



# Latest News in Restructuring & Insolvency

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**Sébastien Binard**

Partner

**Clara Mara-Marhuenda**

Partner

**Grégory Minne**

Partner

**Paul Mousel**

Partner

**Stéphane Joly-Meunier**

Counsel



# Introduction

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**Sebastien Binard**

Partner

## More and more debt...

- **Global debt** represents a record \$244 trillion, which is more than **3 times** the size of the **global economy** (Bloomberg, 15/01/2019 – citing the IMF)
- It has **increased by 74%**, between 2007 and 2017 (McKinsey Global Institute, Visualizing Global Debt, 06/2018)
- Total **US corporate debt** is \$15.5 trillion, which is **74% of US GDP** (Forbes, U.S. Corporate Debt Continues To Rise As Do Problem Leveraged Loans, 25/07/2019)
- **Luxembourg tops the list** for non-financial **corporate debt to GDP** (McKinsey Global Institute, Visualizing Global Debt, 06/2018)

## ... and a looming economic slowdown...

- “**ECB cuts rates** and tells governments to act” (FT, 12/09/2019)
- “With **warning signs** now flashing, our preparedness could soon be tested” (FT, citing K. Georgieva, IMF, 25/09/2019)
- “We see the global economy going through a gradual, synchronized **slowdown**” (Bloomberg, citing D. Lipton, IMF, 01/10/2019)
- “We have limitations to monetary policy (...), which is our most valuable tool” (R. Dalio, Bridgewater Associates, Davos, 01/2019)

... means that winter is coming.

## EU is reacting to the threat

- **New instruments** created through legislative action (*i.e.* beyond monetary/fiscal policy actions)
- **Public debt:** framework on financial assistance to countries of the euro area
  - EFSF (2010) / ESM (2012)
- **Strengthening of financial institutions / insurers:**
  - CRR/CRD IV (2013)
  - BRRD/SRMR (2014)
  - Solvency II (2009/2016)
- **Corporate debtors:** reform of restructuring & insolvency legislation
  - Insolvency Regulation (recast) (2015)
  - Restructuring Directive (2019)

## Luxembourg context

- Record number of insolvencies (2018: 1,195)
  
- Many Luxembourg companies have leveraged balance sheets and will be at risk during recessions.
  
- Archaic legal framework but a significant reform is well-advanced
  - Draft bill N°6539 on preservation of business and modernisation of insolvency law
  - Continuity of business activities (reorganisation) over liquidations (e.g. bankruptcy)
  - Similar focus as Restructuring Directive

## Arendt in this picture

- Responsibility to the market to ensure readiness for the next financial crisis
- Willingness to cover all situations of financial difficulties and all actors
- Cross-practice discipline, combination of strengths and integration a must:
  - Legal advice/support: litigation, banking/finance, corporate, but also funds, employment, tax, capital markets
  - Beyond law:
    - Valuation, preparation of reorganisation plans, negotiations with creditors, operational advice, interim management (ABA)
    - Accounting, liquidation services (AS)
- Dedicated helpdesk: [RIHelpdesk@arendt.com](mailto:RIHelpdesk@arendt.com)

## What we will talk about today

1. Recent R&I developments in the financial sector (Paul Mousel)
2. Draft Bill N°6539 (Clara Mara-Marhuenda, Sébastien Binard)
3. EU Restructuring Directive (Grégory Minne, Stéphane Joly-Meunier)
4. Interactions between Draft Bill N°6539 and the EU Restructuring Directive (Grégory Minne, Sébastien Binard)
5. A few thoughts on Brexit implications to the R&I environment (Clara Mara-Marhuenda, Grégory Minne)
6. Q&A





# 1. Recent R&I developments in the financial sector

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**Paul Mousel**

Partner

## Recent developments in the financial sector (1)

- General bankruptcy rules (*faillite*) date back to Napoleon's Code of Commerce (1807) and have been up-dated in 1870 following a Belgian reform.
- Bankruptcy rules commonly apply to all merchants (*commerçants*) whatever their form (individuals or commercial companies) and whatever their activities.
- Individuals who are not merchants are excluded from bankruptcy rules, but may seek protection under the law of 8 Jan. 2013 on over-indebtedness.
- General features of bankruptcy rules:
  - filing for bankruptcy is mandatory
  - appointment of receiver (*curateur*) overseen by a judge
  - debtor loses administration of his assets/liabilities
  - collective winding-up and equal treatment of creditors
  - criminal sanctions in case of fraudulent bankruptcy

