Global Restructuring and Insolvency Guide - Belgium

| Contents |
| --- |
| To generate table of contents, right-click here and select **Update Field.** |

Please select a topic from the menu.

*This content was last reviewed around October 2021.*

**Remark:** Belgium is a member of the European Union. Please refer to the section "European Union" under Quick Links below to learn more about the implications with respect to the European rules that apply in the field of restructuring and insolvency. The EU Restructuring Directive of 20 June 2019 (EUR 2019/1023) is still to be implemented in Belgium. For more information, please see: [The New European Restructuring Schemes - Update May 2022](https://www.bakermckenzie.com/en/insight/publications/2022/05/new-european-restructuring-schemes-update-may-2022).

# Initial Considerations

## Can you take security over all types of assets, including accounts receivable?

**Judicial reorganization through collective agreement**

Security can generally be taken from overall assets, including accounts receivable. Security taken after the opening of a judicial reorganization procedure will have no effect during such a procedure.

**Bankruptcy**

Security can be taken up to the day preceding the bankruptcy judgment, but security taken in the pre-bankruptcy hardening period (if any) may be subject to a challenge. See below for more information on the pre-bankruptcy hardening period.

## What is the nature of the insolvency process?

**Judicial reorganization through collective agreement**

A pre-bankruptcy moratorium with a view to safeguarding the continuity of part or all of the assets or activities of the enterprise. In principle, the debtor remains in possession.

**Bankruptcy**

A court process with a view to the liquidation of the debtor's assets and the distribution of any proceeds to its creditors. An independent court appointee assumes control over the debtor.

## What is the solvency requirement for a company to file a case in this jurisdiction?

**Judicial reorganization through collective agreement**

The procedure will be opened if the continuity of the enterprise is at risk, either immediately or in the future. The continuity is deemed to be at risk when losses have reduced net assets to less than half of the share capital.

A state of cessation of payments does not in itself preclude the opening of the procedure.

**Bankruptcy**

The conditions for bankruptcy are a durable cessation of payments and the inability to obtain further credit.

## Is there a requirement to demonstrate COMI ("centre of main interests") for a company to file a case in this country?

**Judicial reorganization through collective agreement**

Yes

**Bankruptcy**

Yes

## Is restructuring of both secured and unsecured claims possible?

**Judicial reorganization through collective agreement**

Yes, but secured claims cannot be without the creditor's individual consent, save for a suspension of rights that cannot exceed a period of 24 to 36 months from the date of ratification of the reorganization plan subject to payment of interest.

However, the above protection is limited to the secured amount of the security, the going concern realization value of the secured assets, or the book value of secured receivables.

**Bankruptcy**

There is no restructuring. The procedure aims to liquidate the debtor's assets and distribute the proceeds to the creditors in accordance with their respective priority rights.

## Are the claims of creditors and shareholders put into separate classes for purposes of voting and treatment under the plan or scheme?

**Judicial reorganization through collective agreement**

There are no separate classes for voting and treatment purposes. All creditors affected by the reorganization plan vote as one class.

**Bankruptcy**

N/A

## Is shareholder approval needed to commence a case? Are shareholders entitled to vote on a plan?

**Judicial reorganization through collective agreement**

Shareholder approval is not needed to commence a case.

If a shareholder is also a creditor affected by the reorganization plan, they will be entitled to vote on a plan together with the other creditors.

**Bankruptcy**

Shareholder approval is not needed to commence a case.

N/A

## Is there an ability to bind minority dissenting creditors (i.e., cramdown)?

**Judicial reorganization through collective agreement**

Yes. The reorganization plan will be approved in the case of a positive vote by a double 50% + 1 majority by (i) headcount of creditors affected by the reorganization plan and (ii) principal amounts of their claims. If such approval is obtained and subject to court ratification, unsecured minority dissenting creditors are nevertheless bound by the reorganization plan. In relation to secured creditors, please see above under "Is restructuring of both secured and unsecured claims possible?"

**Bankruptcy**

N/A

# Commencing the Process

## Who can commence?

**Judicial reorganization through collective agreement**

The debtor.

