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## Investing in distressed assets in Belgium

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FW MAGAZINE

REPRINTED FROM
January 2010 Issue

## BELGIUM

# Investing in distressed assets in Belgium

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On 1 April 2009, the new Belgian Business Continuity Act entered into force. This Act replaced the previous legislation relating to the judicial composition of companies (*gerechtelijk akkoord / concordat judiciaire*), which was often criticised and proved to be rather unsuccessful.

The former legislation imposed very strict conditions on companies in order to be eligible for judicial composition, as a result of which, it never offered a real alternative to bankruptcy. As soon as the conditions for bankruptcy were met (i.e., when a company was in a situation of persistent cessation of payment and was unable to obtain credit), the company had an obligation to petition for bankruptcy within one month. The new Business Continuity Act provides that being in a state of bankruptcy does not in itself rule out the option of opening or continuing reorganisation proceedings. Therefore, the continuity of the business has become a real alternative to bankruptcy: the aim of the reorganisation, rather than the fact the debtor is facing bankruptcy, is now the deciding factor when choosing between bankruptcy and reorganisation proceedings.

The Business Continuity Act offers a combination of three different options to facilitate the judicial reorganisation of companies experiencing financial difficulties: (i) a court-assisted voluntary agreement with creditors; (ii) a collective agreement with the creditors; and (iii) a transfer of all or part of the business under the supervision of the court.

**The new Business Continuity Act provides that being in a state of bankruptcy does not in itself rule out the option of opening or continuing reorganisation proceedings.**

A court-assisted voluntary agreement with creditors is a settlement negotiated by the debtor with a number of its creditors (at least two) with a view to reorganising its business. Such an agreement, reached without judicial involvement, must simply be filed in a register with the competent court, but will remain confidential (i.e., third parties cannot access it). The debtor can also first seek judicial protection before negotiating a reorganisation plan, with some or all of its creditors. In that case, the court's role is to confirm the plan in its judgement and close the reorganisation proceedings.

A collective agreement consists of a reorganisation plan devised by the company, which is submitted to the vote of the creditors. At least half of the creditors, both number and value of claims, must vote in favour of the reorganisation plan to have it approved. The plan may include measures to reduce or reschedule liabilities and interest obligations, swap debt into equity, or reduce the company's headcount. An approved reorganisation plan binds all creditors, including secured creditors, whether they have voted in favour of the plan or not. The plan must provide for payment of interest on the creditors' claims and the repayment of such claims may not be suspended for more than 24 months or, if at the end of the initial suspension, the debtor requests an extension and demonstrates that the suspended claims will be paid in full, 36 months. If successfully implemented, the debtor is released from all debts included in the reorganisation plan.

A transfer of all or part of the business under supervision of the court is an option that a company may apply for when filing the petition, or at a later stage in the court proceedings. However, the Public Prosecutor, a creditor or a party interested in acquiring all or part of the debtor's business, may also request the court to order such transfer in specific circumstances defined in the Business Continuity Act.

In its petition for judicial reorganisation, a company must indicate which of the aforementioned options (or combinations thereof) it wishes to pursue.

These new mechanisms, and specifically the court-assisted voluntary agreement, offer new opportunities for investors seeking to acquire distressed businesses or assets.

Until the entry into force of the Business Continuity Act, creditors of a company have generally been reluctant to enter into voluntary agreements with a debtor in financial distress, as such voluntary agreement could easily be set aside in the event the debtor ultimately went bankrupt soon after entering into the agreement. Such was often the case, given the strict rules applying to bankruptcy proceedings. The rules relating to the so-called suspect period allowed third parties to challenge certain transactions entered into by the debtor prior to the date of bankruptcy, including any transactions with creditors or third parties who had knowledge of the debtor's insolvency. A divestment of assets could therefore be undone, if the purchaser was, or should have been, aware of the financial distress of the seller.

The Business Continuity Act favours voluntary agreements, which are often the best and sometimes the only efficient option for multinational companies to redress their financial situation and avoid bankruptcy. Certain payments and transactions made in the context of a judicial reorganisation, whether it be pursuant to a voluntary agreement, reorganisation plan or sale of assets under supervision of the court, are now protected against subsequent insolvency challenge. The insolvency rules that disallow payments of unmatured debts, payments in kind and transactions with counterparties who have knowledge of the insolvency of the debtor, are not applicable to debtors subject to judicial reorganisation.

A second advantage of the court-assisted voluntary agreement is that it remains confidential, as third parties need not be informed of the filing or the content of such agreement without the express consent of the debtor. However, it should be noted that the secrecy of the agreement does not relieve the debtor of its obligations to inform and consult his employees, in accordance with Belgian labour law.

For investors who wish to acquire or take a participation in a distressed company, it is essential to be aware of the risks involved. Obtaining a competitive price may, of course, increase the return on investment in case of a turnaround of the company, but it is equally ▸▸

This article first appeared on www.financierworldwide.com in *January 2010*
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important to address a number of legal issues. These include: (i) careful review of the financial statements of the distressed company; (ii) due diligence on the intangible assets (e.g., determining if and to what extent goodwill may be affected) and the tangible assets (e.g., title and security); (iii) employment relationships (particularly, if the company has a works council or union representation); (iv) directors' liability; (v) tax issues (both of the acquired company and the purchasing entity); and (vi) assessment of the recovery plan conceived by the management of the distressed company.

If an investor does not wish to acquire the company, but simply part of its assets, the focus of the legal due diligence should lie on the title of such assets. It will be important to check commercial contracts with suppliers in order to identify any retention of title clauses and to verify whether the assets are subject to a lien or other form of security.

Although the purchase price may be competitive, it is nevertheless important that an independent appraisal of the business or the assets, following a proper legal and financial due diligence, is carried out. If the divestment of the business or assets takes place after the debtor has entered into reorganisation proceedings, or if the debtor files for bankruptcy soon after the divestment, third parties may challenge such divestment to the extent that the debtor has not received a fair consideration. The rationale of the transaction should therefore be carefully considered, as the price must be defensible in court. ■

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