

REFORM OF THE LEGISLATION ON THE INSOLVENCY OF ASSOCIATIONS

FAIB LUNCH-DEBATE

19 February 2019

Alain Costantini – Partner



1

AGENDA

- I. Introduction to the insolvency reform
- II. Numbers related to insolvent (I)NPAs
- III. New insolvency procedures applicable to associations
- IV. New liabilities of directors of insolvent (I)NPAs
- V. Draft companies & associations Code (“CAC”) and liability of directors
- VI. Practical implications

2

I. INTRODUCTION TO THE INSOLVENCY REFORM

- The Act of 11 August 2017 contains an entirely new insolvency legislation
- This Act is integrated into the Belgian Code of Economic Law and constitutes its Book XX, entitled “insolvency of undertakings”
- Entered into force on 1st May 2018

3

I. INTRODUCTION TO THE INSOLVENCY REFORM

- Book XX of the Code of Economic Law broadens the scope of application of insolvency law by expanding it to “undertakings”
- (I)NPAs are considered as undertakings and are therefore governed by it
- Insolvency procedures of associations are dealt with by the “undertaking Court” (new name of the commercial Court)

4

II. NUMBERS RELATED TO INSOLVENT (I)NPAS

- Overview of the number of bankrupt (I)NPAs in Belgium between May 2018 and December 2018

	Brussels-Capital Region	Flemish Region	Walloon Region	TOTAL
NPA's	34	57	21	112
INPA	-	-	-	1

5

III. NEW INSOLVENCY PROCEDURES APPLICABLE TO ASSOCIATIONS

- 1) Several preliminary insolvency procedures are extended to associations, notably:
- Increased supervision of the financial health of associations, resulting in automatic communications to a division of the undertaking Court dealing with distressed undertakings by the tax administrations, the Social security authorities, the external accountant, the auditor, etc.
 - Appointment of a judicial agent in case of serious and manifest fault
 - Appointment of a mediator (whose mission is to facilitate the restructuring of the assets/activities)
 - Conclusion of an out of court agreement between the association and (some of) its creditors

6

III. NEW INSOLVENCY PROCEDURES APPLICABLE TO ASSOCIATIONS

- 2) The **judicial reorganization procedure** is applicable to associations. Three different types of judicial reorganizations are organized, with a close supervision by the Court:
 - i. Agreement with some of the association's creditors
 - ii. Collective reorganization plan with all association's creditors
 - iii. Sale of all or part of the association's business under judicial control

7

III. NEW INSOLVENCY PROCEDURES APPLICABLE TO ASSOCIATIONS

- 3) The **bankruptcy procedure** is extended to associations
 - However, the obligation to file for bankruptcy in the month of cessation of payments and the criminal sanctions attached to this obligation are not applicable to associations

8

IV. NEW LIABILITIES OF DIRECTORS OF INSOLVENT (I)NPAS

- The extension of the scope of application of insolvency law to (I)NPAs results in new liabilities of directors
- The term “directors” includes (whether these mandates are remunerated or not):
 - i. Current and former directors
 - ii. De facto directors
 - iii. Persons entrusted with daily management

9

IV. NEW LIABILITIES OF DIRECTORS OF INSOLVENT (I)NPAS

1) **Art. XX. 225 of the Belgian Code of Economic Law**

- Serious and manifest fault contributing to the association’s bankruptcy
- Liability for part or all of the debts resulting from the asset shortfall
- Not applicable to:
 - “Small” (I)NPAs using simplified accounts pursuant to articles 17 §2 (NPAs) and 53 §2 (INPAs) of the Act of 27 June 1921
 - “Large” (I)NPAs that, during the three financial years before the bankruptcy **or** during each financial year if the association has been incorporated less than three years before, have an average annual turnover below 620,000 EUR excluding VAT **and** whose total of the balance sheet of the last financial year does not exceed EUR 370,000

10

IV. NEW LIABILITIES OF DIRECTORS OF INSOLVENT (I)NPAS

- Reminder:
- Associations are qualified as “small” if maximum **one** of the following criteria is exceeded:
 - 5 full time employees in average on a yearly basis
 - EUR 312,500 for the total revenues other than exceptional revenues, exclusive of VAT
 - EUR 1,249,500 for the total of the balance sheet
- Associations are qualified as “large” if **at least two** of the criteria above are exceeded

