [stayable claim] on the basis of new information;²⁴⁵ this provision could be useful with regard to contingent or conditional claims.

In all cases, the judgment determining the amount and quality of the claims is not subject to appeal.²⁴⁶

Where applicable, the debtor may correct or complete the list of creditors referred to in the request to open a *réorganisation judiciaire*.²⁴⁷ The court clerk

242 L. 7/08/2023, art. 40(1).

243 L. 7/08/2023, art. 40(2).

244 L. 7/08/2023, art. 40(3).

245 L. 7/08/2023, art. 40(4).

246 L. 7/08/2023, art. 40(5).

247 See above para. 65.

then enters the list and the corrected or completed data in the *réorganisation judiciaire* file²⁴⁸ and notify the creditors that the list has been corrected or supplemented. Such notification may be made by ordinary mail or electronically.²⁴⁹

3.2.2 Content of the restructuring plan

110. The content of the *plan de réorganisation* [restructuring plan] meets the requirements of Article 8(1) of the PRD. More specifically, Article 41 of the New Law stipulates that the restructuring plan is composed of a descriptive part and a prescriptive part.
111. The descriptive part includes the information listed in Article 8(1) of the PRD, most of which must be provided at the time of the request for *réorganisation judiciaire*²⁵⁰: identity of the debtor and, where applicable, identity of the appointed practitioners; the debtor's assets and liabilities; the debtor's economic situation and the situation of the employees; the different 'categories of claims or interests'²⁵¹ affected by the plan and the classes into which the creditors have been grouped; where applicable, the categories of creditors not affected by the plan and a description of the reasons why it is proposed not to include them among affected parties;²⁵² where applicable, the general consequences for employment (e.g. redundancies, part-time working); the arrangements for consulting and informing employee representatives; any new financing and the reasons why the new financing is necessary to implement the restructuring plan; a statement of reasons explaining why the restructuring plan offers a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business.²⁵³
112. The prescriptive part contains the measures to be taken to pay off the *créanciers sursitaires* mentioned on the list attached to the request for *réorganisation judiciaire*²⁵⁴ and, where applicable, the duration of any proposed restructuring measures.²⁵⁵

248 See above para. 69.

249 L. 7/08/2023, art. 40(6).

250 See above para. 65.

251 See above para. 103.

252 See above para. 104.

253 L. 7/08/2023, art. 41(2).

254 See above para. 65.

255 L. 7/08/2023, art. 41(3).

113. It should be noted that under Luxembourg law, the restructuring plan may involve the sale of the business: the plan may provide for the voluntary sale of all or part of the business or its activities.²⁵⁶
114. Article 42 of the New Law gives a general guideline as to the content of the restructuring plan: it describes ‘with precision’ the rights of all persons who are holders of *créances sursitaires* [stayable claims] and the modifications to their rights as a result of the vote and *homologation* [confirmation] of the restructuring plan.
115. According to Article 43, the restructuring measures that may be provided for in the restructuring plan are broadly envisaged: payment deadlines, reductions in the principal and interest of *créances sursitaires*, debt-for-equity swaps²⁵⁷, differentiated settlement of certain categories of claims – on the condition that creditors within the same category are treated equally and in proportion to the amount of their claim, waiver or rescheduling of interests.²⁵⁸
116. While restructuring measures can be imposed on creditors, the New Law also ensures the protection of certain creditors.
117. Firstly, the New Law affirmed the best-interests-of-creditors test defined as the situation in which ‘no creditor would be worse off under the restructuring plan than it would be if the normal rankings were applied, either in the case of bankruptcy or judicial liquidation, or in the case of a better alternative solution, if the restructuring plan was not confirmed’.²⁵⁹ This definition repeats, almost word for word, the definition provided by the PRD. Given the novelty of the concept and the absence of precedent on that point, it is currently unclear what the Luxembourg best-interests-of-creditors test entails (other than what is expressly said in the New Law). One should note that this principle applies particularly to the treatment of ‘small claims.’ The plan may include a list of creditors with minimal claims, for whom inclusion in the plan would pose an ‘unjustifiable administrative and financial burden.’ The plan should

