



# The Belgian Act on Continuity

A NEW RESTRUCTURING TOOL

The Belgian Act on Continuity comes into force on 1 April 2009. It contains new restructuring legislation to enable the reorganisation of Belgian enterprises under the supervision of the court. This briefing outlines the key features of the new legislation.

The Act of Continuity is a welcome legislative step considering the substantial increase in restructurings and insolvencies in Belgium.

New restructuring legislation was recently adopted in Belgium and comes into force on 1 April 2009. The Act of 31 January 2009 on the continuity of undertakings (the Act on Continuity) aims to replace the existing judicial composition procedure (*concordat judiciaire/gerechtelijk akkoord*) with a more effective and flexible restructuring instrument.

The key features of the Act on Continuity are:

- the improvement of court-led monitoring of stressed companies and the possibility to appoint company mediators, principally for small and medium-size enterprises;
- a protection for amicable settlements concluded between stressed companies and (some of) their creditors against certain effects of the suspect period; and
- a court moratorium for stressed companies leading to three types of judicial reorganisation:
  - the reorganisation by way of an amicable settlement under judicial supervision;
  - the reorganisation by way of a collective settlement; and
  - the reorganisation by way of a transfer of the enterprise under judicial authority.

Below is a summary overview of the rules on the protection of amicable settlements and on the court moratorium and judicial reorganisation.

## Amicable settlement

Any company can enter into an amicable settlement with some or all of its creditors to address its difficult financial situation or to reorganise its enterprise. The parties to this amicable settlement are free to determine its content but the amicable settlement does not affect the rights of third parties. Under the Act on Continuity, the company can file a copy of the amicable settlement with the court registry. The purpose of such filing is to protect the terms of the settlement and the transactions concluded under it against certain effects of the suspect period. The suspect period is the period of up to six months between the effective cessation of payments of a company and its declaration of bankruptcy. During the suspect period, payments made in respect of undue debts are deemed ineffective (article 17, 2° Bankruptcy Act) and transactions entered into with a counterparty being aware of the cessation of payments may be set aside (article 18 Bankruptcy Act). The Act on Continuity now provides a safe haven against the risk of the amicable settlement and the related transactions being set aside. Once filed with the court registry, the existence of an amicable settlement can only be revealed to, and a copy obtained by, third parties with the consent of the company.

## Judicial reorganisation

The aim of a judicial reorganisation is to maintain, under the court's supervision, the continuity of all or part of a stressed enterprise or of its activities. The judicial reorganisation involves a moratorium granted to the

debtor during a period of up to six months. During this moratorium period, the debtor will have three options:

- entering into an amicable settlement with some of the creditors;
- obtaining the approval of a reorganisation plan involving all creditors; or
- transferring all or part of the activity under the court's supervision.

### **Moratorium**

The court can grant a moratorium to any debtor requesting it if the continuity of that debtor's enterprise is threatened in the short or long term. A company meeting the conditions for bankruptcy can also be the subject of a moratorium.

During the moratorium period, no enforcement can take place in principle against the debtor's assets and no bankruptcy proceedings can be opened in respect of the debtor. Creditors will however be able to effect set-off, enforce security over financial collateral and enforce receivables pledges. The moratorium does not affect the ongoing contracts but the debtor can decide, even if not allowed contractually, not to perform the obligations under the relevant contract (other than employment contracts) during the moratorium if it is necessary for the purposes of the reorganisation plan or for the transfer of the enterprise.

### **Judicial reorganisation by way of amicable settlement**

The debtor can negotiate an amicable settlement during the moratorium period with two or more of its creditors. This negotiation takes place under the court's supervision. In line with the principles of the Civil Code, the court can impose a payment deferral. Once agreed, the amicable settlement will be presented to the court and the moratorium will end. The amicable settlement as presented to the court is protected against certain effects of the suspect period in the same way as the ordinary amicable settlement.

### **Judicial reorganisation by way of a collective agreement**

The judicial reorganisation by way of a collective agreement starts with a verification of all claims to be included in the reorganisation plan. On that basis, the debtor will prepare a reorganisation plan involving a description of the restructuring and a description of the

creditors' rights following that restructuring. Certain secured creditors can see their payments deferred and enforcement rights suspended in the reorganisation plan for a period of up to 24 months on the condition that they are being paid their interest. The reorganisation plan is then submitted to a vote and needs to be approved by more than half of the creditors representing more than half of the principal amount of the claims involved. If the plan is approved and is deemed in agreement with public order, the court will sanction the reorganisation plan and the moratorium will end. The debtor will be held to implement and comply with the reorganisation plan and if he fails to do so, the creditors may require the court to revoke its approval of the reorganisation plan.

### **Judicial reorganisation by way of a transfer of enterprise under court supervision**

The court can order the transfer of all or part of the activity of the debtor either with the debtor's consent or without such consent at the request of any interested party in the event the debtor is bankrupt or if an attempted reorganisation of the debtor has failed. The court will appoint a representative who will manage the sale and transfer. During the sale and transfer process, the court's representative must prioritise the maintenance activity while considering the rights of the creditors. If comparable offers are being made, priority must be given to the preservation of employment. Once an offer has been selected, the court will hear the various stakeholders, including the creditors, and will approve, where appropriate subject to conditions, or reject the sale. The employment contracts will transfer with the enterprise but the purchaser can decide how many employees are transferred and can renegotiate the terms of the employment contracts. Following the completion of the sale of the enterprise, the creditors will be entitled to exercise their rights on the sale proceeds and the judicial reorganisation will be closed. The remaining part of the enterprise can then be submitted to other insolvency, reorganisation or winding-up proceedings.

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