

Pre-packing in Belgium with the new ‘Silent Bankruptcy’

Jente Dengler and Louis Verstraeten ask if pre-packs are a useful tool for distressed takeovers



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Since 1 September 2023, the Belgian Economic Law Code (‘CEL’) offers a new procedure for companies in financial distress: the so-called ‘private preparation of bankruptcy’, better known as the ‘silent bankruptcy’ or ‘flash bankruptcy’ (*‘besloten voorbereiding van faillissement’ – ‘stil faillissement’ – ‘flitsfaillissement’*).¹

This procedure enables debtors to prepare a transfer of assets and activities in a confidential manner before a bankruptcy is officially declared open.

Background

The silent bankruptcy is specifically designed to avoid the negative effects of bankruptcy and to preserve the value of the business ‘as a going concern’ as much as possible.²

This new option avoids some of the disadvantages of the traditional reorganization procedure aimed at the transfer of a business (better known among Belgian practitioners as the ‘GRP 3’), which is often considered too lengthy, complex and costly.

Moreover, this GRP 3 procedure is public: it is announced in the Belgian Official Gazette, is visible in the (online) Commercial Register and is followed by a public bidding process organized by a court-appointed practitioner.³ This publicity has in many cases proven to be detrimental to a business, in particular to volatile businesses operating in competitive markets where customers, employees and suppliers quickly find their way to

the competition.

By allowing debtors to discretely pre-pack their assets without any interruption of business or unnecessary unrest among stakeholders, the Belgian legislator aims to address this issue in the Belgian restructuring market.

Procedural steps

A debtor who finds himself in a state of bankruptcy⁴ can apply for the silent bankruptcy procedure by petitioning the competent enterprise court, demonstrating that this preparatory phase will:

- smoothen the liquidation of the company and yield the highest possible pay-out to creditors; and
- will preserve employment as much as possible.⁵

The court shall decide on the request very swiftly, within a maximum of three days. If the request is granted, the debtor has 30 days to prepare the full or partial transfer of its assets and activities (extendable to a maximum of 60 days). The court appoints a so-called ‘prospective administrator’ and a ‘prospective supervisory judge’ (*‘beoogd curator’*, respectively *‘beoogd rechter-commissaris’*) who oversee the process and continuously assess the feasibility of a transfer.⁶

Once the transfer has been successfully pre-packed, the silent phase ends and formal bankruptcy proceedings are opened. Immediately thereafter, the transfer is executed ‘as a going concern’ by the prospective administrator in his new capacity as officially appointed administrator of the bankruptcy.⁷

Similarly, the prospective supervisory judge becomes formally the supervisory judge and as such authorizes the transfer without undue delay.⁸

Main advantages

First, by realizing the transfer ‘as a going concern’, the business retains a **higher value** and should yield a higher return for the company’s creditors (compared to a piecemeal liquidation). Especially, as the name suggests, given the **confidentiality** of the process.

No publicity is given to either the application or admission to the proceedings, nor to the appointment of the prospective administrator – unlike traditional reorganization proceedings, which are made public by default.⁹ Unrest among customers, suppliers, financial creditors and employees eroding the value of the business, can thus be avoided. To maintain this confidentiality *throughout* the proceedings, it goes without saying that the use of confidentiality arrangements is an absolute necessity when initiating takeover discussions.

It is important to note that the debtor remains in **control** while pre-packing its business (*‘debtor-in-possession’*). Nevertheless, the debtor must act prudently and in close cooperation with the prospective administrator. The prospective administrator is entitled to request information and is responsible for safeguarding the creditors’ interests throughout the process, under the watchful eye of the prospective supervisory judge. However, he cannot reach out to potential candidates-acquirers directly without the



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debtor's consent.¹⁰

This does not seem advisable either, in view of keeping the process confidential. The sudden intervention of a prospective administrator – being an accredited insolvency lawyer – will quickly raise alarm bells. Instead, appointing an independent M&A advisor to explore the market could be more appropriate.

