Client Alert | White Collar/Investigations

Belgian legislator adapts the legal framework for criminal settlements

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On 2 May 2018, the Belgian State Gazette published the law of 18 March 2018 amending various provisions of criminal law, criminal procedure and civil procedure (the "**Law**").

The Law serves first as a direct response to the judgment of the Belgian Constitutional Court of 2 June 2016 (the "**Ruling**") annulling part of the Belgian criminal settlement regime (*transaction pénale/minnelijke schikking in srafzaken*) and declaring it unconstitutional (see our previous Client Alert 2016), but preserves at the same time its core principles.

As a consequence of the Ruling, the Law introduces judicial scrutiny of the proportionality of the criminal settlement when an investigating judge (*juge d'instruction/onderzoeksrechter*) or a criminal court is seized of the case. Such scrutiny does not concern, however, the opportunity for a criminal settlement, which remains at the discretion of the public prosecutor (*procureur du Roi/procureur des Konings*).

The amended legal framework of the criminal settlement regime will not have a great impact on the convenience of criminal settlements. On the contrary, the modifications can predominantly be considered as improvements because the Law preserves the advantages of the procedure while introducing a judicial scrutiny whether the criminal settlement is proportional. This judicial review of the proportionality of the settlement may prevent public prosecutors from insisting on excessive settlement offers.

At the same occasion, the Law also introduced other changes in criminal law and criminal procedure following other judgements of the Constitutional Court.

The Law entered into force on 12 May 2018.

Details of the main changes to the criminal settlement regime.

Broadening of judicial scrutiny of criminal settlements.

Article 216*bis* of the Belgian Code of Criminal Procedure (the "**CCP**") outlines the procedure to obtain a criminal settlement, i.e. the public prosecutor proposes that the perpetrator pays a sum of money to terminate the prosecution of the offence. On 2 June 2016, the Constitutional Court judged that former Article 216*bis* §2 of the CCP relating to criminal settlements when an investigating judge is in charge of the investigation or when the case has been referred to a criminal court, violates the Constitution due to a lack of judicial scrutiny. Following the Ruling and pending revision of the legislation, public prosecutors were reluctant to propose new criminal settlements when an investigating judge or a criminal court was seized of the case.

To satisfy the concerns expressed by the Constitutional Court, the Law broadens the scrutiny of the criminal settlement either by the investigating courts (*chambre du conseils/raadkamer*) or by the criminal court. These courts will from now on not only have to review the formal requirements of the criminal settlement, but should also examine whether (i) the perpetrator has entered the criminal settlement voluntarily and deliberately, and whether (ii) the amount of the criminal settlement is in proportion to the gravity of the crime and the behaviour of the perpetrator.

However, it should be stressed that the court does not have the authority to question the opportunity of a criminal settlement. This is compatible with the Ruling, as the Constitutional Court ruled that the public prosecutor's discretionary power to propose a criminal settlement or not does not violate the Constitution. It has therefore been left to the discretion of the public prosecutor to decide whether a criminal settlement is opportune or not.

The Law likewise modified Article 216*ter* of the CCP on criminal mediation to provide for the same judicial scrutiny when the investigating judge is seized of the case[1].

Introduction of a duty to notify the social security administration and tax authorities

If the public prosecutor is of the opinion that the facts which form the object of the criminal settlement have caused damage to the social security administration and the tax authorities, the public prosecutor has from now on the duty – when proposing a criminal settlement – to notify these administrations about the underlying facts.

Under the former regime, the social security administration and the tax authorities were already involved in criminal settlements procedures, as their consent to the criminal settlement was required as well as the full payment of the amounts due. According to the legislator, in order to make use of the rights conferred to them, the social security administration and the tax authorities should also have knowledge of the particular facts related to the criminal settlement to fully investigate the amounts due (and potentially increase them as a result) before accepting a criminal settlement.

Due to the introduction in social and tax matters of an information duty towards the social security administration and tax authorities, vigilance may be required before entering into settlement negotiations since these administration might decide to institute their own administrative investigations and possibly introduce (new) administrative claims.

Other changes to the criminal settlement regime

The Law introduces three other modifications with respect to the criminal settlement regime:

- payment of the stipulated amount of the criminal settlement will from now have to take place after judicial confirmation of the criminal settlement instead of before;
- in event of either non-confirmation of a criminal settlement or interruption of negotiations, all documents which have been communicated during the negotiations will have to be removed from the criminal case file and cannot be used in subsequent and other proceedings; and
- the statute of limitation of the criminal procedure will henceforth be suspended for the duration of the negotiations of the criminal settlement, irrespective whether the criminal settlement is proposed during investigation by the public prosecutor or while an investigating judge or a criminal court has been appointed. This means that from the moment that a criminal settlement has been proposed up until the moment that it becomes clear that the criminal settlement will be, for whatever reason, unsuccessful, the time limit to prosecute the offence that is the object of the criminal settlement will stop running.

Other changes introduced by the Law

- The Law introduced two amendments regarding the confiscation of property regime as laid down in Articles 42-43*quater* of the Belgian Criminal Code, following the judgment of the Constitutional Court of 9 February 2017. Henceforth, the judge has the possibility not to confiscate the tools of a crime or misdemeanour, i.e. property that was used or was intended to be used for the perpetration of a criminal offence, if this would be perceived as an unreasonably severe punishment. Moreover, the possibility to confiscate property by way of equivalent has once again since its introduction in the Criminal Code been further extended;

[1] Criminal mediation refers to the mediation procedure voluntarily entered into by the perpetrator and the victim in order to reach an agreement on compensation of the damages and, if applicable, the fulfilment of certain conditions, which allows the public prosecutor to order the discontinuance of the criminal proceedings.

- Following the judgment of the Constitutional Court of 25 January 2017, the Law introduced with respect to investigations by the public prosecutor further the possibility to appeal the refusal of the public prosecutor to grant access to the criminal file to the criminal division of the appellate court (*chambre des mises en accusation/kamer van inbeschuldigingstelling*).

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