## Recent developments in the financial sector (2)

- General bankruptcy rules inadequate to deal with insolvencies in the financial sector
  - bankruptcy proceedings replaced by judicial liquidation
  - involvement of regulators (CSSF and CAA)
- Banks, investment firms, PFS managing third-party funds
  - L. 18 Dec. 2015 and BRRD
  - For Euro-Zone banks and certain investment firms: SRM and SRF
- Payment institutions; electronic money institutions (L. 2009)
- Investment funds (UCITS / UCI) → L. 17 Dec. 2010
- SIF (L. 2007); SICAR (L. 2008); SV (L. 2004)
- ASSEP / SEPCAV (L. 2005)
- FIAR (L. 2016); AIFM (L. 2013)
- Insurance and reinsurance companies (L. 2015)
- Some entities active in the financial sector remain subject to general bankruptcy rules

## Recent developments in the financial sector (3)

- Only State Prosecutor and Regulator may initiate judicial liquidation
- Liquidator overseen by judge
- Regulator loses supervisory role
- Voluntary liquidation still possible, but under supervision of Regulator
- Judicial liquidation always preceded by withdrawal of license and protection from creditors
- District Court may render some or all bankruptcy rules applicable
- Specific purpose of bank resolution mechanism
  - avoid impact on public finances
  - allow depositor / investor protection schemes to play
- Some recent cases : BCCI, Islandic banks, Madoff funds, ABLV



## 2. Draft Bill N°6539

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**Clara Mara-Marhuenda**

Partner

**Sébastien Binard**

Partner

## Draft Bill N°6539



on business preservation and the modernisation of bankruptcy law on 26 February 2013.

## Draft Bill N°6539 (1)

- Current situation: 3 forms of reorganisation proceedings
  - Stay of payments
  - Composition with creditors
  - Controlled management
- Seldom used in practice nowadays, archaic and inadequate
- 2009 governmental programme:
  - “The legislation on companies in financial difficulties will be reviewed”
  - “Efforts will be made (...) to favor recovery over liquidations”
- 2011 debate at the Chamber of Deputies: insolvency law a national priority
- 2013-2019: Draft Bill N°6539, ongoing parliamentary works
- Complex area of law to reform

## Draft Bill N°6539 (2)

- Holistic approach, 4 main focus areas
  - Preventive aspect – measures aimed at avoiding bankruptcy proceedings
    - Identifying businesses in difficulties at an early stage
    - Reorganisation proceedings
  - Repressive aspect – holding entrepreneurs acting in bad faith liable
  - Restorative aspect – giving the unfortunate entrepreneur a second chance
  - Social aspect – protecting business activity and jobs



## Draft Bill N°6539 (3)

- Preventive aspect – Identifying businesses in difficulties at an early stage
  - Series of **indicators**, including annual accounts, debts due to public authorities and redundancies for economic reasons.
  - **Information** communicated to dedicated public body comprising tax and social authorities (CEvED)
  - *Secrétariat du Comité de conjoncture* allowed to convene business owner/manager and formulate recommendations
  - CEvED and *Comité de conjoncture* allowed to grant payment terms, suggest reorganisation measures or seek bankruptcy/dissolution

## Draft Bill N°6539 (4)

- Preventive aspect – Reorganisation proceedings
  - Several proceedings which are adapted to the size of the relevant business
  - The proceedings are largely voluntary
  - Includes out-of-court proceedings, conservatory measures and judicial reorganisation

## Draft Bill N°6539 (5)

- Preventive aspect – Reorganisation proceedings
  - Out-of-court proceedings and conservatory measures
    - **Conciliation**
    - **Mutual agreement**
    - **Conservatory measure**

## Draft Bill N°6539 (6)

- Preventive aspect – Reorganisation proceedings
  - Judicial reorganisation
    - **The stay (“sursis”)**
    - **The collective agreement**
    - **The transfer under judicial control**



- Effect**
1. Opening of a file in the Commercial Court
  2. No bankruptcy / judicial liquidation / enforcement measure (with exceptions)
  3. Suspension of the obligation to submit a bankruptcy petition