256 L. 7/08/2023, art. 46.

257 See above para. 107.

258 See above para. 103.

259 L. 7/08/2023, art. 43, subpara 3.

then specify why it is in the best interests of all affected creditors for these claims to be dealt with outside the restructuring plan and paid immediately.²⁶⁰

118. Secondly, Article 44 of the New Law states that the restructuring plan proposals must include a payment proposal for *tous les créanciers* [all creditors].²⁶¹ This provision may seem inconsistent given that some creditors are not affected by the plan. Nevertheless, it should be noted that, in practice, the plan will also have to deal with not affected parties: as just seen for ‘small claims’, the plan may contain a list of not affected creditors who will be paid immediately in compliance with the best-interests-of-creditors test.²⁶² Besides, in accordance with Article 1(5) of the PRD, certain claims are particularly protected for reasons relating to their holder’s status as a ‘weaker party’ or for reasons relating to morality and public policy: the restructuring plan may not contain any reduction or waiver of claims arising from work performed prior to the opening of the *réorganisation judiciaire*; the plan may not provide for any reduction either of maintenance debts or of debts which result for the debtor from the obligation to make reparation for damage linked to the death or physical injury of a person; the plan may not provide for any reduction or waiver of criminal fines.
119. Thirdly, according to Article 45 of the New Law, the restructuring plan may impose a stay on the exercise of the rights of *créanciers sursitaires extraordinaires*²⁶³ for a period not exceeding twenty-four months from the date of the judgment confirming the *plan de réorganisation*. However, the plan may not include any other measures affecting the rights of *créanciers sursitaires extraordinaires* except with their individual consent or by amicable agreement reached in accordance with *réorganisation par accord amiable*.²⁶⁴ A difficulty may arise when a *créancier sursitaire extraordinaire* is only secured for a part of his claim. In this case, should the creditor be considered as a *créancier sursitaire extraordinaire* for his entire claim or only for the secured part of the claim? Given the silence of the New Law and the lack of doctrine and case law, it is difficult to know what the Luxembourg law’s position on that point is. In Belgium, the transposition law of 7 June 2023 provided an opportunity to clarify the

260 L. 7/08/2023, art. 43, subpara 6. According to the wording of the New Law, these ‘small claims’ should be paid immediately, regardless of whether they are not payable under their own terms and conditions.

261 L. 7/08/2023, art. 44.

262 See above para. 104 and 117.

263 See above para. 102.

264 See above para. 49 and seq.

rule: Belgian law now provides that *créanciers sursitaires extraordinaires* are only considered as such for the effectively secured part of their claim.²⁶⁵ As Belgian law is a source of inspiration for Luxembourg law, it is possible that the latter will follow this solution in the future.

120. Article 47 of the New Law limits the duration of the restructuring plan: the period for implementing the *plan de réorganisation* may not exceed five years from the date of its confirmation by the court.²⁶⁶

3.2.3 Adoption of the restructuring plan

121. In accordance with Article 9(1), subparagraph 1 of the PRD, Article 41 of the New Law provides that the debtor has the right to draw up and submit for adoption the *plan de réorganisation*. The Luxembourg law does not exercise the option in Article 9(1), subparagraph 2 of the PRD, which leaves Member States free to allow creditors or practitioners in the restructuring field to submit restructuring plans. The *mandataire de justice* will nevertheless have the opportunity to intervene in two ways under Luxembourg law. Firstly, if a *mandataire de justice* has been appointed under Article 22²⁶⁷, he will assist the debtor in drawing up the plan – but will certainly not be able to act independently.²⁶⁸ Secondly, if a *mandataire de justice* or an *administrateur provisoire* is appointed under Article 10 or Article 23 based on *manquements graves et caractérisés*²⁶⁹ [serious and obvious misconducts] of the debtor²⁷⁰, his mission – which will be determined by the court – might include the preparation and submission for adoption of a restructuring plan.

