NautaDutilh

Restructuring & Insolvency Law

things you need to know about future insolvency and business restructuring in Belgium

Intro

The Belgian legislator is preparing a legal framework on insolvency law to expand the restructuring toolbox. On 26 March 2023, a draft bill was published transposing EU Directive 2019/1023 on restructuring and insolvency. The Bill should be voted before the summer holidays. Our Restructuring & Insolvency team has identified five things you need to know about the upcoming changes.

#1 Debtors will be supported with self-assessment and debt restructuring

#2 It will be easier to reach an amicable solution through an out-of-court settlement

#3 Under the large enterprise regime, impacted creditors can be placed in different voting classes

#4 Judicial reorganisation through a business transfer will get a new lease of life

#5 Reorganisation or bankruptcy proceedings can be kept confidential for as long as possible

#1

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More emphasis will be placed on the Insolvency Chamber's role to act as a facilitator.

Debtors will be supported with self-assessment and debt restructuring

The insolvency court's early-warning mechanism for debtors will be modernised. Beside continuing to monitor companies' health and acting as a kind of economic police force that steers the identified enterprise into bankruptcy proceedings, more emphasis will be placed on the Insolvency Chamber's role to act as a facilitator.

- The Chamber will encourage enterprises at risk to take timely action by issuing them with alerts, facilitating self-assessment and offering access to the financial information gathered.
- To facilitate debt restructuring, the Chamber will provide a forum where debtors and creditors can discuss a settlement, a feature that seems particularly useful for SME debtors who are primarily faced with tax and corporate debts and do not require complex restructuring tools.
- At the debtor's request, the Chamber can appoint a restructuring expert as a flexible alternative to the current business mediator.

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The mechanisms for judicial and out-of-court amicable settlements will be modernised.

It will be easier to reach an amicable solution through an out-of-court settlement

The Belgian legislator will modernise the mechanisms for judicial and out-of-court amicable settlements. A debtor will for instance no longer have to enter into a settlement arrangement with at least two creditors: one creditor will suffice. Furthermore, any party will be able to ask the court to confirm the out-of-court settlement in order to obtain an enforceable title. The settlement agreement no longer has to be filed in the language of the court. In addition to Dutch, French or German, it can also be filed in an international business language such as English.

#3

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Asset valuations of the company in liquidation and reorganisation value will undoubtedly become more important.

Under the large enterprise regime, impacted creditors can be placed in different voting classes

The current reorganisation procedure based on collective agreement from creditors is most commonly used in Belgium and applies a single regime to all enterprises. The draft bill introduces a distinction between SMEs and large enterprises which involves innovations that will have a major impact, both on the debtor seeking to restructure and on the creditors dealing with a restructuring debtor. Asset valuations of the company in liquidation and reorganisation value will undoubtedly become more important.

Under the large enterprise regime, creditors and shareholders can be placed in different voting classes if their rights in a hypothetical liquidation or the rights obtained under the plan are so dissimilar that there is no comparable position. A class votes in favour of the plan if a simple majority (in amount of the claim or interest) is obtained. There is no headcount. If one or more classes vote against the plan, the court can only sanction the reorganisation plan via a 'cross-class cram down' mechanism. This requires that additional confirmation criteria are met, including the Belgian version of the 'absolute priority rule'. SMEs can choose between the large enterprise regime and the SME regime which closely resembles the current reorganisation procedure by collective agreement.

#4

Judicial reorganisation through a business transfer will get a new lease of life

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The draft bill clarifies the purpose of judicial reorganisation proceedings: efficient asset liquidation.

Judicial reorganisation proceedings by way of a business transfer constitute the first stage in bankruptcy and are in many ways the golden child of Belgium's reorganisation avatar. It allows business transfers while maximising the total value to creditors and laying off employees without being subject to the constraints of the Act of 13 February 1998 (the "Renault" Act). This was an attractive scenario for both creditors and the debtor that could make an offer to buy-out its own business. However, it has been on probation since the ECJ ruled in Plessers that the Belgian insolvency framework infringes EU Council Directive 2001/23/EC regarding the safeguarding of employees' rights in the event of business transfers.

The draft bill clarifies the purpose of judicial reorganisation proceedings: efficient asset liquidation. Furthermore, it adds the condition that the court must review the economic, technical and organisational reasons behind the choice of the transferee with regard to the different categories of employees. In this way, the business transfer option may well rise again from the ashes.

#5

Reorganisation or bankruptcy proceedings can be kept confidential for as long as possible

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Opting for private judicial reorganisation proceedings implies the appointment of an expert who will assist the debtor and creditors in the restructuring process.

Debtors reasonably fear the publicity that inevitably comes with judicial reorganisation proceedings, as this will negatively impact their business and their cash situation. In the future, it will be possible to reorganise judicially through an amicable or collective agreement in total privacy, at the request of the debtor or a creditor/shareholder. Opting for private judicial reorganisation proceedings implies the appointment of an expert who will assist the debtor and creditors in the restructuring process. There is no automatic general stay but the restructuring expert can request that the court order a stay in respect of certain creditors.

Furthermore, the legislator wants to extend the confidential framework to include bankruptcy proceedings by allowing the debtor to prepare them in silence, aided by a trustee. This resembles the pre-packaged bankruptcy procedure proposed by the Belgian legislator in 2017. The ECJ ruling of 28 April 2022 (Heiploeg) and the proposed EU directive harmonising certain aspects of insolvency offer an opportunity to reintroduce this procedure.

About the Restructuring & Insolvency team

Our Restructuring & Insolvency group has in-depth know-how and experience in the areas of corporate restructuring and bankruptcy, including litigation in these areas. We act for all stakeholders (debtors, creditors, foreign bankruptcy administrators, potential buyers of struggling businesses, etc.).

Contact

If you have any questions or would like to discuss the implications of the draft bill, please contact:

Sophie Jacmain Belgium
T: +32 2 566 8194
M: +32 497 51 47 73
Sophie.Jacmain@nautadutilh.com

Stan Brijs Belgium
T: +32 2 566 8192
M: +32 496 50 73 46
Stan.Brijs@nautadutilh.com

Contributors

Gisèle Uwera | Frederik De Leo