

Newsflash

The new federal law on the continuity of undertakings

In most countries, insolvency legislation distinguishes between bankruptcy and reorganisation proceedings. In Belgium, bankruptcies are ruled by the act of 8 August 1997 on bankruptcies whereas reorganisations (“*gerechtelijke akkoorden*” / “*concordats judiciaires*”) were until recently subject to the law of 17 July 1997 on judicial composition.

The judicial composition legislation of 1997 never lived up to its expectations and was scarcely applied, which in turn led the Minister of Justice at the time, Madame Laurette Onkelinx, to gather a panel of experts to compose a draft law with broader ramifications. This new law was approved and voted by the Belgian House of Representatives on 31 January 2009.

Under the new law, the rules and official procedures have been substantially simplified and the range of instruments aimed at helping companies in distress significantly increased. Conservational measures, more flexible instruments that can be used before a legal proceeding is started have been foreseen and the cost of the procedure has been considerably reduced. The general notion that a debtor in distress maintains control over its company remains unchanged.

How does this new act fit in the framework of the other existing insolvency proceedings?

Nothing has changed with respect to the bankruptcy law, which is aimed at the formal winding up and liquidation of commercial entities or commercial activities carried out by individuals.

The judicial composition legislation was updated with the new law of 31 January 2009 which benefits from a broader scope of application and contains provisions that will, it is hoped, render out-of-court reorganisations more successful. The new law is entered into force on the 1st of April 2009 (Royal Decree of 31 March 2009).

What is the rationale behind the new law?

The rationale is double. First of all, a solution had to be found for the various reasons why the old law on the reorganisation of companies in distress was not a success. These were, amongst others,

- a. the excessive number of formalities to be respected and the lack of flexibility in the applicable deadlines,
- b. the liability and cost of the judicial commissioner (“*commissaris inzake opschorting*” / “*commissaire au sursis*”) appointed by the court, limiting the possibility for the latter to act efficiently,
- c. the negative stigma, leading companies to only apply the law once a turnaround could no longer be achieved.

Secondly, the new law provides for a larger bundle of flexible tools to facilitate business recovery, some of which can be applied before a court proceeding has even begun. Moreover, the possibility exists to switch easily from one tool to another.

What are the main features of the new law?

New features include:

- a. the possibility for the court to appoint, on request of the company in distress, a company mediator (“*ondernemingsbemiddelaar*” / “*médiateur d’entreprise*”) able to negotiate, on a confidential basis,
- b. amicable agreements/settlements with part of the creditors (out of court or during court ordered proceedings);
- c. the possibility to choose between three types of formal proceedings : reorganisation by means of an amicable agreement, reorganisation by means of a collective amicable agreement, reorganisation by means of a transfer of the debtor’s activities under judicial authority and the possibility to switch easily from one type to another.

What is the role of the company mediator (“*ondernemingsbemiddelaar*” / “*médiateur d’entreprise*”)?

The role of the former commissioner was to assist the directors of the company, ensure that the formalities foreseen by the law were fulfilled and assist with the drafting of the turnaround plan.

The mediator may be appointed by the court with the consent of the company in distress with the aim to avoid causing unnecessary stress to the creditors and suppliers of the company or to other stakeholders. Key aspects of the mediator’s role include:

- a. **Neutrality:** the mediator must facilitate negotiations through his skills and credibility.
- b. **Authority:** the mediator is appointed by the Court and does not dispose of any decision making powers.
- c. **Confidentiality:** the appointment of a mediator must not be published in the Belgian Official Journal to ensure privacy.

The minor impact on the control of the company and the flexibility of the procedure are all points that add value to this formula in contrast with the appointment of a judicial commissioner.

How does the new act provide for the possibility to reach an amicable agreement with some of the creditors?

Usually, the turnaround of a company in distress can be achieved by rescheduling the contractual or financial obligations with specific creditors or suppliers. Previous legislation made this difficult. If a company is declared bankrupt, specific provisions in the bankruptcy legislation (art. 17 and 18) allow for the last measures to be potentially voided by the bankruptcy trustee. Therefore banks and suppliers are not keen to adapt their contractual relationship with the company in distress.

The new law deliberately allows debtors in distress to conclude amicable agreements and provides protection against the provisions of the bankruptcy legislation. Under certain conditions the payments resulting from these agreements (out-of-court) cannot be undone in the event of later bankruptcy. These agreements must be filed in a register with the court.

Moreover these agreements are binding towards third parties and the violation of creditors' rights is still forbidden pursuant to article 20 of the bankruptcy legislation.

Therefore, banks should no longer object to a company in distress proposing new securities for existing debts, if such steps lead to the possible turnaround of the company.

What are the reasons for altering the role of the former judicial commissioner ?

