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NEW as of 1 September 2023: Significant changes to the restructuring procedures

Belgium has finally implemented Directive 2019/1023 (Directive on restructuring and insolvency) by adopting the law of 7 June 2023. This brings significant changes, mainly focused on the restructuring procedures. The Belgian legislator also took this opportunity to implement case-law of the European Court of Justice regarding the transfer of an enterprise under judicial supervision and Constitutional Court case-law on the system of discharge of debt ('kwijtschelding').

Below we list the most significant changes.

Difference between SME's and big companies

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tools to prevent shareholders from blocking the Restructuring plans and the procedure to follow will depend on the size of an enterprise. The new law distinguishes between SME's and big companies. An SME does not exceed one or more of the following thresholds:

- 250 employees (on an annual average basis)
- Annual turnover of 40 million EUR (excl.VAT)
- Balance sheet total of 20 million EUR

Enterprises acting as a group can also be considered as a big company if they exceed the thresholds on a consolidated basis.

SME's have access to reorganization procedures that are 'lighter' in comparison to big companies (e.g. no cram down rules, etc.), as the legislator did not want to restrict access to reorganization procedures by over-complicating the rules. However, SME's can decide to apply the rules for big companies (Opt-in possibility).

Involvement of equity holders

Equity holders can now be part of a reorganization plan. Under the old regime, reorganization plans were only proposed to creditors, while the equity holders were not part of the plan and thus not affected.

Equity holders are defined as persons who have an ownership interest in the capital of an enterprise, including a shareholder, in so far as that person is not a creditor.

Under the new rules, affected equity holders can be part of reorganization plans. This means that they will have a voting right (in principle in a separate class and can impact the reorganization plan.

The new law also provides application for a restructuring procedure or the execution of reorganization plans.

Voting in classes & treatment of no voters

Big companies, or SME's that opt-in, will, in principle, no longer suffice by drafting reorganization plans which divide the known creditors in only two categories of extraordinary and ordinary creditors (these two categories are the bare minimum).

Restructuring plans will need to form different classes if the rights of creditors are so different that they do not hold a similar position. This is based on two criteria:

(i) The rights provided by the proposed reorganization plan

(ii) The rights creditors would hold in case of bankruptcy/liquidation of the debtor

Reorganization plans are approved if each separate class reaches a simple majority. The majority is reached when creditors belonging to a class and holding 50% of all outstanding debt (in principal) vote in favor of the plan.

In case there are creditors that vote against the adoption of the reorganization plan, the court will have to verify if the 'best interest of creditors' test has been fulfilled. This test checks whether these creditors are not worse off in the reorganization plan compared to liquidation in a bankruptcy scenario. This requires an estimation of the liquidation value of the debtor.

Cram down

The transposition of the Directive on restructuring and insolvency introduces a totally new concept in Begian restructuring law, which also adds an extra layer of complexity: the cram down (only in the system for big companies).

The cram down is the possibility for the restructuring plan to become binding upon dissenting voting classes.

The following conditions need to be met:

(i) The reorganization plan is approved by:

- at least one class of creditors if there are only two classes;
- In case of multiple classes, a majority of classes including at least one class holding secured creditors or a higher-ranking class than the ordinary creditors;
- If that is not the case, at least one class that can expect payment in case of application of the legal ranking system in case of bankruptcy;

(ii) The reorganization plan adheres to the 'absolute priority rule'. This means that classes of dissenting voters need to be paid in full before any lower ranking classes receive payment.

The absolute priority rule takes as bench mark the reorganization value, based on the reorganization plan (and not the liquidation value used for the best interest of creditors test).

In addition, Belgium will also apply the reversed absolute priority rule, meaning no class can be provide with more than its full amount.

This system, will complicate the drafting and negotiation of reorganization plans significantly.

