



## The judicial concordat

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Recent events have given a significant example of the application of a procedure provided for by law: the judicial composition.

### A little history.

The judicial composition procedure is not new. It was formerly known as the preventive composition of bankruptcy, and had been introduced into our law by a law of June 20, 1883 (temporary law), and then a law of June 29, 1887.

The institution had undergone various modifications by the law of August 10, 1946: the name was changed to the term “judicial concordat”.

The old law also provided for a concordat after bankruptcy which allowed the debtor to negotiate with his creditors, present at the bankruptcy, total or partial waivers of debts, in order to resume his activities and make the state of bankruptcy disappear.

These procedures, and mainly the last mentioned, had however fallen into disuse. There then appeared a void in the legislative arsenal, and it became practically impossible to prevent bankruptcy and to maintain an economic activity with all the social implications, in particular that this situation concealed.

The law of July 17, 1997, which entered into force on January 1, 1998, brought into our legislation a means of preventing bankruptcy, without the agreement of all the creditors (Cfr: *Infra*), by giving a new youth - with deep amendments – to the judicial composition.

### The conditions for granting a concordat.

The arrangement is granted “to the debtor” if he cannot temporarily pay his debts, or if the continuity of his business is threatened by difficulties which could lead, in the more or less short term, to a suspension of payments.

The hypothesis is therefore twofold: either the debtor experiences a temporary lack of liquidity preventing him from paying his creditors, or from a structural point of view, it appears that if the debtor continues his activities without providing solutions, he will find himself in the more or less short term in bankruptcy. In these two cases, however, it is necessary to be able to reasonably believe at the time of the grant that the situation can be cleaned up or that economic recovery will be possible.

The judicial composition is a procedure that is open only to traders in person or in company. The accompanying measures, and in particular the moratorium that it can impose on creditors, do not benefit the spouse or co-obligors, such as sureties.

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The judicial composition is introduced before the Commercial Court of the registered office or the domicile of the trader in difficulty.

The new law has almost completely abolished the condition of “unhappy and bona fide debtor”; there remains, however, the case of manifest bad faith or manifest incompetence of management which allows the Court to impose on the trader or the body of the company a procedure of prior authorization or certain acts of administration or disposal .

## The modes of introduction of the concordat.

The concordat can be introduced by the debtor himself or by the Public Prosecutor. The latter can indeed automatically submit to the Commercial Court the situation of a trader in difficulty, in particular on the basis of the information communicated to him by the Commercial Investigation Chamber.

The law also provides that the Commercial Investigation Chamber may ex officio examine whether the debtor fulfills the conditions for granting a composition.

It should be noted that these Commercial Investigation Chambers existed in practice before the entry into force of the law. The new law, however, gave them a legal framework, and imposed on various bodies (Courts, VAT, ONSS, etc.), the communication of information to enable the “tracking” of traders in difficulty.

## The actors of the agreement.

The Commercial Court is obviously an essential player in the judicial composition. Indeed, the decision to grant the provisional stay (Cfr: *Infra*) is taken by this Tribunal. The Court receives the reports of the stay commissioner and presides over the meeting(s) of creditors.

At any time, and even at the request of a creditor, the Court may decide to hear the debtor. The Court may also declare the debtor bankrupt after hearing the latter's defenses.

The decision to grant the provisional reprieve entails the appointment of one or more reprieve commissioners. The Commissioner of the suspended sentence must present the guarantees of independence and impartiality. He must have competence in business management and accounting, he must be subject to a code of ethics (Lawyers, Notaries, Chartered Accountants, etc.) and he must ensure his professional liability.

Its mission is to assist the debtor in his management, to report to the Court and to the creditors. He will have to guide the company without, however, and unless specified in the judgment appointing him, replacing the debtor in its management. The suspension commissioner will therefore not be a party to the contracts, and will not represent the debtor in legal proceedings. At the very least, he could possibly be called there. The Public Prosecutor will be present at each phase of the procedure.

## The stages of the procedure.

The settlement procedure takes place in two stages.

Seized ex officio or by a debtor, the Court may grant the provisional stay which gives rise to a period of observation. Creditors are not summoned, but the law provides that the Court may hear the creditor who so requests. In practice, at the initial stage, this seems impossible, since creditors have almost no way of being informed of the introduction of such a request by the debtor.

The decision granting the provisional stay is published in the Belgian Official Gazette at the behest of the clerk. It includes, in addition to the designation of the suspension commissioner, the invitation to the creditors to declare their claims within a set deadline, as well as the date of the hearing during which it will be ruled on the final suspension. This date must be retained within a maximum period of six months, because the provisional suspension cannot extend over a period of more than six months. This period can of course be shorter. It can however be

extended for certain circumstances (negotiations for the sale of a building in progress, waiting for a financial commitment from a third party, etc.) for a maximum period of three months. Practice shows that the six-month period is already very short in itself and that requests for extensions are numerous.

