# The Preventive Restructuring Directive: A French perspective

Jean-Luc Vallens writes on the impact of the Directive on French practitioners

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**The Preventive Restructuring Directive ("PRD"), which is about to be adopted by the European legislator, deserves the close attention of French practitioners, as it will become part of Book VI of the Commercial Code.**

## More effective prevention

The PRD anticipates putting into place a framework for preventive restructuring that is both efficient and light: involvement of a judge is no longer considered indispensable (Article 4), except for a few matters: evaluation of the business' financial situation, stays of individual action to permit the parties to negotiate and the approval of an agreement. The initiative is left to the debtors or, with their consent, to one of the creditors (Article 4).

The debtor may also be supported by a practitioner if the Member States see it as desirable (Article 5), which will be necessary to guarantee the professionalism of those involved in preventive restructuring. The PRD provides for a temporary stay of individual actions limited to 4 months, though with a possible extension to 12 months, subject to creditors being able to petition for its being lifted in case of unfair prejudice (Articles 6-7). A creditor providing financing for restructuring will enjoy a preference under this framework.

Except for the optional nature of the court intervention possible, the orientation of the procedure is largely inspired by the French *conciliation* procedure. Confidentiality is not, however, given priority by the European law-maker as a necessary procedural tool, though the PRD recommends a limited power for courts to intervene and provides that stays of individual actions should only affect those creditors who have been informed of the negotiations. The PRD also permits the Member States the possibility of introducing or maintaining procedures which do not adhere to the notice conditions, falling within the field of application of the Recast European Insolvency Regulation, to be included within the list in Annex A.

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## A reinforced restructuring procedure

The PRD contains rules destined, it being the case, to apply to preventive procedures, but perhaps also, in an indirect way, to existing restructuring procedures, such as *sauvegarde* and *redressement judiciaire*. In effect, it prescribes the formation of creditor classes to vote on the restructuring agreement: creditors will be grouped together, by reference to the preferences they enjoy and to any existing agreements, into different classes reflecting comparable economic interests.

Creditors thus grouped together will be required to vote on the restructuring proposals (Article 9). At least two classes will be created, one for creditors benefiting from preferences and security, the other for unsecured creditors. A class containing employees may also be put into place. Another class could bring shareholders together, which could increase the chances of a plan being approved via a cross-class cram-down.

With these changes, the French law will move from a classification of creditors within the existing committee structure based on the status of creditors, to a classification in function of the type of debt. For smaller businesses, the Member States may set aside this mechanism as long as they determine what will be acceptable thresholds for approval. Voting majorities may be set freely, subject to an overall limit of 75% of the amount of debt in each class, so as to facilitate the approval of restructuring plans despite the opposition of some creditors.

The scope of application of these principles might extent to *sauvegarde* and *redressement judiciaire* procedures, not just the conciliation procedure. *Sauvegarde* is tied to the criterion of the probability of insolvency, and it is likely that similar rules should apply for the *sauvegarde* and *redressement judiciaire* procedures, for the adoption of plans which have the same outcomes.

The PRD empowers courts with a detailed, though formal, oversight of matters. Assessment will concern, namely, class formation, formalities in relation to the casting of votes, fair information to smaller creditors, the calculation of majorities. The equality of treatment of creditors belonging to the same class will also be a criterion for approval. Inspired by American law, other elements will be introduced, such as the "best interests test", by a comparison between the positions of opposing creditors within the

proposed plan and their situation in a liquidation and the absolute priority rule (Article 10 and 11). Such criteria go further than the current conditions for approval of rescue plans.

