Legislative changes in Belgium

Louis Verstraeten provides an update on the legislative changes recently adopted in Belgium and those changes yet to become law later this calendar year

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Belgian insolvency law was freshly codified in 2018 but will undergo several changes in 2020-2021. This article gives you an update on the legislative changes recently adopted and those changes yet to become law later this calendar year.

A second corona-moratorium

In December 2020, the Belgian legislator has adopted a law installing a second moratorium for a short period from 24 December 2020 until 31 January 2021, to shield Belgian business undertakings from being declared bankrupt. Contrary to the first moratorium (spring 2020), this one did not provide a general "stay" for all companies. Only companies affected by the governmental closure measures were automatically granted a stay, protecting them, among others, from being summoned in bankruptcy or from their assets being attached by creditors. The retail sector and shops have stayed open throughout the winter season and could therefore not benefit from this moratorium, but the entertainment and hospitality sector did certainly benefit from it, as well as from the fact that the government has muzzled the tax collector.

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Changes to the judicial reorganisation

Instead of extending the duration of the second moratorium, on 21 March 2021 the legislator has adopted a modification to the Judicial Reorganisation Procedure.

This judicial reorganisation was first adopted in Belgian law in 1997, was revamped in 2009 via the Law on Continuation of Business Undertakings and was codified in 2018 in the Belgian Insolvency Code, Book XX of the Code of Economic Law. It is a stable insolvency instrument which has benefited from solid case-law developed in the past decade.

Three changes have now been adopted, aiming to lower the threshold and increase the success of the procedure. On the one side, this should be to the benefit of small and midsize companies of which many are expected to be threatened in their continuity or virtually insolvent. On the other side of the spectrum also larger companies with strongly positioned creditors should benefit from these changes.

A silent pre-pack reorganisation

First, a "pre-pack-reorganisation" is facilitated by creating a discrete phase to reach a "preparatory agreement". The debtor files a petition with the court to have a judicial trustee appointed who will assist in the negotiations with key-creditors, or with all creditors when appropriate. Once appointed, the trustee can intervene with the court to impose terms and conditions "adapted to the needs of the debtor" on the creditor. This court injunction can have a duration of maximum of four months and the court can at any time revoke these terms and conditions.

Once the required amicable agreement or reorganisation plan has been agreed with the creditors, the silent preparatory phase passes into a public reorganisation procedure to

obtain the homologation from the court under the usual rules of the judicial reorganisation. This is a very welcome novelty in the Belgian insolvency code, after a previous attempt failed in 2018.

Easier access to the judicial reorganisation procedure

Secondly, the access to the judicial reorganisation procedure has been made easier. Absence of some of the required documents, bookkeeping documents and statements from accountants or auditors, is no longer sanctioned by inadmissibility. Missing documents can be filed at a later stage and the court can even pardon the absence of certain (non-essential) exhibits. This is a welcome relaxation of the existing formal approach of the judicial reorganisation, but it opens the door to courts applying the rules in an unfair variety of severity.

Tax inequalities eliminated

Thirdly, the legislator eliminates an existing inequality in the tax effects of the debt reduction obtained under the judicial reorganisation. Now, all depreciations and provisions on claims and receivables shall be treated equally, be it they result from amicable agreements, collective agreements (such as a reorganisation plan) or through a transfer of the business under judicial supervision.

Temporary effect of the new law

The aforementioned important changes to the Belgian judicial reorganisation entered into effect on 26 March 2021 when the law was published in the official state gazette. Surprisingly, these changes have a temporary duration and shall cease to have effect on 30 June 2021. At that date, the EU Directive on Restructuring and Insolvency must be implemented in Belgian law, whereby it is expected that the pre-pack reorganisation and the easier access to the procedure shall become permanent features of the Belgian insolvency legislation. A legislative proposal to implement the Directive should currently be under construction.

A legislative proposal to repair the effects of the "Plessers" case

An older legislative proposal is waiting for a vote in the Chamber of Belgian parliament in view of reinforcing and repairing the possibility to transfer an undertaking in distress via the judicial reorganisation procedure. Two years ago, the Court of Justice of the European Union (ECJ) ruled in the Plessers Case (C-509/17,ECLI:EU:C:2019:424, dd 16 May 2019) that the Belgian transfer of an undertaking via judicial reorganisation infringed the rights of employees when not all employees are involved in the transfer.

If the proposal would be accepted, a text will be included in the law to emphasize that the transfer of an undertaking via judicial reorganisation is really a "liquidation procedure". The acquirer of the undertaking will from then on have to justify properly why certain employees will be excluded from the transfer. The transfer clears the undertaking from any previous debts, which remain in the insolvent entity. The court, when approving the transfer, will decide upon request to open judicial liquidation or bankruptcy proceedings for the insolvent entity.

It remains to be seen whether the law, when modified, will pass the severe test of the ECJ, which has previously brushed a Dutch reorganisation via bankruptcy off the table for the benefit of the employees in the infamous Estro Case.

Zombie companies and empty boxes

A second subject in the legislative proposal is to expedite the treatment of bankrupt companies with no apparent estate or assets. Zombie companies have always been a problem and the COVID-19 crisis will only exacerbate this phenomenon. This proposal wants to address this issue, but first needs to be voted in Parliament.

To save the courts time and resources and the Belgian state some budget, the courts could soon order the "turbo-liquidation" of the undertaking summoned in bankruptcy, instead of declaring it bankrupt and appointing an IP. "Turbo-liquidation" means that a judicial liquidation of the undertaking is ordered, but that at the same time the immediate closure of the liquidation is pronounced, meaning an "over and out" for the company.

Apart from the obvious short term financial and organisational advantages for courts and the Belgian state, this proposal shall likely have adverse effects. Already, some consider the existing examples of "turbo-liquidation" of sleeping companies as an easy and costless way to liquidate an undertaking.

Conclusion

The rescue culture should drastically improve with the adopted changes to the Belgian insolvency code and the legislative proposals in the pipeline should further enhance the possibilities to restructure companies, both large and small, whether through a silent pre-pack reorganisation or through a public procedure and whether amicably, via a collective cram-down or through an auctioned transfer. All this should culminate in a new law implementing the Directive. The Spring of 2021 is a fertile period for legislative changes in Belgium and before the sun will be at the zenith this summer, our insolvency law will have become more diverse, more flexible and more efficient. ■

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