During this observation period, the debtor will have to draw up a recovery plan which will be submitted to the creditors at the scheduled hearing on the granting of the final stay. The stay commissioner will assist the debtor in drafting this plan.

The recovery plan is divided into two parts: a descriptive part which details the economic situation, the reasons for the difficulties and the evolution of the situation during the provisional stay and a prescriptive part which gives the measures that the debtor submits to his creditors. to allow the composition to be carried out: debt relief, debt rescheduling, priority payment and allocation, realization of assets, etc.

If the rescue of the company and the maintenance of the activities require a reduction in the payroll, a social restructuring plan will be planned, which can provide for layoffs if necessary. In this case, the staff representatives within the Works Council or failing that the Committee for Prevention and Protection at Work or failing that the trade union delegation or failing that a staff delegation, will be heard.

During the period of provisional suspension, the commissioner of the suspension must ensure that any disputes on the claims declared are settled, in particular in order to be able to define the amount of the liabilities and the number of creditors. These two figures are used to determine the voting quorums at the meeting called to decide on the granting of the final reprieve.

On the day fixed by the Court, the latter hears the debtor, the commissioner of the stay, the creditors. A vote is then taken. Only creditors who have declared a claim, and in respect of whom the plan provides for a stay, take part in the vote. The final reprieve may be granted if more than half of the creditors who have declared claims take part in the vote (in person or by proxy), and if these creditors voting in favor represent half of the declared liabilities.

The major innovation of the law is that privileged creditors (banks, VAT, Contributions, ONSS, Social Insurance Fund, etc.) are treated like other creditors, and must therefore take part in the vote, and may possibly be opposed by the recovery plan. Only small exception: the duration of the final reprieve.

In principle, the final suspension cannot exceed 2 years (with a single possibility of extension for a maximum period of one year). However, the reorganization plan may be imposed on preferential creditors without their consent, and only if the plan provides that payments or reimbursements are not suspended for more than 18 months.

Once the final stay has been granted, the stay commissioner remains in office and ensures that the plan is carried out. He will report to the Tribunal, and he may submit to the Tribunal, the difficulties arising from the execution of the plan. The Court may possibly decide to revoke the stay.

The vote in favor of the plan and the granting of the definitive reprieve have a coercive effect with regard to all the creditors, even those who did not take part in the vote or objected. Of course, the creditors concerned are those whose claim existed on the day the provisional stay was granted. The other creditors are not affected by the recovery plan as set out below.

## Consequences of the granting of the provisional reprieve.

The provisional stay does not put an end to the activity of the debtor and does not put an end to the contracts in progress. This means that not only contracts concluded before the concordat remain in force and must be executed normally. On the other hand, the debtor can

and will undoubtedly have to enter into new contracts after the granting of the final stay (for example with a supplier of goods).

All the debts which will arise during the concordat must be paid without the possible reductions provided for by the plan being applicable (Ex: rent, new expiry date of a leasing contract, supplies of goods or services, etc.)

It is also provided that the interest produced by the debts declared in the composition must be paid in any case during the period of the provisional stay for all creditors and during the period of the definitive stay for privileged creditors.

In order to provide the debtor with the peace of mind needed to examine the situation and draw up the recovery plan, it is provided that no more attachments can be made. Seizures made before the granting of the provisional stay retain their protective effect; the debtor may request the release before the Commercial Court.

## Business transfer.

The law reserves a special procedure aimed at the transfer of the company on the initiative of the commissioner to the stay. Without being bound by a time limit or a phase of the procedure, the commissioner of the stay may, with the authorization of the Court, carry out a total or partial transfer of the business, if this transfer contributes to the reimbursement of the creditors, and if it enables economic activity and a certain volume of employment to be maintained.

The proposal will be discussed with the competent management bodies of the company and the workers' representatives. The transfer will only be authorized with the vote of the creditors on the basis of the two quorums mentioned above (half of the creditors and half of the claims).

## Conclusion.

This law can only be applauded. Its goal is pragmatic and meets the realities of economic life. The troubled trader usually just sinks deeper day by day to the ultimate detriment of all his creditors. There is also an obvious risk that the debtor in dire straits will commit indelicacy or favor one or the other creditor. The establishment of a "peace of the brave" with the appointment of a Commissioner with a reprieve, makes it possible to avoid these problems in the greatest transparency and with the control of the Commercial Court. This can also allow the maintenance of an economic activity and a job. The realization of the composition is in principle more advantageous for all the creditors than would be a priori a bankruptcy.

The practice, however, paints a less enthusiastic picture. Many creditors do not distinguish between composition and bankruptcy, and are reluctant to continue negotiating with the debtor. The deadlines set by the procedure are often too short, both for the provisional stay and for the definitive stay, as well as the payment of privileged claims, which are often the most important, within 18 months.

The success statistics for concordats are pretty bad. The cause is certainly also to be found among traders who may have turned to the procedure a little too late...

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