122. As soon as the *plan de réorganisation* is filed with the court registry, the *créanciers sursitaires* appearing on the list attached to the request for the opening of the *réorganisation judiciaire*²⁷¹ receive, through the court clerk, a communication indicating that they may consult the restructuring plan at the court registry, along with the place, day and time of the hearing at which a vote on the restructuring plan will be taken. It is regrettable that the New Law doesn't specify whether communication from the court clerk can be made electronically and

265 CDE, art. XX.75/2(2).

266 See below para. 125 and seq.

267 See above paras. 84 to 86.

268 L. 7/08/2023, art. 41(1), subpara 2.

269 See below para. 94.

270 See above paras. 45 and 87.

271 See above para. 65.

doesn't envisage that the plan can be consulted online. The notice also indicates that creditors will be able to submit their observations at the hearing and that only the *créanciers sursitaires ordinaires et extraordinaires*²⁷² whose rights are affected by the plan have the right to vote on the adoption of the plan, in accordance with Article 9(2) of the PRD.²⁷³ Employee representatives are also informed of the content of the *plan de réorganisation* by the debtor.²⁷⁴

123. Article 49 of the New Law specifies the procedures for adopting the *plan de réorganisation*. On the day of the hearing, the court will hear the report of the delegated judge, as well as the debtor and the creditors. The appointment of a *mandataire de justice* to represent the collective interests of the creditors could be useful in that respect.²⁷⁵
124. The Luxembourg law transposes Article 9(6) of the PRD by providing for a double majority for the adoption of the restructuring plan: to be approved, the *plan de réorganisation* must receive in each class (1) the favourable vote of the majority of the creditors, (2) representing by their uncontested or provisionally admitted²⁷⁶ claims at least one half of all the principal sums due.²⁷⁷ Creditors may vote in person, by written proxy, or through their lawyer (who may act without a special proxy). The option provided for in Article 9(7) of the PRD is not exercised by the New Law, which only provides for a formal vote. Creditors who have voted against the adoption of the plan can challenge whether the plan satisfies the best-interests-of-creditors test.²⁷⁸

3.2.4 Confirmation (homologation) of the restructuring plan and cross-class cram-down

125. Under Luxembourg law, the confirmation of the *plan de réorganisation* systematically requires its *homologation* [confirmation]. Consequently, Article 10(1) of

272 See above para. 102.

273 L. 7/08/2023, art. 48, subpara 1.

274 L. 7/08/2023, art. 48, subpara 3.

275 See above para. 86.

276 See above para. 109.

277 With regard to 'half of all the principal sums due', it is not entirely clear whether the New Law considers either the principal sums due to the creditors grouped together in the class in question, or the principal sums due in toto. The first proposal seems to be more relevant, given the wording of the text. Moreover, Belgian law states that the *plan de réorganisation* is considered to be approved 'by a class of creditors' if the creditors 'representing half of the claims in principal and interest' approve the plan (CDE, art. XX.83/14(1)). Given the influence of Belgian law in Luxembourg, one can assume that the Luxembourg provision should be understood and interpreted in that sense.

278 See above para. 117.

the PRD is inapplicable in Luxembourg law: under Article 50 of the New Law, all restructuring plans are subject to *homologation* by the court.