*files application*

**District Court Commercial Chamber**

*informs*

**Public Prosecutor**

*opens*

**Procedures :**  
- Stay  
- Collective agreement and/or  
- Transfer under judicial control

*appoints*

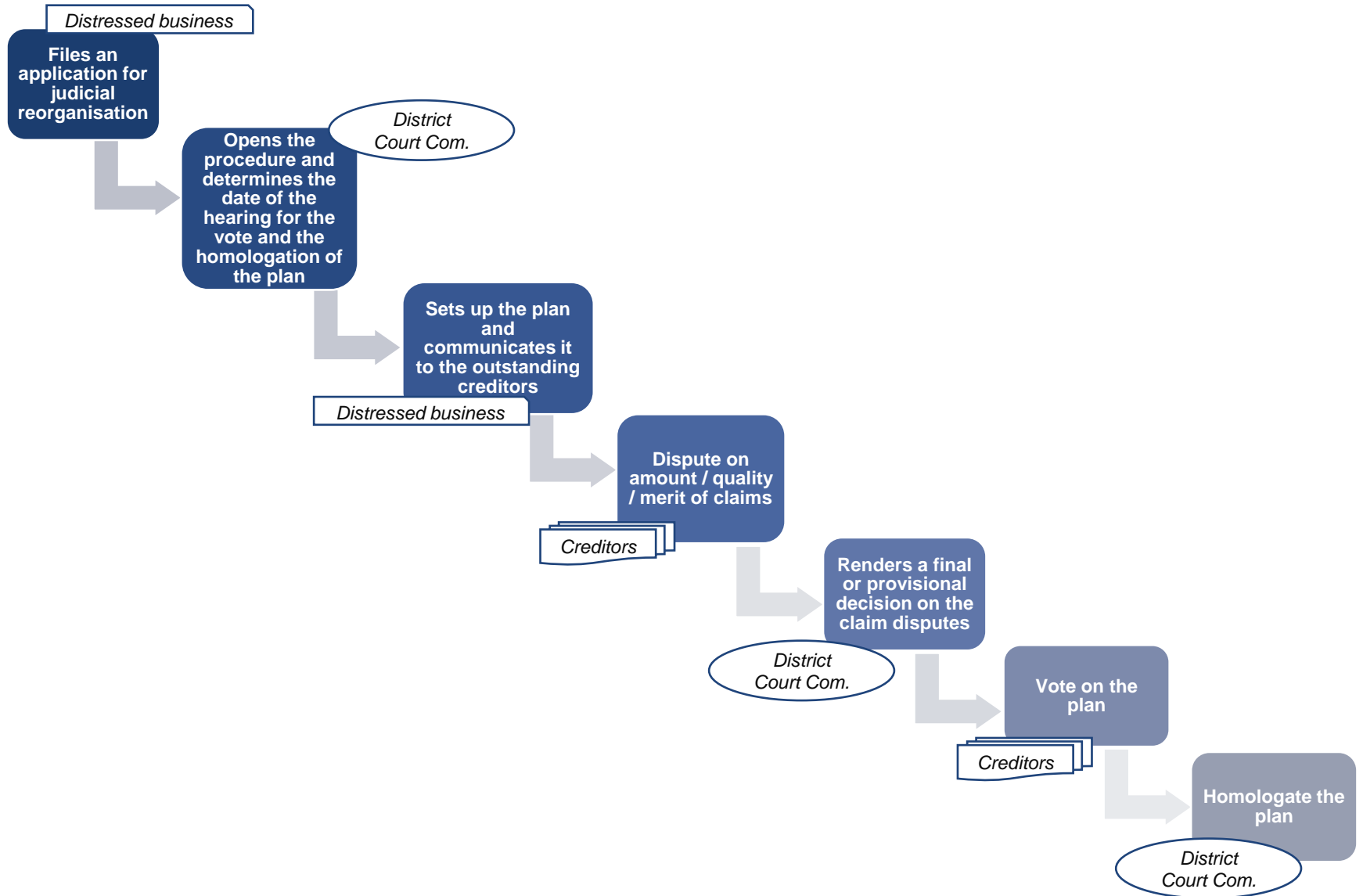
**Delegated judge**

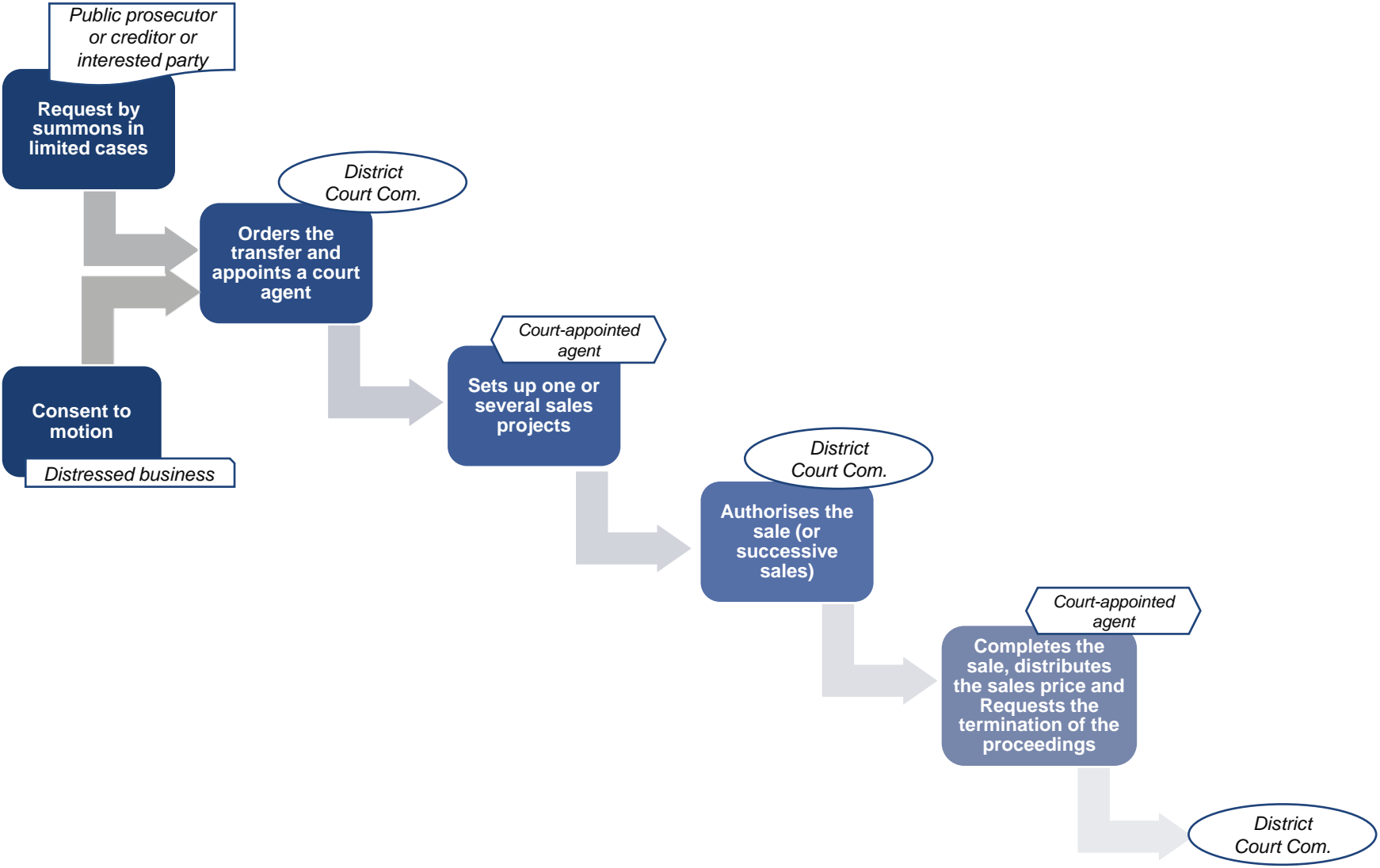
*appoints (optional)*

**Court-appointed agent (new) or provisional administrator**

**Effect**

1. Provisional stay of: enforcement proceedings, declaration of bankruptcy or judicial liquidation, enforcement measures (with exceptions)
2. Continuity of existing contracts
3. Payments are effective against third parties
4. New liabilities = debts of the insolvency estate





## Draft Bill N°6539 (10)

- Restorative aspect:
  - “Second chance”
  - For natural persons only, condition of good faith
  
- Repressive aspect
  - Objective: preventing abuses of insolvency law
  - Fraudulent bankruptcy easier to prosecute
  - Slightly lower liability threshold for directors
  - Fast-track dissolution of “phantom” companies
  
- Social aspect
  - Objective: preserving the business activity and jobs
  - Transfer of business under judicial control:
    - involvement of employees / employee representative
    - **but** possibility to take over some but not all employees





## 3. EU Restructuring Directive

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**Grégory Minne**

Partner

**Stéphane Joly-Meunier**

Counsel

## Directive (EU) 2019/1023



**20 June 2019**

on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measure to increase efficiency of restructuring, insolvency and discharge of debt.