**Bankruptcy**

The debtor, one or more creditors, the public prosecutor's office, a provisional administrator appointed by the court, and the bankruptcy trustee of the main insolvency proceedings in the case of territorial insolvency proceedings.

## Is shareholder's consent required to commence proceeding?

**Judicial reorganization through collective agreement**

No

**Bankruptcy**

No

## Is there an ability to consolidate group estates?

No, but there is a possibility of appointing a common insolvency practitioner for group members with a COMI in Belgium. Group cooperation and coordination with group members with a COMI in the EU as per Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (EUIR).

## Is there any court involvement?

**Judicial reorganization through collective agreement**

Yes. The court opens and supervises the process. Any reorganization plan approved by the double majority of creditors is to be ratified by the court.

**Bankruptcy**

Yes. The court opens and supervises the process.

## Who manages the debtor?

**Judicial reorganization through collective agreement**

In principle, the debtor remains in possession.

**Bankruptcy**

A court-appointed independent bankruptcy trustee.

## What is level of disclosure of process to voting creditors?

**Judicial reorganization through collective agreement**

Creditors will receive access to the draft reorganization plan and an invitation to a court hearing for the creditors' vote on the plan. The court hearing will take place no earlier than 15 days following notice to the creditors.

**Bankruptcy**

N/A

## What entities are excluded from customary insolvency or reorganisation proceedings, and what legislation applies to them?

**Judicial reorganization through collective agreement**

Public law entities are excluded.

Consumers are subject to a specific insolvency procedure — the collective debt administration.

Credit institutions, insurance undertakings, investment firms, management companies of collective investment undertakings, clearing and settlement institutions and similar institutions, reinsurance undertakings, institutions for occupational retirement provision, financial holding companies and mixed financial holding companies are excluded from the benefit of judicial reorganization proceedings. These entities are subject to sector-specific legislation.

**Bankruptcy**

Public law entities are excluded.

Consumers are subject to a specific insolvency procedure — the collective debt administration.

## How long does it generally take for a creditor to commence the procedure?

**Judicial reorganization through collective agreement**

Any request to open a judicial reorganization procedure must be accompanied by a number of documents, including a statement of assets and liabilities, an income statement no older than three months, and a forward-looking cash flow statement for the duration of the requested stay, with such documents to be prepared with the assistance of an auditor or external accountant. It took a few weeks to prepare these and other required documents. However, the Law of 21 March 2021 now permits the delivery of some of these documents to be postponed so that the judicial reorganization request can be filed on an expedited basis.

The court will organize a hearing within 15 days of the filing of the request to open the procedure. The court will subsequently decide within eight days following the hearing. In the period between the filing of the request and the decision by the court, the debtor will, however, already benefit from protection against bankruptcy filings and enforcement measures.

**Bankruptcy**

A debtor that meets the conditions for bankruptcy must file for bankruptcy (or request a judicial reorganization) within one month of the conditions being satisfied.

# Effect of Process

## Does debtor remain in possession with continuation of incumbent management control?

**Judicial reorganization through collective agreement**

In principle, yes.

**Bankruptcy**

No. A court-appointed bankruptcy trustee assumes control.

## What is the stay/moratorium regime (if any)? Is the stay or moratorium worldwide?

**Judicial reorganization through collective agreement**

The debtor benefits from a moratorium in the period between the opening of the procedure by the court and the ratification of the reorganization plan. Subject to limited exceptions, creditors may not take any enforcement action.

The moratorium would apply worldwide in respect of all the debtor's assets irrespective of where they are located. The subject, however, to the opening of a territorial insolvency proceeding where the debtor has an establishment and various other exceptions. Besides, a different question is whether a local non- EU court would accept and enforce such a moratorium.

**Bankruptcy**

N/A

## Is there a provision for debtor in possession or rescuer financing or superpriority or priming financing?

**Judicial reorganization through collective agreement**

Yes. New creditors are not subject to the moratorium. If there is a close connection between the termination of the judicial reorganization and subsequent bankruptcy, new creditors will enjoy a super-priority in the subsequent bankruptcy.

