On 27 May 2013, the legislator passed a new law adjusting certain provisions of the Continuity of Enterprises Act in order to prevent abuses and curb the reckless filing of requests. Accordingly, this “Amending Act” imposes new formal requirements on the debtor who wishes to initiate a judicial reorganization procedure. Overview of the new measures.

The new formal requirements of the Belgian Continuity of Enterprises Act: a good step forward?

Recently, the Belgian Continuity of Enterprises Act (hereinafter the “Act”) celebrated the fifth anniversary of its adoption by the Belgian parliament. Since its entry into force on 1 April 2009, the Act has been quite successful: in comparison with the former “Judicial Composition Act” of 17 July 1997, a significantly larger number of enterprises have had recourse to it. The Act does indeed offer a new range of options – including a potential judicial settlement with debtors – intended to help distressed companies to recover from their financial situation. This success should, however, be put into perspective: it appears that many companies were taking advantage of the procedures provided by the Act while being eventually declared bankrupt.

It thus appeared necessary to the legislator to consider the pitfalls of the Act’s application and to try to provide a remedy. On 27 May 2013, the legislator passed a new law (the “Amending Act”) adjusting certain provisions of the Continuity of Enterprises Act. This new law does not intend to review the balance and the fundamental principles of the Act, but instead aims to prevent abuses and curb the reckless filing of requests. In order to achieve this, the Amending Act provides significant changes in practice. Some of the most important of them are described below.

The scope of the Act has been extended to allow farmers (natural persons) to initiate a judicial reorganization procedure. This extension was inevitable since the Constitutional Court stated that the farmers’ exclusion from the benefit of the law was unconstitutional. Many observers agree that the Constitutional Court’s recent case law suggests a future extension of the scope of the Act to any natural person engaged in economic activities, excluding liberal professions.

The Amending Act has strengthened the formal conditions imposed on the debtor for the opening of the procedure in order to avoid late filing of a petition for the sole purpose of avoiding a bankruptcy process. The new requirements outlined hereinafter are clearly intended to raise the
access threshold and to prevent the abuses faced by many commercial courts.

Among other things, the Amending Act imposes the payment of a fee of 1,000 EUR to cover all the procedure costs. This provision is not currently applicable – it will enter into force on 31 December 2014 at the latest.

Furthermore, the legislator decrees that any debtor who wishes to initiate a judicial procedure must submit all the documents required by law to the clerk’s office along with his petition, otherwise it will be deemed inadmissible. Accordingly, the debtor can no longer benefit from the 14 days delay that was initially granted to complete his file after filing his petition. Nevertheless, the court may in some circumstances allow the debtor to remedy the omission or irregularity.

In support of his petition, the debtor must add “an accounting statement showing the assets and liabilities and the profit and loss account, no more than three months old, drawn up under the supervision of an auditor, an external accountant, an external certified accountant or an external tax specialist”, as well as “a budget with an estimate of the income and expenses for at least the duration of the requested moratorium, drawn up with the assistance of an external accountant, an external certified accountant, an external tax specialist or an auditor”. By means of these “figures professionals”, the legislator is willing to objectify the information given by the debtor in the preparation of his petition. The scope of their remit is, according to the preparatory papers, limited to a marginal verification rather than a thorough review of the financial situation. The strong roles played by these professionals is undoubtedly a positive step forward in curbing abuses related to incomplete accounting statements.

The legislator’s concern for the credibility of the proposed reorganization derives also from another important provision of the Amending Act. In addition to the obligation to draw up the aforementioned financial statements under the supervision or with the assistance of a “figures professional”, the law now obliges the debtor, when submitting his petition, to indicate “the measures and proposals he is considering to restore the profitability and solvency of his enterprise, to implement a possible social plan and to pay his creditors”. This information will enable the court to have a comprehensive view of the development of the procedure. Before this modification of the law, the debtor was solely required to state those measures and proposals “if he is able to do so”.

Pursuant to article 10 of the Act, the “figures professional” who faces in the performance of his duties “serious and corroborating facts which may jeopardize the continuity of the company is required to inform the debtor thereof in detail, if necessary through his management. Thereafter, if the debtor does not take the necessary measures to ensure the continuity of his company for at least a period of twelve months, the figures professional may inform the president of the commercial court thereof in writing”. This new provision must be taken seriously. Whether or not the professional chooses to inform the court about the lack of appropriate measures, he must on the other hand advise the debtor’s management and keep evidence of his steps. According to the preparatory papers, “they might be liable to third parties as well if they do not formally draw the
attention of the management to its obligations”.

This first glimpse of the “adjustments” brought to the Continuity of Enterprises Act shows the legislator’s clear intention to raise the low access threshold of the procedure in order to make it more effective and to prevent obvious abuses. In general, we agree with those modifications in the Act. Our only reservation is that the strict conditions imposed from the beginning of the procedure, combined with the new costs, will inevitably discourage many debtors that meet the requirements from filing a petition. Without a doubt, what the Continuity of Enterprises Act gains in effectiveness, it loses in flexibility.