## Directive (EU) 2019/1023 - KEY POINTS

- SCOPE
- PREVENTION ASPECTS
- RESTRUCTURING FRAMEWORK
- OTHER IMPACTS
- DIRECTIVE (EU) 2019/1023 AND REGULATION (EU) 2015/848

## Directive (EU) 2019/1023 - Scope

### WHO

is impacted?

- **Small, large** entrepreneurs engaged in **business, trade** and other **professional** activities
- **EXCLUSION**
  - Financial institutions
  - Regulated entities

### WHAT

WILL change ?

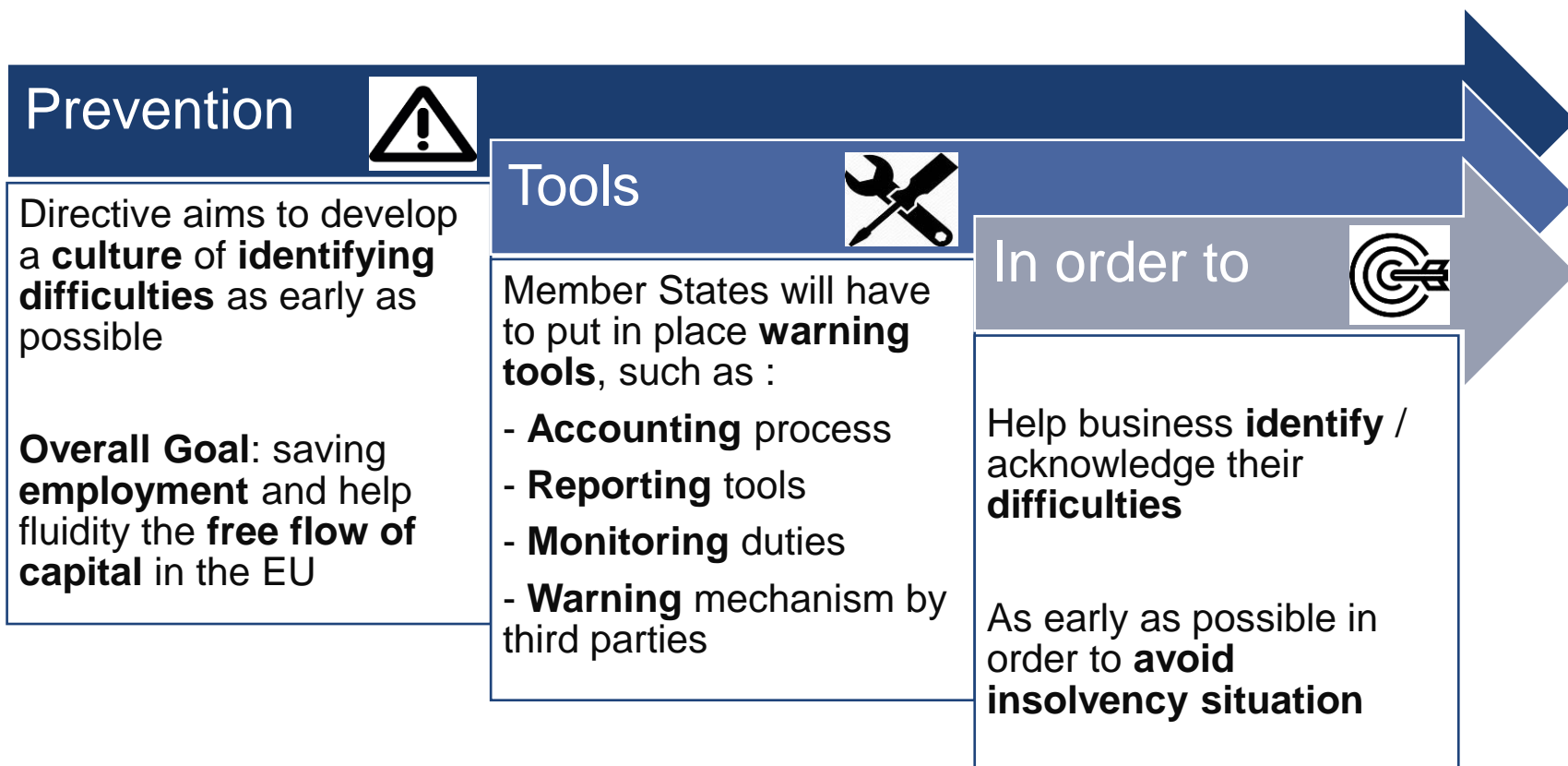
- **Harmonization** of the principles applicable to **restructuring** proceedings in the EU
- **Optimization** of the **rescue** mechanism of **distressed** business
- Promotion of a **culture** of **second chance** for failed entrepreneurs

