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New support measures for enterprises in difficulty: highlights from the Law of 21 March 2021

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In the COVID-19 context and in light of the moratorium on bankruptcies ending on 31 January 2021, a new law has been adopted to further support enterprises facing financial difficulties.

The law of 21 March 2021 amending Book XX of the Code of Economic Law (the "CEL") and the Income Tax Code 1992 (the "ITC 1992") has been published in the Belgian Official Journal on 26 March 2021 (the "Law") (here).

The Law intends to:

- create a non-public pre-packaged agreement;
- extend the circumstances where a judicial representative may be appointed;
- soften the admissibility conditions to the judicial reorganisation procedure ("PRJ/WCO") for the debtor – especially small and mid-sized enterprises (the "SMEs");
- authorise successive PRJ/WCO
- extend the period of files examination by the chamber for enterprises in difficulty (the "Chamber");
- enable the electronic vote on the reorganisation plan;
- harmonise the tax advantage that creditors may derive from debt relief by the debtor.

THE PRE-PACKAGED AGREEMENT

The pre-packaged agreement is the Law's major novelty: a debtor may conclude a non-public preliminary agreement before an "official" PRJ/WCO with one or several creditors, under the supervision and with the assistance of a judicial representative. This preparatory phase has the advantage to take place without any publicity. This remains a preliminary phase, which will lead, if successful, to the opening of a "traditional", but quicker PRJ/WCO.

New Article 39/1 of the CEL offers the debtor, in a preparatory phase before the official PRJ/WCO, to have a judicial representative appointed to assist him to conclude (i) an amicable agreement with one or several of its creditors or (ii) a reorganisation plan with all of its creditors.

During this preparatory phase, the judicial representative may request the president of the court to grant a payment extension proportionate to the debtor's needs. This extension may not exceed 4 months.

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By the end of the preparatory phase and depending on its success, the judicial representative shall request the president of the court to put an end to this preliminary procedure, or submit an amicable agreement or a reorganisation plan.

If a “pre-packaged agreement” has been concluded, the president of the court shall forward the case to the insolvency court. The latter shall then open the judicial reorganisation procedure and set a hearing date either to homologate the amicable agreement or to vote on the plan within a shorter period than for a “standard” PRJ/WCO (i.e. a PRJ/WCO without a “pre-packaged agreement”).

From the referring of the case by the president to the insolvency court, the debtor will benefit from the normal protection offered by the PRJ/WCO.

According to the preparatory work for the Law, the main goals of this “pre-packaged agreement” are:

- to achieve a simplified and quicker PRJ/WCO by amicable agreement or by collective agreement;
- to provide a legal framework for negotiating a reorganisation plan/an amicable agreement without (negative) publicity;
- to allow a reduction of the suspension period to a minimum and the publication of the enterprise’s financial difficulties to coincide with a proposal to resolve these problems in the form of a previously negotiated reorganisation plan or amicable agreement;
- to limit the financial uncertainty for the current and potential business partners of the enterprise in difficulty.

THE OTHER NOVELTIES

<u>New cases where a judicial representative may be appointed</u>

In addition to cases of serious management breaches that threaten the enterprise’s continuity, the debtor may now also request to appoint a judicial representative where events lead to the “ungovernability” of the undertaking. The measure should preserve that continuity.

By “ungovernability”, the legislator means, for example, the death of a director or a conflict between directors, without necessarily involving proof of obvious management shortcomings.

<u>Softening of the admissibility conditions to the PRJ/WCO</u>

The Law notably relaxed the formal admissibility conditions to the PRJ/WCO.

First, the annexes to the application for judicial reorganisation are not required under penalty of non-admissibility anymore. The debtor may issue some of the annexes up to two days before the

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introductory pleading. If he is unable to provide the requested exhibits, he must only file a note justifying such absence “in a detailed manner”.

Furthermore, for a PRJ by transfer, some of the annexes to the application are not required anymore.

Autorisation of successive PRJ/WCO

Previously, if an enterprise had benefited from a PRJ/WCO, it could not apply for a new procedure for a period of three years.

The Law has removed this prohibition to file successive PRJ/WCO while maintaining the protection of the rights acquired by creditors during the previous PRJ/WCO.

Extension of the file examination period by the Chamber

The Law extends the period during which the Chamber monitors the situation of enterprises in difficulty to 18 months.

If the Chamber entrusts a “report judge” for such monitoring, the period is extended to 8 months (with a maximum of 10 months) starting from the “report judge” appointment.

Electronic vote of the reorganisation plan

The Law allows voting electronically on the reorganisation plan (through REGSOL). Such a vote will take place during an online hearing (i.e. by video conference).

Amendment to the ITC 1992

Alongside amendments to the CEL, the legislator modified the ITC 1992 to harmonise the tax advantage that creditors may derive from debt relief by the debtor, in particular in case of a pre-packaged agreement (see above).

WHAT NOW?

Most articles of the Law entered into force on 26 March 2021 and will have effect until 30 June 2021. However, the Government may extend their application by Royal Decree.

In addition, the Belgian legislator still has to transpose by 17 July 2021, at least partially, the Directive (EU) 2019/1023 of 20 June 2019 on restructuring and insolvency (here). Therefore, we may expect the main content of the Law to be integrated into the law that will transpose the Directive 2019/2023.

The articles providing for new electronic means should enter into force on 1 January 2023.

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In its opinion of 11 February 2021, the Council of State had highlighted some inconsistencies in the Law, particularly concerning the role of the judicial representative. Some of its criticisms are now echoed by insolvency practitioners. Let’s hope that these remarks will be heard when transposing the Directive (EU) 2019/1023 into Belgian law.

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