Notwithstanding the debtor retaining control, its statutory **obligation to timely file** for bankruptcy (*i.e.*, within 30 days after becoming cashflow insolvent)¹¹ on pain of personal liability, is suspended during this preparatory process.¹²

In addition, compared to an 'ordinary', fully out-of-court, asset deal, there are **no time-consuming notification requirements** to be taken into account, particularly towards public creditors.¹³ There is also less risk that strict employment protection rules will deter interested parties and jeopardize the chances of a successful business transfer. Although the debtor must demonstrate in its petition that the silent bankruptcy procedure is in the interest of **preserving employment**, a candidate-acquirer is not bound under the Belgian Collective Labour Agreement no. 32bis, *i.e.*, the national implementation of the TUPE Directive,¹⁴ to take over all employees associated with the business.¹⁵

Last but not least, since it is the prospective administrator who effectively concludes the transfer once he is officially appointed as administrator in the subsequent bankruptcy, the likelihood of the transfer being challenged at a later stage is minimal, thus providing greater **legal certainty** to the parties involved.

Key considerations

- **No Moratorium** – During this preparatory phase, creditors can still enforce security interests, seize the debtor's assets and summon the debtor in bankruptcy (unlike in traditional reorganization proceedings).¹⁶

- **Related Parties and Insiders** – The debtor himself and related parties may also present themselves as potential candidate-acquirers, provided that the prospective administrator and prospective supervisory judge are duly informed about their relation with the debtor.¹⁷
- **Preparatory Only** – The debtor merely prepares the business transfer. The actual conclusion of the transfer takes place only – but, immediately – after the formal bankruptcy declaration by the appointed administrator who, save in exceptional cases, will be the prospective administrator who was already involved during the preparatory phase.
- **Role of Prospective Administrator** – The prospective administrator oversees the process and safeguards the creditors' interests. As he will officially be appointed as administrator in the subsequent bankruptcy proceedings, he has a vested interest in the closing of the pre-packaged transfer at the highest possible price (his interests being aligned with those of the creditors he represents). After all, his remuneration is calculated as a percentage of the sale proceeds. Close cooperation and a good relationship with the prospective administrator are therefore key to a successful transfer.
- **Time Pressure** – The relatively short timeframe (30-60 days) may present a challenge: the debtor must act quickly and negotiate under time constraints.

A useful tool for distressed takeovers?

The private preparation of bankruptcy provides a legal framework for Belgian debtors on the verge of bankruptcy to efficiently pre-pack their business. Although the procedure presents certain challenges, including the absence of creditor protection, it



offers notable advantages such as time and cost savings, confidentiality, retention of control, preservation of 'going concern' value, and increased legal certainty for the parties involved. ■

Footnotes:

- 1 New Articles XX.97/1-XX.97/6, CEL, inserted by the Belgian Act of 7 June 2023 transposing EU Directive 2019/1023 of 20 June 2019 on preventive restructuring frameworks.
- 2 *Parl. St. Kamer*, 2022-2023, no. 55-3231/001, p. 80.
- 3 Article XX.87, CEL.
- 4 *i.e.*, cashflow insolvent (Article XX.99, CEL).
- 5 Article XX.97/1, CEL.
- 6 Article XX.97/2-3, CEL.
- 7 Article XX.97/5 CEL.
- 8 Article XX.142, CEL. Optionally, the bankruptcy administrator may also request the court to ratify the transfer (Article. XX.166 §3, CEL)
- 9 Article XX.48, CEL. Notwithstanding this, the Act of 7 June 2023 also introduced private variants of certain reorganization proceedings, which are however not particularly aimed at a transfer of business (see Article XX.83/22, CEL *et seq.*)
- 10 Article XX.97/4, CEL.
- 11 Article XX.102, CEL.
- 12 *Parl. St. Kamer*, 2022-2023, no. 55-3231/001, p. 81. Please note that other liability grounds (e.g. wrongful trading under Article XX.227, CEL) continue to apply in full.
- 13 E.g. specific certificates need to be obtained from the tax administration and social security authorities for a transfer to be effective against these public creditors and for the transferee to avoid joint and several liability for the existing tax and social security debts of the transferor.
- 14 Article 12, CLA no. 32bis, implementing the bankruptcy exception in Article 5, EU Directive 2001/23/EC relating to the safeguarding of employees' rights in the event of transfers of undertakings or businesses
- 15 Provided that the currently pending *Wibra België NV* case (C-431/23), which however relates to the former GRP 3 procedure, does not indirectly present any obstacles to this new pre-pack procedure.
- 16 Articles XX.50 and XX.83/24, CEL.
- 17 Article XX.97/3, CEL.



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