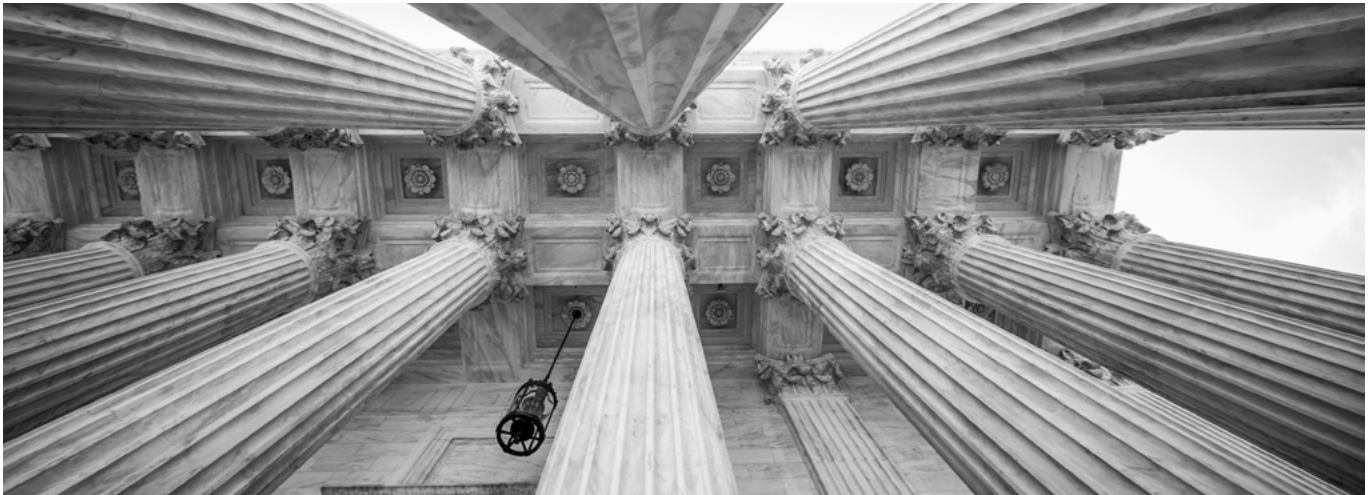


## Judicial reorganisation through transfer by court order (transfert par décision de justice)

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, the public prosecutor, a creditor or any other person with an interest in acquiring all or part of the business to file for a judicial reorganisation proceeding in the form of a transfer by court order.



### 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 67 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 through transfer by court order. In short, the court may order the transfer of all or part of the business or its activities in order to ensure its/their continuance.

### Who may initiate this procedure

A judicial reorganisation procedure through transfer by court order may be requested by:

- The debtor;
- The public prosecutor;
- Any creditor; or
- Any other person with an interest in acquiring all or part of the business.

Thus, the New Law clearly restricts the scope of persons who can initiate the judicial reorganisation process through transfer by court order.

It is, therefore, up to the person claiming to be a creditor to establish his/her/its status as a creditor.

A transfer by court order may also be requested by any person with an interest in acquiring all or part of the company. This interest must however be legitimate.

Thus, a competitor making such a request solely in order to consolidate its competitive position will not have a legitimate interest.

It was confirmed by recent Luxembourg case law that the sole fact that a company is a competitor is not sufficient to prove that the latter is acting with the sole aim of eliminating a competitor. Its interest is legitimate in itself. In order to deny the admissibility of a request to open a judicial reorganisation procedure, the court must therefore be able to identify in its purpose an intention that is manifestly opposite to preserving the continuity of the company's activities.

### **Additional conditions in case the opening of the procedure is not requested by the debtor itself**

A transfer by court order may be ordered by the court if not requested by the debtor itself when :

- the debtor fulfils the conditions for bankruptcy without having requested the opening of judicial reorganisation proceedings ;
- the court (i) rejects the application to initiate a judicial reorganisation proceeding, (ii) orders its early termination or (iii) revokes the reorganisation plan ;
- the creditors do not approve the judicial reorganisation plan ;
- the court refuses to approve the reorganisation plan.

The request is to be made in the petition or writ of summons for early termination of the reorganisation proceedings or revocation of the reorganisation plan, or in a separate writ directed against the debtor. As soon as the petition is filed or the summons served, the court appoints a delegate judge to report to the court hearing the case on the basis of the petition and on any elements that may be useful for its assessment.

### **The transfer of all or part of the business or its activities**

The Court of Appeal has recently confirmed that the holding of shares is not – in principle – a transferable activity within the meaning of the New Law.

A transferable activity should constitute an economic activity, the maintenance of which should be ensured in particular to preserve jobs. Doing so, the Court of Appeal confirmed the interpretation given to the “transfer of activities” by the parliamentary works, that referred to the transfer of a company's activities with a view to maintaining its economic viability, and specified that this transfer includes, in particular, the means of production, customers and staff.

### **Appointment of a court-appointed agent**

The court ordering the transfer appoints a court-appointed agent (*mandataire de justice*) to organise and carry out the transfer in the name and on behalf of the debtor. It determines the purpose of the transfer or leaves it to the discretion of the court-appointed agent.

The court-appointed agent will draw up one or more proposals in order to organise and carry out the court-ordered transfer through the sale or assignment of the assets necessary or useful to maintain all or part of the company's economic activity.

The court-appointed agent shall seek out and solicits offers, giving priority to maintaining all or part of the company's activity, while taking into account the rights of creditors and maintaining a certain level of employment. The latter being a priority in accordance with the parliamentary works.

It will then be up to the court to authorise one or more sales on the basis of the proposals submitted to it by the court-appointed agent. Once the sale(s) have been completed, the court will close the proceedings.

### **What about the creditors**

- Pending the planned transfer, current contracts continue to apply.
- Furthermore, the New Law allows the court to order an additional stay (*sursis*) which may not exceed 6 months from the date of the decision. This stay should enable the

court-appointed agent to organise the transfer while enjoying a certain protection from the creditors.

- However, any stay provided for by the New Law does not prevent the implementation of financial guarantees governed by the law dated 5 August 2005 on financial collateral arrangements, as amended.
- In the absence of a stay, creditors, and not only those benefiting from a financial guarantee, would be able to enforce their claims. Thus, making the chances of success of a court-ordered transfer procedure nearly inexistant.
- A prospective bidder may indicate one or more current agreements which are not concluded *intuitu personae* between the debtor and one or more co-contractors, which he wishes to take over in full, including past debts, if his bid is accepted. However, the consent of the co-contractor will be required for *intuitu personae* agreements. If an existing agreement is to be taken over, whether or not it has been concluded *intuitu personae*, the court-appointed agent must inform the other contracting party or parties concerned, even if their consent is not required.
- When the transfer involves real estate, registered mortgage or preferential creditors, mortgage or preferential creditors exempt from registration, and creditors who have had a summons or writ of seizure transcribed, must be invited to the authorisation procedure by registered letter sent at least eight days before the hearing.
- Finally, for a bid to be taken into consideration, the price offered for all the assets sold or transferred must be equal to or higher than the presumed value in the event of a bankruptcy or liquidation. Such valuation of the price will have to be carried out by the court-appointed agent, who will, however, have to take into account that the liquidation value or the value in case of bankruptcy can only be approximated. In the event that an offer is made by persons who exercise or have exercised control over the company and at the same time directly or indirectly exercise control over rights necessary for the continuation of its activities, the offer may only be taken into consideration on the condition that these rights are accessible under the same conditions to other bidders.

## Contacts



**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