Private reorganization procedures

The transposition law introduces a completely new option of private reorganization. True, this procedure already had a predecessor in the temporary law of 2021, but this precedent is now being adapted to the directive to provide a legal framework in which debtors can negotiate an amicable agreement or reorganization plan without publicity.

Too often, publicity meant negative consequences (both financial and reputational), and thus initiating the public procedures is not obvious for an enterprise.

The discretion of closed proceedings should increase the chances of success of a reorganization.

Because there is no publicity, there is also no suspension of creditors' rights. In addition, those who are not involved in the procedure cannot be affected.

The procedure starts with the filing of a petition for the appointment of a restructuring expert. This can be done by both the debtor and creditors/capital holders. Creditors are thus given an important tool that did not exist before.

Like the public procedures, the closed procedure requires that the continuity of the enterprise is threatened in the short or longer term.

The debtor can choose in the petition which creditors he wishes to involve in the proceedings. If a reorganization plan is voted upon by the participating creditors, it will also be binding upon those creditors who were initially involved, but do not longer wish to participate.

Transfer under judicial supervision

The new law also takes into account the European Court of Justice’s judgements regarding the pre-pack in the Netherlands (Estro-Smallsteps/Heiploeg) and Plessers regarding the judicial reorganization through transfer under court supervision.

In the Plessers case, the ECJ concluded that the procedure of judicial reorganization through transfer under court supervision is not a bankruptcy or similar procedure aimed at liquidating the company under court supervision.

As a consequence, the freedom of choice for an acquirer of assets/activities to decide which employees to take over (based on objective criteria) is not in line with the European Directive relating to safeguarding of employees, rights in the event of transfer of undertakings (2001/23/EC). This directive only foresees this freedom of choice as an exception (article 5), in case of liquidation procedures. In any other transfer, all employee contracts should be taken over.

The purpose of the transposition law is now to bring the procedure of transfer under judicial supervision fully in line with article 5 of the Directive relating to safeguarding of employees, rights in the event of transfer of undertakings .

Therefore, the law now explicitly states that the purpose is to liquidate the enterprise.

In order to maintain the attractiveness of this procedure as an efficient restructuring tool, it was also important to provide the various stakeholders with the guarantee that a takeover would not be questioned afterwards.

Pre-pack or silent bankruptcy

The new law also introduces a pre-pack or silent bankruptcy procedure.

The goal is to preserve value that would otherwise be lost in a bankruptcy procedure.

If an enterprise thinks that the bankruptcy conditions are met, it can ask the court to prepare the bankruptcy without any publicity. This will mean to prepare a transfer of all or part of the activities/assets.

The enterprise will need to proof that a discrete preparation is beneficial for both the creditors as the preservation of employment.

The court will appoint an intended bankruptcy administrator who will analyze the feasibility of the transfer, taking into account the interest of the creditors.

The pre-pack has a limited period of time of 30 days (30 days extension possible) to prepare the transfer. The actual transfer only takes place after the enterprise has been declared bankrupt.

Discharge of debt

As of September 1, the discharge of debt of a bankrupt natural person will automatically intervene as a result of the judgment closing the bankruptcy, without the need to file a formal request.

This adjustment comes after the Constitutional Court overturned the rule that a request for discharge had to be filed within 3 months of the opening of the bankruptcy in a series of rulings.

Consequently, the legislature is now choosing to make this an automatic consequence of the closing of the bankruptcy. This also means that some bankrupt natural persons will now have to wait longer. Under the old rules, one could ask for the discharge to be decided upon within one year from the opening of the bankruptcy.

Now a formal discharge will only follow the judgment closing the bankruptcy proceedings. In addition, the law provides the possibility for interested parties, including the bankruptcy administrator and the public prosecutor to oppose this discharge.

The changes to the insolvency law bring new challenges and opportunities. It will be interesting to see how big companies will navigate the more complex reorganisation procedures and how courts will apply the cram-down rule.

It also remains to be seen how useful the private reorganisation procedures and pre-pack will prove to be.

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