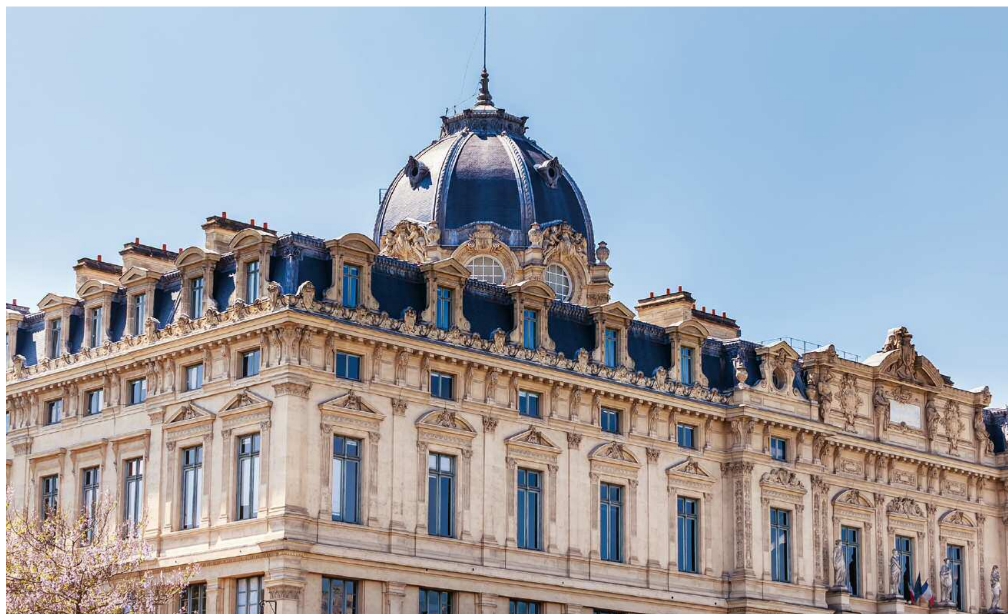
Finally, courts should be entitled to reject a proposed plan if it does not offer a reasonable prospect for the avoidance of insolvency or does not ensure the viability of the business. This sounds similar to the current French law (Article 13).

The plan that is approved will be binding for all affected parties. Legislators however may provide that the plan should not in any event affect the rights of workers. In case of an appeal against the court's approval, the Member States will have to provide rules for a fast procedural treatment, and if an appeal stays the application of an order, the affected creditors should receive damages, for example interests on late payments (Article 15).

## Making directors more responsible

The Member States should impose general duties on directors, such as the duty to protect the interests of creditors in cases where insolvency is probable, to take necessary steps to avoid insolvency, and to avoid gross negligence in carrying out activities that could compromise the viability of the business (Article 18). This draws on duties provided for and sanctioned by the French law in the presence of management misconduct, voluntarily neglecting to declare the insolvency of the business, defects in the keeping of accounts and the misappropriation of assets.

The French Commercial Code will not need substantial modification, except insofar as qualifying what 'management misconduct' might mean. The PRD also prescribes limiting the shareholders' rights: they will be excluded from voting on plans and courts will have the possibility to reject any objection in respect of a plan voted against their will (Articles 9 and 12). The French



law currently considers shareholders as unsecured creditors and the legislator will have to amend it.

## A rescue eased by debt cancellation

The French law grants individual debtors a general discharge except for some exceptions upon the closure of a *liquidation judiciaire*.

The PRD provides for an automatic cancellation of unpaid debt at the end of a three-year period, depending on a confirmation of a plan, or on opening of an insolvency procedure. Discharge is therefore uncoupled from the end of procedural operations. Any disqualification from professional activity based only on the fact of insolvency (such as in the current French law, during a *liquidation judiciaire*) should also end when the discharge happens. Usual exceptions however may be made where the debtor was acting in bad faith, in case of a substantial breach in the payment obligations, or where the debtor fails to cooperate.

The prescribed three-year duration should be enacted in coordination with the duration of a rescue plan, thus, possibly greater. The longer period of a plan could derogate to the general rule (see Article 20-2(2)). Exceptions are provided for other debts, including criminal sanctions, damages, alimentary and family support, debts arising after the judgment opening the proceedings and for some debtors subject to professional conduct rules (Articles 19-22). The French law will not require substantial modification in this regard.

## Experienced professionals

The PRD's model here is largely based on the status of French professionals insofar as the conditions for appointment and practice (transparency, fairness and professional training) are concerned. Parties will get the right to remove practitioners in order to avoid any conflicts of interest (Articles 26-27). Qualification requirements are also introduced for judges in charge of insolvency procedures (Article 24). Training provided to judges by the French National School for Judiciary is very much in line with these requirements (see the World Bank Doing Business Report 2019). ■

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