11

IV. NEW LIABILITIES OF DIRECTORS OF INSOLVENT (I)NPAS

2) Art. XX. 226 of the Belgian Code of Economic Law

- Liability for unpaid social security contributions
- If, in a period of five years before the bankruptcy, directors have been involved in at least two bankruptcies or liquidations of other undertakings where social contributions were not paid

12

IV. NEW LIABILITIES OF DIRECTORS OF INSOLVENT (I)NPAS

3) Art. XX. 227 of the Belgian Code of Economic Law

- Liability of directors questioned by a curator for part or all of the debts resulting from the asset shortfall in case of “wrongful trading”, meaning:
 - i. The directors knew (or should have known) that, at some time before bankruptcy, the association clearly had no reasonable prospect of preserving the undertaking or its activities and avoiding bankruptcy
 - ii. The directors were already acting at the time in a capacity of director
 - iii. At the moment referred to under i., the directors did not act as a normally prudent and diligent director would have acted in the same circumstances
- Not applicable to “small” (I)NPAs using simplified accounts pursuant to articles 17 §2 (NPAs) and 53 §2 (INPAs) of the Act of 27 June 1921

13

V. DRAFT COMPANIES & ASSOCIATIONS CODE AND LIABILITY OF DIRECTORS (“CAC”)

- The CAC modifies the general legal regime of the liability of directors of associations
- A legal limitation of the liability of directors is foreseen:
 - Liability is limited to financial thresholds (250,000 EUR, 1,000,000 EUR, 3,000,000 or 12,000,000 EUR), depending on the annual turnover & balance sheet total of the (I)NPA
 - Various exclusions are foreseen and notably art. XX. 226 of the Code of Economic Law
 - => Objective: better insurability of the risks

14

V. DRAFT COMPANIES & ASSOCIATIONS CODE AND LIABILITY OF DIRECTORS

Average turnover on an annual basis (EUR Excl.VAT) *	And/ or	Average balance sheet total over the same period (EUR) *	Financial limits
Turnover < 700,000	AND	BST ≤ 350,000	250,000 EUR
700,000 ≥ turnover ≤ 9,000,000	OR	350,000 > BST ≤ 4,500,000	1,000,000 EUR
9,000,000 > turnover < 50,000,000	OR	4,500,000 > BST < 43,000,000	1,000,000 EUR
9,000,000 > turnover < 50,000,000	AND	4,500,000 > BST < 43,000,000	3,000,000 EUR
50,000,000 ≥ turnover	OR	43,000,000 ≥ BST	12,000,000 EUR

*The turnover and balance sheet total are calculated over the three financial years preceding the introduction of the action for damages, or over the period since the incorporation if less than three financial years have elapsed since this incorporation.

15

V. DRAFT COMPANIES & ASSOCIATIONS CODE AND LIABILITY OF DIRECTORS

- Joint and several liability?
 - Currently: contrary to directors of commercial companies, directors of associations are individually liable for negligence or torts committed. In the case that different directors committed together negligence (/tort) while the negligence (/tort) of one director alone was not sufficient to have caused the damage, the directors may be declared jointly and severally liable with the other directors who caused the damage to indemnify the full damage
 - After the CAC reform: joint and several liability of the directors when the Board is organized as a collegial body and – when there is no collegial Board – in case of violation of the CAC or the AoA. Possibility of release from liability when the director (i) did not take part in the misconduct, and (ii) reported the misconduct
- => More denunciations by directors are to be expected

16

VI. PRACTICAL IMPLICATIONS

- Professionalization of the sector
- Assimilation of the legal provisions applicable to associations & companies (undertakings, insolvency, CAC)
- Impact on how liabilities of directors will be apprehended?
- Social contingencies ?
- Opportunity to review your contracts with insurance companies?

17

QUESTIONS / COMMENTS ?

18



THANK YOU!

Alain Costantini – Partner (Dear Krzewinski & Willez)

Tel. : 010/41 72 97

Email : ac@dkw-law.com

Allée de Clerlande 3

1340 Ottignies Louvain-la-Neuve