126. Within fifteen days of the hearing, the court decides whether or not to confirm the *plan de réorganisation*.²⁷⁹ *Homologation* of restructuring plans under Luxembourg law is subject more or less to the conditions set out in Article 10(2) of the PRD: compliance with the formalities for adoption;²⁸⁰ equal treatment of creditors belonging to the same category;²⁸¹ any new financing is necessary to implement the restructuring plan and does not unfairly prejudice the interests of creditors;²⁸² satisfaction of the best-interests-of-creditors test, which creditors voting against adoption of the plan may challenge “in a reasoned manner.”²⁸³ On this last point, in the event of a challenge by dissenting creditors, the court must verify that the restructuring plan meets the best-interests-of-creditors test,²⁸⁴ in accordance with Article 10(2), subparagraph 2, of the PRD.
127. Article 50, subparagraph 2, of the New Law transposes in Luxembourg law the cross-class cram-down mechanism provided for in Article 11 of the PRD. If the *plan de réorganisation* has not been approved by the affected parties in each class authorized to vote, it may be *homologué* [confirmed] on the proposal of the debtor or with the agreement of the debtor and be imposed on the dissenting class of creditors.
128. This assumes that the restructuring plan has been approved by one of the classes of creditors authorized to vote and that it meets at least the following three conditions:
- any new financing is necessary to implement the plan and does not unfairly prejudice the interests of creditors, and the best-interests-of-creditors test is satisfied;
 - where the plan has been approved solely by the class of *créanciers sursitaires ordinaires*, creditors in the class of *créanciers sursitaires extraordinaires*

279 L. 7/08/2023, art. 50, subpara 1.

280 L. 7/08/2023, art. 50, subpara 3.

281 L. 7/08/2023, art. 43, subpara 2. – See above paras. 103 and 115.

282 L. 7/08/2023, art. 50, subpara 2.

283 L. 7/08/2023, art. 43, subpara 3, and 49, subpara 7. See above para 117.

284 L. 7/08/2023, art. 50, subpara 2.

are treated “more favourably” than creditors in the class of *créanciers sursitaires ordinaires*. The New Law may appear rather ambiguous on this point, because of the terms used. Indeed, the wording of the law, which reproduces the terms of Article 11(1)(c) of the PRD, might suggest that the relative priority rule (RPR) has been adopted in Luxembourg law. From this point of view, French law has adopted – with important exceptions²⁸⁵ – absolute priority rule (APR)²⁸⁶ in much more explicit terms, providing that cross-class cram-down is only possible if the claims of affected creditors of a class that voted against the plan are satisfied in full by the same or equivalent means when a more junior class is entitled to a payment or retains an interest under the plan, in compliance with Article 11(2) of the PRD.²⁸⁷ This being said, one must recall that Article 45 of the New Law provides that, apart from a stay, the *plan de réorganisation* may not include any other measure affecting the rights of *créanciers sursitaires extraordinaires*, except with their individual consent.²⁸⁸ As a result, Luxembourg law ensures that, if dissenting, the class of *créanciers sursitaires extraordinaires* is paid in full if the *créanciers sursitaires ordinaires* receives any distribution or keeps any interest under the restructuring plan. Thus, APR applies effectively under Luxembourg law;

- no class of affected parties may, under the restructuring plan, receive or retain more than the total amount of its claims or interests.

129. In addition, *homologation* of the restructuring plan requires compliance with the formalities prescribed by law and equal treatment of creditors in the same category.²⁸⁹

285 C. com., Art. L. 626-32, II.

286 About this rule: O. Debenne et E. Rosier, ‘La règle de priorité absolue’, Rev. proc. coll. nov.-déc. 2021, étude 20.

287 C. com., Art. L. 626-32, I, 3°. See Th. Mastrullo, ‘Between modernity and prudence: the transposition into French law of Directive (UE) 2019/1023 of 20 June 2019 on restructuring and insolvency’, EIRJ-2022-4.