Small companies can rarely afford services rendered by a judicial commissioner and risk receiving limited and ineffective services and even bankruptcy through the huge cost of extended services. Big companies, on the contrary, do not need an external administrator and can manage the turnaround process themselves. Furthermore, appointing an administrator appeared to have an adverse effect in the past. As the former reorganisation proceedings could only be initiated and continued for as long as a turnaround seems reasonably possible, many commissioners terminated the proceedings too soon due to their fear of being held liable for the losses incurred during the reorganisation proceedings. Creditors are known to engage legal action against commissioners who continue proceedings when bankruptcy seems inevitable, arguing that they have less assets to share than if the company had been declared bankrupt at the moment the reorganisation procedure began.

The former judicial commissioner will be replaced by a judge delegate ("*gedelegeerd rechter*" / "*juge délégué*"), with a mere supervisory role and act as a contact person for any stakeholders.

Finally, the new law strongly confirms the powers of the courts under case-law to appoint a temporary director ("*voorlopig bewindvoerder*" / "*administrateur provisoire*") in case the transfer of the company in distress is deemed necessary.

Does the new procedure also entail the protection of the debtor ?

The debtor may opt for filing for reorganisation in the traditional way. The debtor therefore needs to prove that the continuity of the activities is threatened and draft a reorganisation plan, which must be approved by the majority of the creditors (representing at least half of the outstanding claims) under the supervision of the court.

A suspension period of six months, during which the debtor cannot be declared bankrupt and no enforcement measures can be taken, is granted by the court and is applicable as soon as the court opens the proceedings. The court may extend the suspension period twice with each extension lasting 6 months, bringing the maximum period of suspension to 18 months.

When a collective agreement is reached with the creditors, the court will initiate a repayment schedule. Such a schedule is binding upon all creditors, which means that as long as the company in distress respects the terms of the repayment schedule, no enforcement measures may be taken. Such a repayment schedule has a maximum duration of five years as from the moment the collective agreement is approved by the court.

How does the suspension affect the current agreements?

The new legislation, in the same way as its predecessor, provides that notwithstanding all conflicting provisions in the contract, the demand or the opening of the court ordered reorganisation procedure does not terminate current agreements/contracts or the modalities of their application (art. 35 § 1). However, the agreements may be terminated during the procedure if the company in distress defaults on payments.

Additionally, the new law proposes the following innovation: the company in distress can unilaterally decide to suspend the performance of a contract (an exception is made for employment contracts), if this is necessary in order to be able to present a turnaround plan to the creditors or to be able to achieve a transfer of undertakings.

In this case, the damages incurred, which are undoubtedly due, become a 'suspended claim' to be paid out through the realisation of the turnaround plan.

Is it possible to transfer a business or any part of a business from the company in distress to a third party? Under which conditions?

The transfer of all or part of the debtor's business can be requested by the debtor himself but can also be ordered by the Court on the request of the public prosecutor, a creditor or an interested buyer.

The court will appoint a judicial agent ("*mandataire de justice*" / "*gerechtsmandataris*") who is in charge of the organisation and realisation of the transfer in the name and on behalf of the company in distress.

From an employment law perspective, the purchaser now has the possibility to choose the employees it wishes to have transferred insofar as the choice is made for technical, economic or organisational reasons and that it takes place without discrimination.

Under the previous law, the purchaser was obliged to take over all the employees and its liabilities were unrestricted. As a result many purchasers waited until the company in distress was declared bankrupt, after which they could take over activities without being held liable for all the employees related to the transferred part of the business.

What happens to secured receivables under the new procedure?

The new law prohibits any creditor from initiating or maintaining enforcement measures against the debtor such as enforcing securities during the period of suspension granted by the court.

There are, however, a few exceptions to this rule.

First, with respect to commercial matters, the law on commercial pledges provides that the creditor-pledgee receives the interest, dividends and the capital of the pledged values on their maturity date and offsets them against their own receivables. This means that the creditor will not have to enforce their receivables because they have the right to offset the received amounts against their receivable. This constitutes a great privilege for the creditor-pledgee, who will not suffer from the suspension. This privilege granted to the creditor-pledgee in commercial matters will not be suspended by a reorganisation because the new law states that the suspension has no impact on the fate of specifically pledged receivables (art.32).

However, the situation is slightly different in the case of a pledge on the business (“pand op handelszaak” / “gage sur fonds de commerce”) of the debtor which includes movable property, receivables and cash. This pledge on the business is a floating charge, as a result of which, as long as no attachment or garnishment has been made on the pledged values, the pledged receivables will not be regarded as “specifically pledged” within the meaning of article 32. Therefore, the creditor-pledgee is not protected by article 32 and will have to respect the suspension.

The pledgee who has a pledge on cash in an account will not have to respect the suspension either. This is a result of article 9 of the law of 15 December 2004 on financial securities, which provides that the creditor-pledgee has the right to enforce a pledge on cash values without prior notice or judicial decision if the debtor defaults payments. The creditor-pledgee will have to offset the received amounts against its receivables - in principal, interests and costs in accordance with article 1254 of the Civil Code, and the rules determined by the parties in respect of the assessment and the call date of the cash values will apply.

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