



Deloitte Legal Newsflash

Enterprise Continuity Services

Upcoming amendments to insolvency proceedings and safeguarding of employee rights

At the end of October 2020, a draft bill was filed in anticipation of a wave of bankruptcies consequent to the COVID-19 crisis, and in response to the *Plessers*-case judgment by the Court of Justice of the European Union (CJEU).

Facilitating judicial dissolution

The bankruptcy procedure in Belgium requires the involvement of many (judicial) parties, making the procedure rather complex, costly and time consuming.

This is particularly inefficient for much of the insolvencies in Belgium concerning companies without actual activities, assets and employees (*'empty boxes'*).

In this context and considering the expected wave of pandemic driven bankruptcies, the legislator aims to promote judicial dissolution by offering the court a discretionary decision to apply the most appropriate procedure (bankruptcy or judicial dissolution):

- The court will be entitled to convert the procedure in bankruptcy claims filed through writ of summons or petition for bankruptcy;

- Creditors will be entitled to submit a 'two-fold' writ of summons: one to declare bankruptcy and, alternatively, one aimed at judicial dissolution.

Belgium's pre-insolvency landscape reshaped by CJEU

The *Plessers* case judgment of 16 May 2019 ([C. Plessers v Prefaco NV, Belgian State, C-509/17](#)) stated that the protection of employees in a judicial reorganisation through court-supervised transfer ("LCE 3") was not in line with the European TUPE-Directive, as the Belgian procedure allows transferees to 'cherry pick' employees from the company in reorganisation without any obligation to take over the entire workforce concerned.

This provision deviates from the principle of the TUPE-Directive, stating that *all* employees involved should be transferred when an undertaking (or part thereof) is itself transferred.

However, deviations can only be justified in line with exceptions explicitly listed in the TUPE-Directive, including when the transferor is subject to bankruptcy proceedings or any similar insolvency proceedings initiated for liquidation, under the supervision of a competent public authority.

The CJEU ruled that the LCE 3 procedure does not meet these conditions, as it does not automatically lead to bankruptcy proceedings and is initiated to safeguard the company. Legally therefore, the transferee cannot cherry-pick employees.

Belgium legislator aligns position

To prevent companies from being challenged on the procedure applied, the draft bill provides that the transferee must justify the decision if not all employees are selected by the purchaser in the transfer under LCE 3.

The justification should be based on technical, economical and/or organisational grounds, and unrelated to the transfer as such. The court will then have to verify said justification upon the transfer's authorisation.

The question is however, whether this draft bill ensures compliance with the TUPE-Directive, which only provides the option to *dismiss* employees for technical, economical and/or organisational reasons, without any link to the transfer. In LCE 3 proceedings, there will be a selection procedure that is related to the transfer.

Looking ahead

The future of LCE 3-proceedings had become unclear since the *Plessers*-case, because without the right to pick and choose employees, the incentive for any company to take over a struggling enterprise diminishes considerably. With this draft bill, the legislator aims to safeguard the benefit of the scheme. However, it remains to be seen whether this new set-up will pass the CJEU test.

Deloitte Legal's [Enterprise Continuity Services](#) team will provide updates on the final text and entry into force. In the

meantime, the team is readily available to assist with any questions on this topic.

Contacts

If you have any questions concerning the items in this newsflash, please get in touch with your usual Deloitte Legal - *Lawyers* contact at our office in Belgium or:

- **Stijn Demeestere**, sdemeestere@deloitte.com, +32 2 800 71 42
- **Jürgen Egger**, jegger@deloitte.com, +32 2 800 70 53

For general inquiries, please contact:
bedeloittelegal@deloitte.com, + 32 2 800 70 00

Be sure to visit us at our website: <http://www.deloittelegal.be>



As a top legal practice in Belgium, Deloitte Legal - *Lawyers* is a full service business law firm, highly recommended by the most authoritative legal guides. Deloitte Legal - *Lawyers* is based in Zaventem, Watermael-Boitsfort, Antwerp, Ghent and Kortrijk. It consists of close to 150 highly qualified Bar-admitted lawyers. Deloitte Legal - *Lawyers* offers expert advice in the fields of banking & finance, commercial, corporate/M&A, employment, IT/IP, public/administrative, insolvency and reorganisations, real estate, EU law, tax law, tax & legal services for high-net-worth families & individuals (Greenille Private Client) and dispute resolution. Whenever required to ensure a seamless and comprehensive high-quality service, Deloitte Legal - *Lawyers* collaborates closely with other professions (e.g. tax, financial advisory, accountancy, consulting), and with a select group of law firms all over the world.

Deloitte Legal - *Lawyers* provides thorough and practical solutions tailored to the needs of clients ranging from multinational companies, national large and medium-sized enterprises, financial institutions, government bodies to private clients.

More information: www.deloittelegal.be

© 2020, Deloitte Legal - *Lawyers* - The content and layout of this communication are the copyright of Deloitte Legal - *Lawyers* or its contributors, and are protected under copyright and other relevant and intellectual property rights laws and regulations. No reproduction in any form or through any medium is allowed without the explicit consent of Deloitte Legal - *Lawyers* or its contributors.

[Subscribe](#) | [Unsubscribe](#)