Strelia Restructuring and Insolvency Newsflash

July 2023

Forthcoming legislative changes in insolvency law as of 1 September 2023: transposition of the Restructuring Directive and other modifications

Context

A new insolvency law concerning the reorganisation and liquidation of companies in distress enters into force on **1 September 2023** and applies to insolvency proceedings initiated after this date. The new law has multiple objectives: transposing the Restructuring Directive, updating the legislation in light of the recent case law of the Court of Justice of the European Union (**CJEU**)[1] and making other modifications. Substantial changes are made to the current insolvency legislation, adding an extra layer of complexity to an already complex area of law.

On 20 June 2019, the European Parliament and Council adopted a new Directive on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt (**Restructuring Directive**). The Restructuring Directive mainly concerns reorganisation proceedings and contains many concepts previously unknown in Belgian law. Whilst the Belgian legislator has just passed a bill transposing this Restructuring Directive, a new directive on harmonising certain aspects of insolvency law is already on its way[2]. The latter concerns bankruptcy proceedings.

After failing to meet the initial deadline and the extension for the transposition, the Belgian legislator finally passed the bill transposing the Restructuring Directive on 25 May 2023. Belgium, along with Bulgaria, Luxembourg, and Poland is one of the last member states to transpose the Restructuring Directive.

We list the most substantial changes and novelties of the new insolvency law below.

Substantial changes and novelties

1. New terminology

Say hello to the "*herstructureringsdeskundige*" or "*praticien de la reorganisation*", defined as a court mandatary appointed by the insolvency court to perform one or more of the following tasks:

- assisting the debtor or the creditors in drafting or negotiating a restructuring plan;
- supervising the activity of the debtor during the negotiations on a restructuring plan, and reporting to the court;
- taking partial control over the assets or affairs of the debtor during negotiations of judicial reorganisation proceedings.

[1] Judgment of 22 June 2017, *Estro/Smallsteps,* C-126/16, ECLI:EU:C:2017:489; Judgment of 16 May 2019, *Plessers,* C-509/17, ECLI:EU:C:2019:424.

[2] Proposal of 7 December 2022 of the European Commission for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0702.

Say hello as well to the "*vereffeningsdeskundige*" or "*praticien de la liquidation*", which includes the bankruptcy administrator ("*curator"* or *"curateur"*) and liquidator ("*vereffenaar"* or *"liquidateur")*.

Under the new law, the term court mandatary ("*gerechtsmandataris*" or "*mandataire de justice*") is used as an umbrella term for the above terms, including the provisional administrator appointed by a judicial authority.

Furthermore, the enterprise mediator ("*ondernemingsbemiddelaar"* or *"médiateur d'entreprise)* disappears and is replaced by the same "*herstructureringsdeskundige*" or "*praticien de la reorganisation*" who can perform enterprise mediation ("*ondernemingsbemiddeling"* or "*mediation d'entreprise*) to facilitate the recovery of the enterprise.

2. Modified amicable agreement

Out-of-court amicable agreements obtain a certain protection if they meet the legal requirements. Under the current law, one of those requirements was that amicable agreements could only be concluded with two or more creditors. Under the new law an amicable agreement can be concluded with only one creditor. This is to address the situation where one creditor owns most or even all claims against the debtor. The same applies to the judicial reorganisation proceedings through amicable agreement.

3. New competence of the Chamber for enterprises in difficulties

Another novelty is the possibility for the debtor, if in its opinion there is imminent insolvency, to request the Chamber for enterprises in difficulties to convene a creditor before the Chamber to negotiate a settlement. If successful, the Chamber for enterprises in difficulties records the settlement and issues it with a form of enforcement. The aim is to allow the debtor to obtain a settlement with its major creditors in an informal way. Even the social security administration and tax administration can be convened before the Chamber for enterprises in difficulties.

This procedure is distinct from the judicial reorganisation proceedings through amicable or collective agreement.

4. Reduction of types of reorganisation proceedings

To conform to the decision of the CJEU in the Plessers case, from now on there will be only two types of judicial reorganisation proceedings, through amicable and collective agreement, albeit with different formats as explained below. The former judicial reorganisation proceedings through transfer of undertakings under judicial authority will become distinct liquidation proceedings, followed by a mandatory winding up of the company.

5. Distinction between public and private reorganisation proceedings

Under the current law all types of judicial reorganisation proceedings are public : the opening of the proceedings is published in the Belgian Official Gazette. As a consequence, creditors, stakeholders and other interested parties could easily find out whether a company was in financial difficulties. The publicity would sometimes lead to the adverse effect of the aim of reorganisation proceedings, exacerbating the debtor's situation.

The new law offers debtors the possibility to apply for private or confidential judicial reorganisation proceedings. This responds to the possibility given by the Restructuring Directive to provide flexible solutions for preventive systems. The private nature of the proceedings entails that there is no general suspension or stay of creditors' and employees' rights against the company. Those not involved in the private proceedings cannot be affected. The company remains obliged to comply with its commitments to employees, the government, and non-impacted creditors.

