

Judicial reorganisation by agreement of the creditors (*accord collectif*)

The Law of 7 August 2023 on business preservation and modernising bankruptcy law introduces three new judicial reorganisation procedures. One of these proceedings allows a debtor to file for a judicial reorganisation proceeding aiming to reach a collective agreement with its creditors.



General

The Law of 7 August 2023 on business preservation and modernising bankruptcy law (the “**New Law**”) introduces three new judicial reorganisation procedures that aim to preserve the continuity of a company’s assets or activities. In particular, those procedures intend to prevent that a company needs to file for bankruptcy automatically when it is in difficulty.

The three proceedings, aiming at obtaining a suspension (*sursis*) of payment, are either (i) for the purpose of reaching a settlement agreement (*accord amiable*), or (ii) to obtain the agreement of the creditors (*accord collectif*) in accordance with articles 38 to 45 of the New Law, or (iii) to enable all or part of the assets or activities to be transferred by court order (*transfert par décision de justice*) to one or more third parties in accordance with articles 55 to 64 of the New Law.

The conditions to open a judicial reorganisation procedure, the petition to open one and the subsequent proceedings are common to all three reorganisation procedures and reference is made to the [Newsflash dated 12 June 2024](#) for a summary thereof.

This Newsflash intends to provide an overview of the rules and procedures specific to the judicial reorganisation procedure by collective agreement. In short, this reorganisation procedure aims at obtaining the approval by a majority of the creditors of each class on a reorganisation plan, which will then, after being approved (*homologué*) by the court, be binding on all existing creditors.

Reorganisation plan

(1) Contents

The reorganisation plan consists of a descriptive part and a prescriptive part.

The descriptive part of the plan describes the state of the business, the difficulties it is experiencing and the means to be implemented to remedy them. It specifies how the debtor intends to restore the company’s profitability.

The prescriptive part contains the specific measures to be taken to pay off the surplus creditors.

(2) Reorganisation measures

Subject to certain reservations, these measures may be determined by the debtor on a completely voluntary basis, depending on his ability to repay. In particular, the plan may provide for :

- payment terms/extension;
- a partial debt waiver;
- the conversion of debts into shares;
- deferred payments;
- a waiver of interest;
- the rescheduling of interest payments;
- prohibiting the off-set of claims against debts owed by the creditor subsequent to approval of the plan by the court (*homologation*);
- a reduction in the payroll, with possible redundancies;
- the suspension of the exercise of the existing rights of extraordinary creditors for a period not exceeding twenty-four months from the date of the judgment validating the plan, provided that the interest on their claims is paid during this period; or
- the voluntary transfer of all or part of the business or its activities.

(3) General principles of the plan

The plan must be in the best interest of the creditors (*meilleur intérêt des créanciers*), meaning that no creditor is in a less favourable position as a result of the reorganisation plan than he would be if the normal order of priorities were applied, either in the case of bankruptcy or compulsory liquidation, or in the case of a better alternative solution, if the plan were not approved.

The implementation period of the plan may not exceed five years from the date of approval by the court.

Procedure once the reorganisation plan has been filed with the Court registry

(1) Communication by the court clerk's office to the creditors indicating

- a) that the plan is under review and that they may consult it at the court clerk's office ;
- b) the place, day and time of the hearing at which the vote on the plan will take place, to be held at the earliest fifteen days after this communication ;

c) that they may share their observations on the proposed plan either in writing or orally at the hearing ; and

d) that only ordinary and extraordinary creditors whose rights are affected by the plan may take part in the vote.

(2) Vote

On the day indicated to the creditors, the court hears the delegated judge's report, as well as the debtor and the creditors' arguments.

The reorganisation plan is deemed to be approved by the creditors when the ballot receives a favourable vote of a majority of the creditors in each class, representing half of all the sums due in principal by their uncontested or provisionally admitted claims.

A creditor may take part in the vote in person, by written proxy or through his lawyer, who may act without special proxy.

Creditors who do not take part in the vote and the claims they hold are not taken into account when calculating majorities.

The court's approval (*homologation*) of the reorganisation plan

The court decides whether or not to approve the reorganisation plan within fifteen days of the hearing, and in any event before the suspension period (*sursis*) expires. The court will verify (i) whether any new financing provided for in the plan is necessary to implement the restructuring plan, (ii) whether the plan does not excessively prejudice the interests of the creditors and (iii) if the plan is contested by creditors, whether it meets the criterion of the best interest of the creditors.

If the plan has not been approved by each of the classes entitled to vote, it may nevertheless be approved and imposed on the dissenting classes (cross-class cram down) if:

- a) the reorganisation plan complies with the general requirements described above in the first paragraph of this section;
- b) where the plan has only been approved by the class of ordinary creditors, creditors in the extraordinary class are treated in a more favourable manner than creditors in the class of ordinary creditors;

c) no class of affected parties, under the plan, receives or retains more than the total amount of its claims or interests.

If the court considers that such formalities have not been complied with, that the conditions listed above have not been met or that the plan is contrary to public policy, it may, in a reasoned decision and before ruling, authorise the debtor to propose an adapted plan to the creditors. The court shall set out in a single decision all the objections that should be made – in its opinion – to the plan. In this case, it decides that the period of suspension should be extended without exceeding the maximum period allowed. The court also sets the date of the vote on the plan.

Approval (*homologation*) may only be refused by the court in the following cases:

- a) if the formalities required by law have not been complied with;
- b) if the conditions set out in the first paragraph of this section are not met, including, but not limited to, if the plan is contested by creditors and it does not meet the test of being in the best interest of creditors. The criterion of the best interests of creditors means that no dissenting creditor should be in a less favourable position as a result of the reorganisation plan than it would be if the normal order of priorities in liquidation were applied, either in the case of liquidation, whether by distribution of assets or by sale of the going concern, or in the case of a better alternative solution if the reorganisation plan were not validated;
- c) if the plan does not offer a reasonable prospect of avoiding the insolvency of the debtor or securing the viability of the business; or
- d) for violation of public order (*ordre public*). The role of the court is limited. Thus, approval of the reorganisation plan can only be refused in cases provided for by law. One of the grounds for refusal is a breach of public order, which is itself understood in its strictest sense. Violation of a mandatory provision should, therefore, not be considered as sufficient.

Approval of the reorganisation plan by the court makes it binding on all creditors.

Subject to any disputes arising from the implementation of the plan, the decision to approve the plan by the court closes the judicial reorganisation proceedings.

This decision is published in the RESA and notified by the court clerk's office to the debtor and the creditors.

An appeal may be lodged by the debtor if the approval is rejected, and by the parties involved in the judicial reorganisation proceedings when approval is granted. A creditor's appeal is directed against all parties involved in the judicial reorganisation proceedings as well as against the debtor.

The judgment may be appealed within fifteen days of its notification.

Your contact persons



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



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

