Strelia Restructuring and Insolvency Newsflash

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Ongoing innovation of the Belgian insolvency law : change of the current law and a new proposal for a European bankruptcy Directive !

Insolvency law in Belgium will be subject to a lot of change, through the transposition of two consecutive directives of the European Union and the implementation of the case law of the European Court of Justice. The first changes in the law are imminent. The main tendencies of the upcoming evolution are explained in the contribution below.

Do not hesitate to reach out to the members of our Insolvency & Restructuring team for assistance or queries on this subject matter. We advise both companies in financial distress and their creditors. We are appointed by the Brussels Enterprise court as insolvency practitioners, which gives us a unique expertise in the matter.

The European legislator has become very active in the matter of insolvency and restructuring since over the last two decades.

In 2000, the European Council Regulation of 29 May 2000 on insolvency proceedings was adopted. It contains no material provisions but merely provisions of private international law allowing to determine the applicable law in cross-border insolvency proceedings. Harmonisation of the material law in the Member States was realised by consecutive European directives.

Over the last decades, the provisions of the law that aimed at saving viable activities through reorganisation have been modernised, whereas the provisions concerning the winding-up of non viable companies through bankruptcy proceedings have remained largely unchanged.

In 2009, upon the initiative of the Belgian legislator, the law on the continuity of enterprises entered into force providing new types of proceedings that aimed at the restructuring of enterprises in distress. Thousands of enterprises applied the new judicial reorganisation proceedings whereas the previous law on the judicial composition (le concordat judicaire, het gerechtelijk akkoord) was limited to a handful of applications per year, most of them unsuccessful. Minor material changes in the law followed afterwards.

A first European directive concerning preventive restructuring of enterprises in financial difficulties has been transposed into Belgian law together with modifications to comply with the case law of the Court of justice.

In 2016, the European Commission proposed a new European Directive in view of bringing harmonisation in the preventive restructuring proceedings in the Member States, considering that in all the Member States, restructuring should enable debtors in financial difficulties to continue business.

Preventive restructuring procedures are schemes which are available for debtors in financial distress before they become insolvent, i.e. when there is only a likelihood of insolvency. They are based on the fact that there is a much greater chance of saving distressed businesses when tools for restructuring their debts are used at a very early stage, before they become irreversibly insolvent. The minimum harmonisation standards of the directive only apply to businesses that are not yet insolvent and pursue the very aim of avoiding insolvency proceedings for businesses that can become viable again. They do not address the situation where a business becomes insolvent and has to undergo bankruptcy proceedings.

In 2019, the European Court of Justice rendered a decision (the Plessers case) denouncing the non compliance with the European law of the Belgian proceedings with a transfer of undertakings.

The directive was finally adopted by the Parliament and the Council in 2019. Belgium is currently still in the process of transposing this restructuring directive, the vote on the new law being imminent.

Formal reorganisation proceedings will be subject to major innovations : the possibility to start proceedings in a confidential framework, different rules for small and large enterprises, creditors being grouped in classes of creditors voting separately on a restructuring plan, strong involvement of the shareholders in the restructuring plan, new rules on the transfer of undertakings to comply with the case law of the European Court of Justice and, finally, new proceedings in view of the preparation of a transfer of undertakings following bankruptcy.

A proposal for a second, new European directive, concerning bankruptcy proceedings

Very recently, the European Commission decided to take the harmonisation process a step further and extend it to the insolvency legislation concerning bankruptcy and liquidation of enterprises. On 7 December 2022 it adopted a Proposal for a directive harmonising certain aspects of insolvency law, focusing on liquidation proceedings.

The European Parliament and Council consider that harmonised insolvency laws, can improve certainty for investors, reduce costs and facilitate cross-border investments, while also making risk capital more attractive and accessible to companies.

Diverging insolvency regimes across the EU member states represent a particular problem for cross-border investors. The playing field is not equal, with similar investments in EU states with more efficient insolvency regimes being seen as more attractive than in other EU states with less efficient insolvency regimes, thus creating a significant obstacle to the cross-border flow of capital and to the functioning of the single market.

The Belgian legislator will therefore not be able to put down the pen and, once more, will have to modify the insolvency law. The proposed Directive targets the three key dimensions of insolvency law: (i) the recovery of assets from the liquidated insolvency estate; (ii) the efficiency of proceedings; and (iii) the predictable and fair distribution of recovered value among creditors.

To maximise the recovery of value from the insolvent company for creditors the provisions on avoidance actions and asset tracing mutually reinforce each other. They do this by introducing a minimum set of harmonised conditions for exercising avoidance actions and by strengthening asset traceability through improving insolvency practitioners' access to bank account information, beneficial ownership information and certain national asset registers, including those from other EU states.

The objective is to strengthen procedural efficiency, in particular for liquidating insolvent micro-enterprises. To ensure a fair and predictable distribution of recovered values among creditors, the proposal introduces requirements for improving the representation of creditors' interests in the proceedings through creditors' committees. This is complemented by greater transparency for creditors in relation to the rules governing the ranking of claims.

The changes concerning the reorganisation of enterprises in distress that will enter into force very soon will be important. Our conclusion is that, for the time being, there will be no rest for the Belgian legislator who will, once again, have to transpose the upcoming directive on bankruptcy proceedings.

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