Broadening scope of insolvency legislation

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Historically, Belgian insolvency legislation has applied only to entities involved in commercial activities. However, recent jurisprudence and upcoming legislative changes will result in important amendments that are intended to broaden the scope of the existing legislation.

Background

From the Napoleonic period until recently, Belgian commercial legislation applied only to parties that were regularly involved in commercial activities listed in the Code of Commerce. Only parties that were frequently involved in such commercial activities and that intended to make a profit could call themselves merchants under Belgian legislation.

As a result, numerous activities and professions were excluded from the Code of Commerce, despite being similar to merchant activities. Examples included farming, healthcare, non-profit activities and liberal professions (eg, lawyers, architects, public notaries and accountants).

Even if such activities were conducted within the framework of a professional partnership or corporation, the Code of Commerce did not regard them as merchant activities. The commercial courts thus had no authority over these entities.

All non-merchant professions and partnerships were also excluded from bankruptcy. This did not change when in 1997 the rules regarding bankruptcy were updated and a new statute was implemented.

Legal developments

At the start of the 2000s, Constitutional Court jurisprudence and legislative changes to the bankruptcy statute made the statute more favourable for bankrupt entities and broadened the 'fresh start' principle, under which creditors can no longer seek payment of the remainder of their claims following the closure of the bankruptcy.

On January 31 2009 the Business Continuity Act was passed. Its aim is to protect companies in financial difficulty from their creditors, so that a reorganisation process can take place and bankruptcy can be avoided.

In general, parties that are eligible for the application of insolvency legislation (bankruptcy legislation and the Business Continuity Act) benefit from these effects. In particular, the fresh start principle introduced in the bankruptcy law and developed further in the Business Continuity Act – together with the Business Continuity Act's protection against creditors – make it easier to wind up activities and clear debts.

Entities that are unable to benefit from insolvency legislation cannot invoke its positive effects. These parties must resort to less beneficial alternatives, such as the general liquidation scheme included in the Code on Companies or the collective settlement of debt proceedings (for civil

debtors). However, these proceedings were never meant to be invoked in the case of a commercial insolvency, as they do not include the idea of a fresh start for entrepreneurs and the collective settlement of debt proceedings cannot be invoked by corporations. Further, these alternatives protect the rights of creditors to a much lesser extent.

However, the Business Continuity Act's scope is broader than that foreseen in the Code of Commerce. It applies not only to merchants, but also to all partnerships or corporations, even if they are not involved in commercial activities. The act still excludes non-profit organisations and financial entities (eg, banks and insurance companies that are governed by a special legal framework) from its scope.

In a February 28 2013 judgment, the Constitutional Court decided that the exclusion of farmers from the Business Continuity Act's benefits infringed the equality principle in the Constitution. The court found the Code of Commerce's definition of a 'merchant' to be an unacceptable reason for excluding farmers from the Business Continuity Act's benefits as non-merchants.

Conversely, in a March 12 2015 judgment, the Constitutional Court ruled that the exclusion of accountants from the Business Continuity Act did not infringe the equality principle. To support its judgment, the court referred to the professional conduct rules that apply to liberal professionals and the fact that bankruptcy legislation prevented such professionals or entities from being declared bankrupt. The court also underlined the special role and tasks that the Business Continuity Act conferred on accountants (eg, the assistance that an accountant is required to provide to a company applying for Business Continuity Act protection).

As recently as 2014, some first-instance commercial courts and appeal courts ruled that pharmacies (also a liberal profession) could be declared bankrupt, as they were involved in general purchase and sales activities of over-the-counter medicinal products.

Comment

These developments have produced numerous interpretations, problems and divergent jurisprudence. Specialists agree that the differences regarding the application of insolvency legislation cannot be maintained.

The minister of justice recently announced that legislative steps will be taken in that regard. The changes to insolvency legislation – to both bankruptcy legislation and the Business Continuity Act – aim to move away from the 'merchant' concept to a broader 'entrepreneurial' concept.

As a result, all entities that are involved in commercial or entrepreneurial activity – including the liberal professions – will be eligible to benefit from the Business Continuity Act and bankruptcy legislation. However, it remains unclear whether the same would be true for non-profit organisations.

Polls have shown that up to 80% of entrepreneurs involved in the liberal professions favour the proposed legislative changes.

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