### WHAT

will NOT change ?

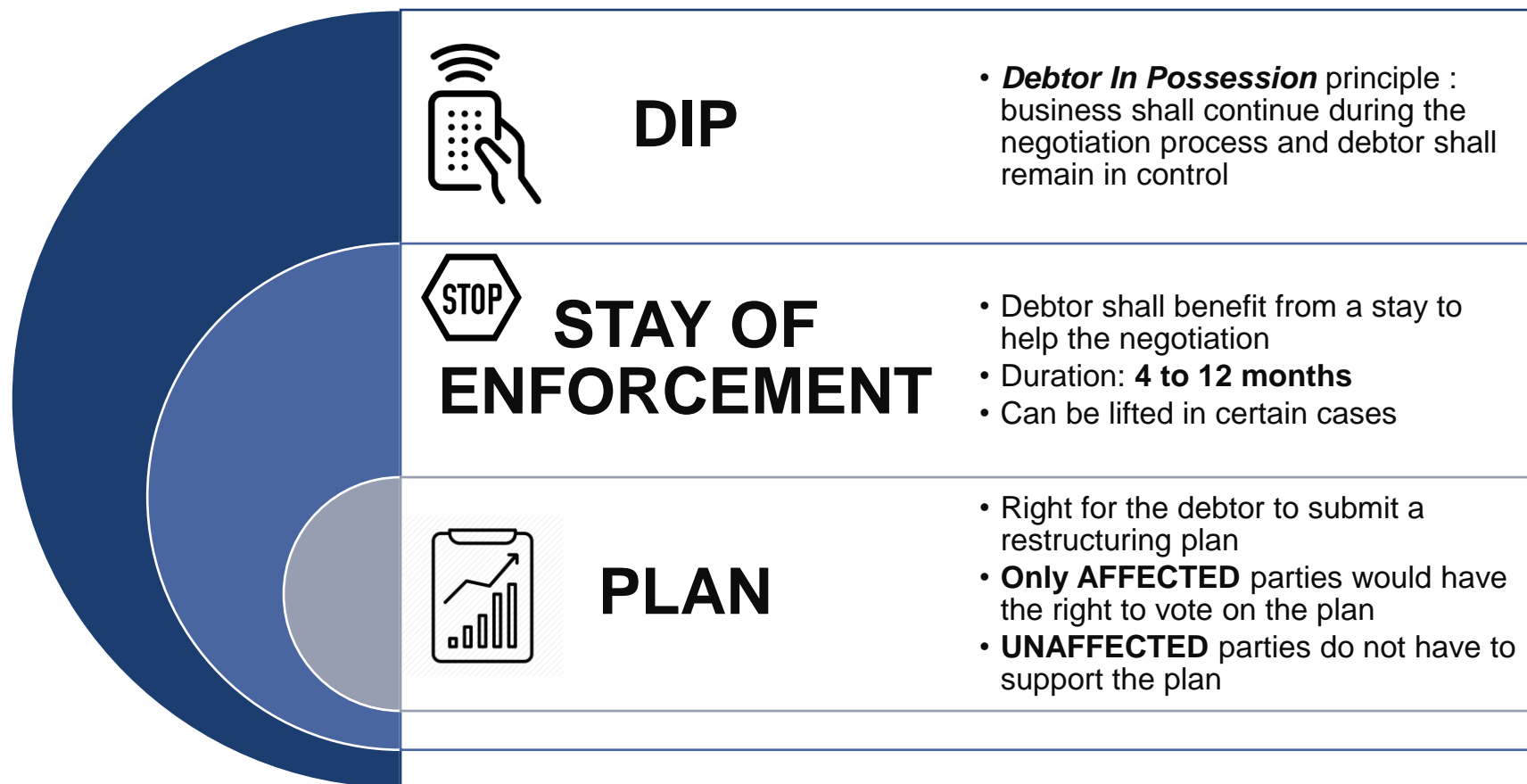
- **Insolvency Regulation**
- Rules applicable to **formal insolvency proceedings**
- **Consensual** restructuring rules

