

# The new Belgian Insolvency Code: A step towards the law of tomorrow

Belgian reforms to codify and improve existing law in line with European best practices



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**O**ver the past few years, the Belgian legislature has consolidated various pieces of legislation regulating businesses into a single instrument: the Code of Economic Law (*Code de droit économique/Wetboek van economisch recht*). Insolvency law has not escaped this trend.

In the summer of 2017, the Belgian Parliament enacted Book XX of the Code of Economic Law, entitled 'Insolvency of Undertakings' (hereinafter the 'Insolvency Code'). The new rules will enter into force on 1 May 2018 and will be applicable to insolvency proceedings opened after this date. The primary purpose of the Insolvency Code is to centralise and integrate the existing rules of Belgian insolvency law, previously found in the Bankruptcy Act of 8 August 1997 and the Business Continuity Act of 31 January 2009. Its secondary purpose is to modernise insolvency proceedings. Some new features of the Insolvency Code are presented below.

## An 'undertaking' rather than a 'merchant'

The most important change introduced by the Insolvency Code is the extension of the scope of insolvency proceedings. Previously, insolvency proceedings (in particular bankruptcy) were only available to persons that qualified as a 'merchant', a narrow legal concept dating back to the Commercial Code of 1807. This limited, and in many respects antiquated, concept was

considered to no longer reflect current (European and Belgian) business and legal reality. The Insolvency Code replaces the concept of merchant with that of an 'undertaking' (*entreprise/onderneming*). This concept encompasses most legal forms under which independent economic activity can be conducted. The result is that many more economic operators will become subject to insolvency law. For example, the so-called liberal professions (e.g. lawyers and architects), farmers, non-profit associations and unincorporated organisations (such as the *maatschap/société de droit commun*), which were excluded from the old insolvency legislation, will fall under the scope of the new code. This means that they can be declared bankrupt but can also benefit from reorganisation proceedings.

## Digitisation

In keeping with the ongoing digitisation of the Belgian judiciary, the Insolvency Code strives to make insolvency proceedings fully digital. All information related to insolvency proceedings will henceforth be consolidated in an online central solvency register, which will be accessible to magistrates, debtors, creditors and their lawyers. The register that will be connected to the registers of other Member States, pursuant to the Recast Insolvency Regulation. Digitisation will not only reduce the cost and length of insolvency proceedings but also ease the workload of the judiciary and enhance transparency.

## Strengthening of the 'fresh start' rules

The Insolvency Code also reforms the so-called "fresh start" rules. The idea behind these rules is that insolvency should not be a stigma and that natural person debtors should be given a genuine second chance to start over. To this end, the Insolvency Code replaces the rather complex rules on debt forgiveness (*excusabilité/verschoonbaarheid*) with a new regime on debt discharge (*effacement/kwijtschelding*). Under the new rules, the remaining debts of an entrepreneur will be discharged unless an interested party (e.g. a creditor or the trustee in bankruptcy) actively opposes discharge by demonstrating that gross and serious misconduct on the debtor's part contributed to the bankruptcy. To further strengthen the fresh start rules, income from a new activity arising after the start of the proceedings will be excluded from the bankruptcy estate (*masse de la faillite/massa van het faillissement*), whereas today such income falls within the estate until the close of the proceedings.

## Settlement possibilities

Pursuant to the European Union's wish to promote out-of-court settlements as an alternative to formal insolvency proceedings, the Insolvency Code strengthens the existing settlement possibilities. The parties to a confidential settlement will now be able to petition the court to approve their agreement and/or to issue an enforceable order for the debts covered by the agreement.



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## Liability actions

Liability claims against directors raised in the context of insolvency proceedings will henceforth form an integral part of the Insolvency Code.

The rules governing claims for gross and serious negligence (*faute grave et caractérisée/kennelijk grove fout*) have been reformed. Under the old rules, only the trustee in bankruptcy could, in practice, bring such an action. Under the new rules, if the trustee in bankruptcy fails to act, an individual creditor has the right to bring an action on behalf of the bankruptcy estate. Furthermore, the creditor will be indemnified for the costs of the proceedings

- (i) when the trustee in bankruptcy takes over the suit, or
- (ii) if the trustee does not take over the suit, if the proceedings are ultimately successful.

