New Belgian insolvency legislation in 2021

The introduction of a pre-pack insolvency procedure in Belgium and easier access to judicial reorganisation proceedings

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Last Friday, 26 March 2021, the Belgian Insolvency Law was amended with the introduction of a pre-packaged insolvency procedure, allowing the debtor to discretely prepare for judicial reorganisation proceedings under the supervision of a judicial administrator. Other noteworthy changes include (i) a lower threshold for the opening of judicial reorganisation proceedings, and (ii) the more flexible appointment of judicial administrators.

1. Overview of the Insolvency Amendment

On 11 March 2021, the Belgian Parliament adopted a new law amending the existing Insolvency Law (the **Insolvency Amendment**) that is currently embedded in Book XX of the Code of Economic Law (the **CEL**). This Insolvency Amendment is a new chapter in Belgium's approach to dealing with the economic impact of the Covid-19 pandemic on Belgian undertakings.

At the time of expiry of the (second) statutory moratorium period on 31 January 2021 (which temporarily protected some debtors affected by the Covid-19 pandemic), the Belgian government announced insolvency law reforms to further support undertakings that are particularly affected by the Covid-19 pandemic. Pending such reforms, governmental creditors (such as the tax authorities) are adopting a more lenient attitude towards debtors in financial distress due to the Covid-19 pandemic.

The Insolvency Amendment introduces (among some minor other changes) the following measures:

- The “pre-packaged insolvency” procedure, where the debtor may discretely prepare for judicial reorganisation proceedings under the supervision of a judicial administrator. This new procedure will be explained in further detail below.
- The Insolvency Amendment introduces a tax equalisation of depreciation and provisions on claims with respect to creditors, regardless of the type of insolvency procedure – this now also includes the out-of-court amicable settlement.
- The debtor may now also request the appointment of a judicial administrator, not only in the event of gross errors, but also when the company can no longer be properly managed in specific circumstances.
- The threshold for opening judicial reorganisation proceedings has been lowered.

The Insolvency Amendment entered into force last Friday, on 26 March 2021. The new pre-packaged insolvency procedure will automatically expire on 30 June 2021, unless extended by Royal Decree. Such extension will most probably occur, as the pre-packaged insolvency procedure would otherwise lose its practical effect, and this will also allow practitioners to become more acquainted with the new measure. The Insolvency Amendment does not address transitional measures once the legal basis for a pre-pack insolvency “expires”. This could be an issue for example when a debtor is in the middle of the pre-pack procedure at the time of such expiry.

2. The pre-pack insolvency procedure finds its way into Belgian law

The Insolvency Amendment introduces a “pre-packaged insolvency procedure” in Belgium by means of a new article XX.39/1 CEL.

The purpose of the pre-packaged insolvency (**Pre-pack**) procedure is to confidentially test the possibility of an amicable or collective arrangement with a debtor’s most important creditors "in the shadow" of formal insolvency proceedings. This occurs during a Pre-pack phase, ie a court-supervised preparatory negotiation phase. If the negotiations in this Pre-pack phase are successful, the Pre-pack phase will be converted into the existing judicial reorganisation proceedings (aimed at obtaining either an amicable agreement with two or more creditors, or a collective reorganisation agreement that is approved by the majority of creditors representing the majority of the claims and binding on dissenting creditors).

This new process consists of the following features:

- A debtor-company may initiate the Pre-pack procedure by filing a petition with the President of the competent enterprise court, substantiating that its continuity is at risk immediately or in the short term.
- To ensure confidentiality, the petition is “unilateral” (meaning that creditors are not summoned to share their views on the petition) and will be decided upon by the President in a hearing behind closed doors (held within 8 days from the date of the petition). The subsequent decision of the President is not published in the Belgian Official State Gazette. Opposition by third parties is not possible.
- If the President decides to refuse the Pre-pack petition, the debtor may appeal such decision within 8 working days after being notified of that decision.
- If the President decides to approve the Pre-pack petition, the President will appoint a judicial administrator (who may be proposed by the debtor). After the appointment of the judicial administrator (which is again not published), the debtor must produce a list of creditors and disclose this to the judicial administrator.
- The judicial administrator will subsequently assist the debtor in negotiating an amicable agreement, or a collective restructuring plan with either all or some of the creditors (as the judicial administrator deems fit).

During the Pre-pack phase, the debtor remains in control and may terminate the Pre-pack procedure at any time.

The negotiations conducted by the judicial administrator envisage (i) an amicable agreement with at least two of the debtor's creditors and which is only binding to the parties to the agreement, or (ii) a collective restructuring plan which requires the approval of the (double) majority of creditors (both in the number of creditors and in the amount of the claims) in order to become binding upon all creditors, and which may include various restructuring measures (such as payment deadlines, haircuts on the outstanding debts, a debt-for-equity swap, a differentiated arrangement for certain types of claims or a voluntary sale of all or part of the enterprise).

If the negotiations conducted by the judicial administrator are successful, the President of the enterprise court will refer the matter to the insolvency chamber of the enterprise court for the formal opening of judicial reorganisation proceedings. Subsequently, an amicable agreement might be sanctioned ("homologated") by the court, or the collective restructuring plan might be put to the creditors' vote.

Once referred, the judicial reorganisation proceedings are expedited (since the majority of the preparatory works have already been carried out):

- Within 5 working days after referral, the enterprise court will initiate formal judicial reorganisation proceedings.
- In the event of an amicable agreement, the enterprise court will decide on confirming or rejecting the amicable settlement within one month.
- In the event of a collective restructuring agreement, the creditors will vote on a restructuring plan and the court will decide on confirming or rejecting the collective agreement within 3 months.

At the request of the judicial administrator, during the Pre-pack procedure, the President of the enterprise court may subject unwilling or malicious creditors to payment terms and/or payment conditions as well as stay enforcement measures for a maximum period of four months.

As soon as the matter is referred to the insolvency chamber of the enterprise court (as explained above), the debtor-company will enjoy the full suspension period (moratorium) offered by the formal judicial reorganisation proceedings (ie during which enforcement measures against the company's assets – for debts incurred before the opening of the judicial reorganisation proceedings – will be suspended).

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