# Directive (EU) 2019/1023 – Prevention aspects



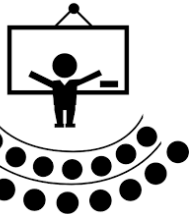
# Directive (EU) 2019/1023 – Restructuring aspects (1/2)

## RULES OF THE NEW RESTRUCTURING FRAMEWORK



# Directive (EU) 2019/1023 – Restructuring aspects (2/2)

## RULES TO IMPLEMENT A RESTRUCTURING PLAN



### Class System

- Affected Parties to be divided into classes (same of type of interest per class)
- Workers can be a separate class
- Classification will be examined by the court (when the plan is reviewed)



### Voting Rules

- A Majority in each class has to vote in favor of the plan (majority cannot be more than 75%)



### Court Confirmation

- Mandatory in certain cases (workforce affected, new financing,...)
- And subject to equal treatment of creditors with same interests, satisfaction of best-interest of creditors (new criteria)

### Cross-Class Cram-Down

- Plan can still be approved if plan meets the best interest of the creditors test and certain other conditions aimed at preserving the equal treatment of similar affected parties

## Directive (EU) 2019/1023 – Other impacts

### FINANCING

- **EXISTING**
  - *ipso facto* clause should be ineffective when a plan is negotiated
- **NEW**
  - Protection of lenders providing *interim* financing
  - E.g.: claw back immunity, no criminal liability, and priority of repayment



### EMPLOYEES

- Full labor law protection
- Stay of enforcement not applicable
- Can be part of a specific class
- Any other protective rights remain in place (e.g. right of information, etc.)





## Directive (EU) 2019/1023 and Regulation (EU) 2015/848

### Regulation (EU) 2015/848

- Jurisdiction (main and territorial proceedings)
- Applicable law (protection of security rights)
- Recognition and enforcement of judgments

## Directive (EU) 2019/1023 and Regulation (EU) 2015/848

Interaction of the two texts

- Inclusion of restructuring proceedings in Annex A
- Stay of individual enforcement proceedings
  - Jurisdiction
  - Applicable law
  - Recognition and enforcement of judgments
  - Protection of security rights



## 4. Interactions between Draft Bill N°6539 and the EU Restructuring Directive

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**Grégory Minne**

Partner

**Sébastien Binard**

Partner

## Draft Bill N°6539 vs Restructuring Directive

- Both instruments aim to cover generally similar issues under generally similar objectives:
  - prevention of insolvency situations
  - new and more efficient restructuring processes
  - second chance
- Additional requirements of the Restructuring Directive preventive measures:
  - stronger focus on **prevention vs information** at the stage of financial difficulties
  - additional **procedural constraints** to be complied with in restructuring proceedings, e.g.:
    - classifications of affected parties
    - cross-class cram-down mechanics



## 5. A few thoughts on Brexit implications to the R&I environment

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**Clara Mara-Marhuenda**

Partner

**Grégory Minne**

Partner

## Relationship between the EU and the UK after Brexit

- Description of the current situation
- “No deal” Brexit
  - Effects of UK proceedings in the EU
  - Effects of Luxembourg proceedings in the UK
  - Pending insolvency proceedings (transitional arrangements ?)
  - Protection of security rights



## Q&A

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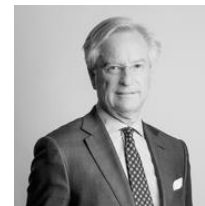


## Contact us



**Sébastien Binard**

Partner  
sebastien.binard@arendt.com  
+352 40 78 78 524



**Paul Mousel**

Partner  
paul.mousel@arendt.com  
+352 40 78 78 217



**Clara Mara-Marhuenda**

Partner  
clara.mara@arendt.com  
+352 40 78 78 276



**Stéphane Joly-Meunier**

Counsel  
stephane.joly-meunier@arendt.com  
+352 40 78 78 286



**Grégory Minne**

Partner  
gregory.minne@arendt.com  
+352 40 78 78 355

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