288 See above para. 119.

289 See above para. 126.

130. A few clarifications are necessary due to the specific nature of the choices made by the Luxembourg lawmaker:
- (1) The rule that the plan must be approved by “a majority of the voting of affected parties”, laid down in Article 11(1)(b)(i) of the PRD, is not applicable in Luxembourg, where only two classes are provided for. The dissent of one of the two classes therefore automatically entails the application of Article 11(1)(b)(ii) of the PRD, relating to the case where the plan has been approved by at least one of the voting classes of affected parties.
 - (2) Since there are only two classes of creditors, the priority rule adopted by the Luxembourg law²⁹⁰ applies only to the class of *créanciers sursitaires extraordinaires*.
131. Article 11(2) of the PRD gives Member States the option of opting for the absolute priority rule (APR), under which the dissenting class of affected creditors is paid in full if a more junior class receives any distribution or keeps any interest under the restructuring plan. This option is not exercised in Luxembourg: the Luxembourg lawmaker has deemed it of little interest since the New Law provides that the claims of *créanciers sursitaires extraordinaires* cannot be reduced without their individual consent. Accordingly, the APR is implicitly but necessarily applicable under Luxembourg law.²⁹¹
132. Several rules ensure that the *homologation* decision is taken in an efficient manner and with a view to expeditious treatment of the matter, in accordance with Article 10(4) of the PRD. If the court considers that the formalities have not been followed, that the conditions relating to new financing and satisfaction of the best-interests-of-creditors test have not been met, or that the *plan de réorganisation* is contrary to public policy, it may, by reasoned decision and before giving judgment, authorize the debtor to submit an adapted restructuring plan to the creditors, in accordance with the same formalities as set out above. The court sets out in a single decision ‘all the objections that it considers should be made to the plan’. In this case, the stay is extended but may not exceed twelve months. Decisions taken at this stage can only be appealed together with the final *homologation* judgment.²⁹²

290 See above para. 128.

291 Ibid.

292 L. 7/08/2023, art. 50, subpara 3.

133. In addition, the New Law sets out a limitative list of circumstances in which *homologation* may be refused: failure to comply with the formalities required by law; failure to comply with the above-mentioned conditions relating to new financing and the best-interests-of-creditors test in the event of a challenge by dissenting creditors²⁹³; the plan does not offer a reasonable prospect of preventing the insolvency of the debtor or ensuring the viability of the business, as required by Article 10(3) of the PRD; breach of public policy.²⁹⁴ Finally, *homologation* may not be made subject to any condition not provided for in the restructuring plan, nor may it make any amendment whatsoever to the plan.²⁹⁵
134. The judgment ruling on *homologation* closes the *réorganisation judiciaire* proceedings.²⁹⁶ It is published in the *RESA* and notified to the debtor and the creditors.²⁹⁷
135. Regarding appeals, Article 51 of the New Law provides that the judgment ruling on the application for *homologation* may be appealed. More specifically, the debtor may lodge an appeal if the *homologation* is rejected, and the parties involved in the *réorganisation judiciaire*²⁹⁸ may appeal if the *homologation* is granted. The public prosecutor also has the right to appeal.²⁹⁹ Where the appeal is lodged by a creditor, it is directed against all the parties involved in the proceedings as well as the debtor.³⁰⁰ The time limit for lodging an appeal is fifteen days from the date of notification of the judgment.³⁰¹
136. In accordance with Article 16(2) of the PRD, Article 51, subparagraph 4, of the New Law provides that appeals shall be heard as a matter of urgency and in accordance with the same procedure as at first instance. The action is brought and judged *comme en matière de référé* [as in expedited proceedings], with the

293 See above para. 126.

294 L. 7/08/2023, art. 50, subpara 4.

295 L. 7/08/2023, art. 50, subpara 5.

296 L. 7/08/2023, art. 50, subpara 6.

297 L. 7/08/2023, art. 50, subpara 7.

298 Article 51, subparagraph 2, of the New Law reads in French: 'les parties intervenues durant la procédure de réorganisation judiciaire'. Thus, the standing to appeal is defined broadly: the text mainly refers to affected creditors who have voted against the plan, but not only. For instance, one may think that an appointed practitioner (a *mandataire de justice* appointed on the request of an interested third party notably, see above para. 86), could also lodge appeal.