In addition, in certain cases, the liquidation proceeds are distributed on a *pro rata* basis amongst all creditors, without regard to security interests or statutory liens.

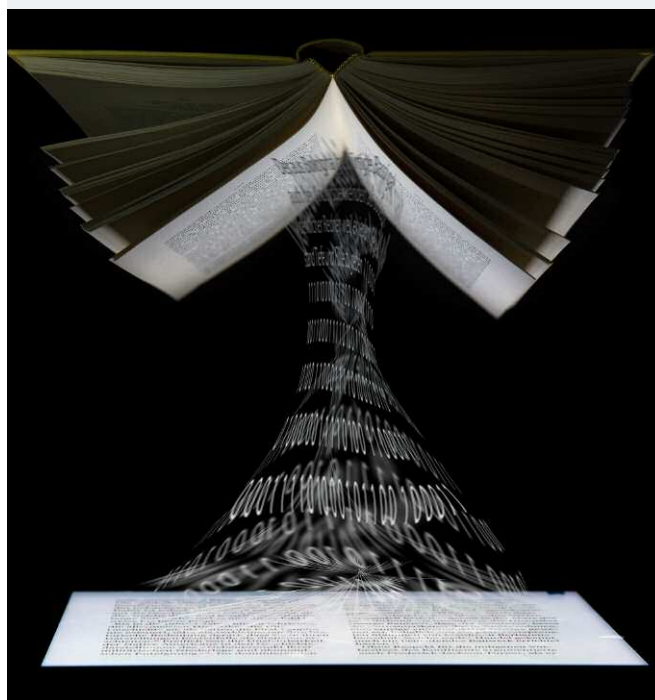
In addition, a separate liability action for ‘wrongful trading’ has been introduced. This type of action, which already exists in other countries, can be brought against a director who knew or should have known that there was no reasonable possibility to continue the business or avoid bankruptcy and yet failed to act as a reasonably prudent person would have done under the same circumstances. The underlying purpose is to improve the diligence of directors of struggling businesses.

## Internationalisation

The Insolvency Code provides for a robust framework of rules to support cross-border insolvency proceedings, in accordance with the Recast Insolvency Regulation.

In this respect, the Insolvency Code distinguishes between

- (i) European insolvency proceedings, and



- (ii) other international insolvency proceedings.

With respect to the former, the Insolvency Code provides for complementary rules in support of the Recast Insolvency Regulation. With respect to the latter, the Belgian legislature opted for consistency and replicated, insofar as possible, the rules applicable to European insolvency proceedings.

## Reinforced preventive measures but no prepack

The Insolvency Code amends and improves the existing rules on preventive measures. The powers of the offices for firms in difficulty (*chambres des entreprises en difficulté/kamers voor ondernemingen in moeilijkheden*) are reinforced, specifically *vis-à-vis* dormant companies. The bill initially contained an interesting framework for prepack transfers. However, at the end of the parliamentary process, the European Court of Justice issued its *Estro* judgment, in the aftermath of which the government decided to drop, for the time being, this new

mechanism and await further developments at the European level.

## Conclusion

In the words of Justice Minister Koen Geens, the codification and modernisation of insolvency law form part of an effort “to make strides towards the law of tomorrow”. While not a revolution, the new Insolvency Code is nonetheless a substantial step forward. The result is a more accessible and up-to-date statutory framework with more balanced insolvency rules that allow the flexible and efficient restructuring of undertakings, while taking into account creditors’ and other stakeholders’ concerns and facilitating a fresh start for debtors. ■



**DIGITISATION WILL NOT ONLY REDUCE THE COST AND LENGTH OF INSOLVENCY PROCEEDINGS BUT ALSO EASE THE WORKLOAD OF THE JUDICIARY AND ENHANCE TRANSPARENCY**

