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THE LAW TRANSPOSING THE DIRECTIVE 2019/1023 ON RESTRUCTURING AND INSOLVENCY

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FINALLY OUT

Fanny Laune & Zoé Ledent | June 2023

This is it ! The Directive 2019/1023 on Restructuring and Insolvency has finally been transposed into Belgian Law!

On 25 May 2023, almost three years behind schedule, the long-awaited law amending book XX of the Code of Economic Law ("CEL") was finally voted in plenary session.

Below, we review the main novelties of the Law transposing the Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 (the "**Law**").

NEW POWERS FOR THE CHAMBER FOR UNDERTAKINGS IN DIFFICULTY

The main change regarding "early warning" mechanisms concerns the ***Chamber for Undertakings in Difficulty***, which has received new powers.

It is now entitled, outside any insolvency proceedings and upon request of a debtor, to:

i. ***convene his main creditors in order to try to find an informal agreement***, in the same way as the new out-of-court settlement chambers arising in some courts do;

ii. ***appoint a reorganisation practitioner*** to facilitate, on a confidential basis, the reorganisation of the debtor's business.

SEVERAL NOVELTIES REGARDING THE JUDICIAL REORGANISATION PROCEDURE

The three existing types of judicial reorganisation (i.e. by mutual agreement, by collective agreement and by transfer of undertaking) are maintained, but there are interesting new features.

1. The right to request a "private" reorganisation procedures is maintained with some adjustments

The Law confirmed the possibility, which was introduced by a "temporary" law during the pandemic, for a debtor to apply for a "private" judicial reorganisation by mutual or collective agreement, which will take place ***in complete confidentiality***.

Here are its main features compared to the "public" reorganisation procedure:

- ***A reorganisation practitioner is necessarily appointed*** – at the request of the debtor, a creditor or an equity holder – whose mission will be to negotiate an amicable settlement with one or several creditors or a collective agreement;
- A collective agreement may be negotiated ***without including all creditors*** but only some of them;
- The debtor ***does not automatically benefit from a stay of enforcement measures***, but the reorganisation practitioner may request one under certain conditions;
- ***The entire procedure***, including the rulings, ***is confidential***.

2. New class voting system for large companies

Large companies undergoing a judicial reorganisation by collective agreement will now have to ***define classes of creditors and equity holders*** for the purpose of voting on the reorganisation plan.

In brief, creditors and equity holders will have to be classified in separate classes if their rights differ to such an extent as regards their nature, their quality or their value that there can be no question of a comparable position (extraordinary and ordinary outstanding creditors will necessarily be in separate classes).

A ***majority vote*** (i.e. the creditors/equity holders representing at least half of the claims in principal and interest) is requested ***among each of the classes*** for the plan to be homologated.

However, ***the reorganisation plan may be homologated despite the lack of approval of one or several classes***, provided namely that:

- The plan complies with all formal and substantive requirements set by the Law;
- It has been approved:
  - by one of the classes, when there are only two classes of creditors and equity holders;
  - by a majority of the classes, when there are more than two classes of creditors and equity holders, provided that one at least of the approving classes is a class of creditors benefiting from a security *in rem* or at least ranking higher than ordinary outstanding creditors;
- Unless if there are reasonable reasons to do so, the plan does not derogate from the rank that would be applied to creditors in the event of the undertaking's liquidation;
- None of the classes would receive or maintain more than the total amount of its claims or interests.

As for SMEs, the current regime will remain applicable, but the debtor can explicitly ***choose for the application of the class voting system***.

3. The Judicial reorganisation by transfer of undertaking officially becomes a "liquidation procedure"

The definition and purpose of the judicial reorganisation by transfer of undertaking is rephrased to be in line with the *Plessers* and *Heiploeg* case-law of the ECJ (see our previous newsletters here).

Accordingly, the judicial reorganisation by transfer of undertaking expressly aims at the liquidation of the undertaking, and a liquidation practitioner is appointed, whose tasks notably include managing and liquidating the debtor's assets.

As a result, there should be ***no more discussion about the transferee keeping his right to choose the transferred undertaking's employees that he will take over***, but such a right is subject to court review of the selection criteria. If the grounds are not appropriate, the court may dismiss the transfer.

4. Also worth mentioning...

Some other novelties are worth mentioning regarding judicial reorganisation, notably :

- The Law amends the ***definition of extraordinary outstanding creditors***, which now includes all claims secured by a security *in rem* as defined in article 3.3 of the Belgian Civil Code (BCC), i.e. special liens (such as the lessor's lien), pledges, mortgages and rights of retention;
- Debtors will be entitled, in the context of a judicial reorganisation by mutual agreement, to enter into an ***agreement with only one of their creditors***;
- Creditors will be entitled to ***ask the court to withdraw the stay of enforcement measures***, provided that it clearly adversely affects them;
- The directors of an undertaking ***do not need*** – when applicable – ***shareholders' approval to file for judicial reorganisation***;
- In the context of a judicial reorganisation by collective agreement:
  - The reorganisation plan ***may not include minor claims*** whose inclusion in the plan would cause an unjustifiable administrative and financial burden;
  - ***A reduction of claims for more than 80 % may be admitted*** when justified by compelling requirements related to the continuity of the business;
  - Courts ***will be entitled to refuse to homologate a reorganisation plan***, at the request of any interested party, ***if it does not offer a reasonable prospect of avoiding liquidation or bankruptcy***.

NEW PRIVATE PREPARATION TO BANKRUPTCY

One other very important novelty is the possibility for a company to privately prepare for bankruptcy.

In short, a debtor in situation of bankruptcy may ask the court to appoint a ***liquidation practitioner prior to any declaration of bankruptcy to confidentially prepare the transfer of its activities***.

BANKRUPTCY AND LIQUIDATION

The Law includes a number of amendments regarding bankruptcy to ***simplify the procedure and encourage the use of liquidation rather than bankruptcy***. For instance, courts requested to declare bankruptcy, will be entitled to pronounce the dissolution of the undertaking, rather than its bankruptcy.

WHEN WILL THESE CHANGES BECOME EFFECTIVE?

The Law will enter into force on the ***1st of September 2023*** and will be applicable to insolvency proceedings initiated as of this date.

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