**Bankruptcy**

Yes

## Can procedure be used to implement a debt-to-equity swap?

**Judicial reorganization through collective agreement**

Yes

**Bankruptcy**

N/A

## Are third party releases available?

In principle, third parties such as co-debtors, guarantors or security providers do not benefit from the procedure.

## Are the proceedings recognised abroad?

Yes. In the EU, in accordance with the provisions of the EUIR.

## Has the UNCITRAL Model Law been adopted?

No

## Can a debtor continue to carry on business during insolvency proceedings?

**Judicial reorganization through collective agreement**

Yes

**Bankruptcy**

The bankruptcy court may authorize the bankruptcy trustee to continue the business.

# Other Factors

## Are there any wrongful or insolvent trading restrictions and what is the directors' liability?

**Judicial reorganization through collective agreement**

The judicial reorganization is a moratorium with a view to safeguarding the continuity of part or all of the assets or activities of the enterprise. As such, directors may be able to reduce the risk of liability for wrongful or insolvent trading by requesting a judicial reorganization.

**Bankruptcy**

Yes. Directors, including former directors and de facto directors, may be held liable for part or all of the net liabilities if: (i) the director knew or must have known that there was no reasonable prospect of safeguarding the enterprise or its activities and avoiding bankruptcy; and (ii) the director did not act in the way that a reasonably prudent director would have acted in similar circumstances. In addition, as stated above, the directors must declare bankruptcy (or request a judicial reorganization) within one month of the date on which the conditions for bankruptcy are satisfied.

## What is the order of priority of claims?

**Judicial reorganization through collective agreement**

The reorganization plan will determine to what extent creditors will be disinterested. In relation to secured creditors, please see above under "Is restructuring of both secured and unsecured claims possible?" In relation to unsecured creditors, the reorganization plan must, in principle, offer repayment of at least 20% of the principal amount of each claim. If the reorganization plan provides for different treatment of different creditors, public creditors with a general lien (e.g., tax authorities) may, in principle, not be treated less favorably than the unsecured creditors that are treated most favorably. Employees must be paid in full.

**Bankruptcy**

The order of priority in the case of bankruptcy is extremely complicated given the many different types of liens (e.g., vendor's lien, the general lien of public creditors and employees) recognized by law. Secured claims will be senior to unsecured claims to the extent of the value of the secured assets but may be junior to specific liens affecting the secured assets (e.g., vendor's lien). A case-by-case analysis is inevitable.

## Do pension liabilities have any priority over other unsecured claims?

**Judicial reorganization through collective agreement**

Company pension schemes are supervised by the Financial Services and Market Authority (FSMA). As company pension schemes must be externalized to a pension provider (be it a group insurer or a pension fund), a potential judicial reorganization of an employer would not affect the pension provisions.

**Bankruptcy**

Company pension schemes are supervised by the Financial Services and Market Authority (FSMA). As company pension schemes must be externalized to a pension provider (be it a group insurer or a pension fund), an employer's potential bankruptcy would not affect the pension provisions.

If the pension provider is subject to bankruptcy proceedings, the employer will remain responsible for fulfilling the pension obligations toward its employees.

## Is it possible to challenge prior transactions?

**Judicial reorganization through collective agreement**

There is no specific mechanism to challenge transactions that occurred prior to the judicial reorganization. The general principles of law in relation to fraudulent acts will apply.

**Bankruptcy**

The default position is that there is no pre-bankruptcy hardening period. If there are serious and objective circumstances that unambiguously indicate that payments have ceased prior to the bankruptcy judgment, the bankruptcy court may, however, impose a pre-bankruptcy hardening period. If imposed, the pre-bankruptcy hardening may (subject to limited exceptions) not exceed six months.

Payments affected and legal acts entered into during the pre-bankruptcy hardening period may be subject to challenge. Payments affected and legal acts entered into prior to the pre-bankruptcy hardening (or, if no pre-bankruptcy hardening period is imposed, prior to the bankruptcy judgment) may in principle only be challenged in case of intent to prejudice the creditors.

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