299 L. 7/08/2023, art. 51, subpara 7.

300 L. 7/08/2023, art. 51, subpara 2.

301 L. 7/08/2023, art. 51, subpara 3.

summons and the notice of appeal being served on the public prosecutor and the *procureur général d'État* [Chief public prosecutor] respectively.³⁰²

137. In accordance with Article 16(3) of the PRD, an appeal does not in principle have suspensive effect, unless the judgment refuses *homologation*.³⁰³ The appeal has full jurisdiction, with the Cour d'appel [Court of Appeal] having the same powers as the *tribunal d'arrondissement* [district court]. However, it is not a matter of setting aside the restructuring plan, according to the terms of Article 16(4)(a) of the PRD, but of refusing to confirm it. The Court may not confirm the restructuring plan by making amendments to it, as permitted by Article 16(4)(b) of the PRD.³⁰⁴

3.2.5 Effects of the restructuring plan

138. As required by Article 15(1) of the PRD, Article 53, subparagraph 1, of the New Law provides that the *homologation* of the *plan de réorganisation* shall render it binding on all *créanciers sursitaires*. *Créances sursitaires* [stayable claims] that have been contested, but judicially recognised after the *homologation*, are paid in accordance with the procedures set out for claims of the same nature.³⁰⁵
139. Under Article 15(2) of the PRD, Member States must ensure that creditors who are not involved in the adoption of the restructuring plan are not affected by the plan. In this respect, the New Law invites all affected creditors (*créanciers sursitaires ordinaires* and *créanciers sursitaires extraordinaires*) to vote. But the New Law also states that *créances sursitaires* that have not been included in the list of creditors and that have not been contested are paid after the plan has been fully implemented, in accordance with the procedures set out for claims of the same nature.³⁰⁶ And if the creditor has not been informed during the stay, it will be paid according to the terms and to the extent provided for in the *plan homologué* [confirmed plan] for similar claims.³⁰⁷

302 L. 7/08/2023, art. 51, subpara 5 and 6.

303 L. 7/08/2023, art. 51, subpara 9.

304 See above para. 133.

305 L. 7/08/2023, art. 53, subpara 2. The same provision stipulates that under no circumstances may the implementation of the *plan de réorganisation* be suspended in whole or in part as a result of decisions handed down on the contestations.

306 L. 7/08/2023, art. 53, subpara 3.

307 Ibid.

140. Unless expressly provided otherwise in the *plan de réorganisation*, the full implementation of the plan fully and definitively discharges the debtor in respect of all claims included therein.³⁰⁸ The restructuring plan does not benefit co-debtors or persons who have provided personal security, without prejudice to the effects of a specific agreement.³⁰⁹

3.2.6 Revocation of the restructuring plan

141. According to Article 54, subparagraph 1, of the New Law, the revocation of the *plan de réorganisation* may be requested by any creditor, where the debtor 'is clearly no longer able to implement the plan and the creditor suffers prejudice as a result.' The court rules on the report of the delegated judge and after hearing the debtor. The creditor who requested the revocation and the debtor are notified of the revocation judgment; the judgement is published in the *RESA*.³¹⁰

142. In addition, the *déclaration de faillite* [declaration of bankruptcy] of the debtor automatically entails the revocation of the restructuring plan.³¹¹

143. The revocation of the *plan de réorganisation* has a retroactive effect. It deprives the plan of all effect, except in respect of transactions and payments already made – and especially the sale that has already taken place of all or part of the business or its activities.³¹² Except for transactions and payments already made, the debtor and creditors are then in the same position as they would have been had there been no confirmed restructuring plan.³¹³

308 L. 7/08/2023, art. 53, subpara 4.

309 L. 7/08/2023, art. 53, subpara 5.

310 L. 7/08/2023, art. 54, subpara 2.

311 L. 7/08/2023, art. 54, subpara 3.

312 L. 7/08/2023, art. 54, subpara 4.

313 L. 7/08/2023, art. 54, subpara 5.