6. Distinction between small and medium-sized enterprises (SMEs) and large enterprises

The Restructuring Directive lays down minimum standards for the content of a restructuring plan. It introduces the obligation to separate creditors into different classes, the 'best-interest-of-creditors' test, meaning that no dissenting creditor is worse off under a restructuring plan than it would be in the case of liquidation, and a cross-class-cram down with an absolute or relative priority rule in case a majority of voting classes does not support

the restructuring plan.

The Directive however allows member states to provide that debtors that are SMEs, on account of their relatively simple capital structure, be exempted from the obligation to treat affected parties in separate classes. Indeed, the Belgian legislator has chosen to exempt SMEs from this obligation to create separate classes of creditors. For SMEs the plan shall be deemed approved by the creditors if the majority of them, represented by their claims, representing half of the amounts due in principal and interest, vote in favour.

SMEs represent the large majority of all business in the European Union.[3] On 31 December 2021 Belgium counted 1.092.955 SMEs, with a continuous upward trend.[4] Therefore, the impact of the new regime on voting in classes of creditors and the possibility to cross-class cram-down creditors seems to be limited.

Large enterprises are enterprises that exceed one or more of the following criteria during two consecutive financial years:

- Annual average number of employees: 250;
- Annual turnover excluded value added tax: 40.000.000,00 EUR;
- Balance sheet total: 20.000.000,00 EUR.

We draw your attention to the fact that enterprises in group companies can also qualify as large enterprises when, taken together, they exceed the above thresholds. SMEs can also voluntarily opt-in to the regime applying to large enterprises.

Large enterprises must create classes of affected parties in their plan. Creditors and equity holders are placed in different classes if the rights they would have in a liquidation of the debtor's assets or on the basis of the plan are so different in terms of their nature, capacity or value that there is no comparable position. There are at least two classes of creditors: "*buitengewone schuldeisers in de opschorting*" or "*créanciers sursitaires extraordinaires*", i.e., creditors with preferential rights at the time of opening of the reorganisation proceedings, and "*gewone schuldeisers in de opschorting"* or "*créanciers sursitaires ordinaires",* i.e., creditors without preferential rights at the time of opening of the reorganisation proceedings.

The plan is approved when a majority is obtained in each class. The plan is approved by a class when the creditors or equity holders belonging to that class, representing half of all amounts and interests due in principal, vote in favour. If there are non-consenting creditors, the plan will be assessed against the best-interest-of-creditors test. If the plan is not approved by one or more classes, it can still be imposed on the non-approving classes through the cross-class cram-down. In this regard, the Belgian legislator opted for the absolute priority rule, but allowing deviation if there is reasonable cause and if said creditors or equity holders are not manifestly prejudiced by it, subject to approval by the court.[5]

7. Involvement of equity holders

For the first time and in line with the Restructuring Directive requirements, equity holders can be explicitly involved in reorganisation proceedings. Although the current law provides for a debt-to-equity swap, allowing creditors to converse their debt into equity, this has rarely been used in practice. For SMEs the debt-to-equity swap is maintained, with an addition allowing any stakeholder to request the court to order the shareholders meeting to take the decisions for the implementation of the plan, if the plan requires such decision of the shareholders and the shareholders unreasonably prevent the implementation of the plan.[6] The forced debt-to-equity swap does not apply to large enterprises.

[3] Recital 17 of the Restructuring Directive.

[4] "Statistieken over kmo's in België", FOD Economie, available on: https://economie.fgov.be/nl/themas/ondernemingen/kmos-en-zelfstandigen-cijfers/statistieken-over-kmos-belgie.

[5] It is useful to refer to pages 61 to 65 of the preparatory works containing examples of the cross-class cram-down principle (MvT, Parl. St. 3231/001).

[6] For further insights on this matter: B. DE MOOR, M. CALLEBAUT, S. ONDERBEKE and A. DAPONTE, "Debt-to-equity swaps in the context of reorganisation proceedings", *DAOR* 2022, p. 4-18.

Equity holders are involved differently in large enterprises, are they are part of the 'affected parties' in the restructuring plan. This means that they have to vote on the plan and that efforts, for example an equity increase through cash injection or contribution in kind, from the equity holders may be required, or even imposed through the cross-class cram-down.

8. Private preparation of bankruptcy proceedings

The last substantial change relates to bankruptcy proceedings. The new law makes it possible for the debtor to prepare its bankruptcy proceedings privately or confidentially, whereby the bankruptcy administrator is involved in the preparation of the bankruptcy proceedings, representing the interests of the debtor's joint creditors.

Expectations

Not only for enterprises in distress but also practitioners in the insolvency field, the new insolvency law brings new changes and challenges. It will take some time before the new role of the "*herstructureringsdeskundige*" or "*praticien de la reorganisation*" reaches it full potential as intended by the new law and the Restructuring Directive.

It remains to be seen how the new regime concerning the collective agreement for large enterprises will unfold in practice and if it will lead to many applications. SMEs may opt for the new regime to, among other reasons, make use of the cross-class cram-down mechanism.

Furthermore, it will be interesting to follow the developments in companies in distress with regard to the role of the shareholders. Will more efforts and concessions be asked from the shareholders, and if so, in what form?

It will take some time for the effects and applications of the new law to become clear, resulting undoubtedly in interesting case law of the Belgian courts.

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