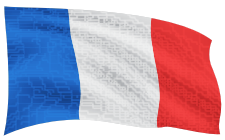
Legislative news from France



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During the course of the summer of 2021, the French legislator has adopted two important texts. The first text is a law of a temporary nature, which aims to allow companies to recover from the effects of the sanitary crisis, the second is an ordinance which transcribes the European Directive of 20 June 2019 on preventive restructuring frameworks and insolvency proceedings into the French Commercial Code.

Temporary crisis exit proceedings

The law of 31 May 2021 (applicable for a period of two years) has put in place specific proceedings for the smallest companies (with *less than 20 employees and with a turnover of less than €3 million*) to favour their exit from the crisis. These proceedings are of a voluntary nature, meaning that it is only available upon a demand of a debtor already insolvent. The eligible debtor has to submit a provisional budget showing that its business is profitable. The debtor must also have sufficient funds to pay the wage claims and be able to justify its ability to draw up a draft plan.

This procedure may also be applicable to a company being already in the implementation phase of a safeguard or reorganisation plan and expecting to become again insolvent. The specific proceedings can have a *maximum* duration of three months during which an insolvency practitioner draws up a list of claims from the debtor's accounting documents, which is then sent to each creditor, for a possible updating.

The proposals for settlement are drawn up on the basis of this list. Indeed, to enhance simplicity in these specific proceedings, the law sets aside the formalities for the lodgment and verification of claims.

The opening of such voluntary proceedings obviously obstructs any application for reorganisation or liquidation proceedings filed by creditors.

The plan must provide instalment payments of the claims mentioned on the above list: this precaution is likely to make the debtor company responsible from the beginning of the proceedings. Other creditors are not affected by the plan, but the stay of individual lawsuits applicable from the opening of the proceedings is nevertheless opposable to all of them. The plan also protects maintenance claims, wage claims, claims arising from tort, as well as the smallest claims.

Finally, current contracts remain in force: their termination is not open under the ordinary-law conditions of the Commercial Code. The same rule applies to third party claims on assets held by the debtor.

If a plan is not adopted within this period of three months, reorganisation or liquidation proceedings may be ordered under the current conditions laid down in the Commercial Code.

These specific proceedings will cease to apply in 2024, unless extended by legislation and subject, of course, to plans made under these temporary legislative arrangements.

Transposition of the European Directive of 20 June 2019

The Directive of 20 June 2019 on preventive restructuring frameworks has been implemented into French law with an ordinance of 15 September 2021, which introduces the standards enshrined by the European legislator while coordinating the Commercial Code with the domestic rules on security interests.

The goals of the new legislation are numerous: to improve the attractiveness of French law, to prevent the dissemination of non-performing loans, to encourage the maintenance of economic activity and jobs, to ensure the balance of interests involved and to guarantee the right of the debtors to a second chance. Its objective is also to harmonise French and German laws according to the Treaty on Franco-German integration and cooperation concluded between the two countries in 2019.

The ordinance makes few changes to the current effective mechanisms of French law and its administrative organisation, such as the preventive proceedings known as conciliation, which served as a model for the Directive concerning the rules for protecting the rights of employees and the consequences of the closure of liquidation proceedings resulting in the debtor's full discharge. Nor does it change the professional rules applicable to insolvency practitioners or to the specialisation of judges (these administrative aspects are already in accordance with the Directive).

That being said, each of the procedures is subject to amendments incorporating the provisions of the Directive.

Conciliation

The debtor will be entitled to file for a time extension against a creditor who refused to give him a delay and a postponement of payments for claims not yet due; in the case of the resolution of an amicable agreement, securities constituted during the conciliation procedure may be declared as lapsed (if this lapse is not waived by a contractual clause, except where the rules of the suspect period are applicable); the auditor may finally warn the president of

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the commercial court of the foreseeable difficulties of the company under his supervision without any delay.

Accelerated safeguard proceedings

At the end of an unsuccessful conciliation, accelerated safeguard proceedings may be opened for a period of two months or a maximum of four months, at the request of the debtor, if a plan is likely to be approved by a majority of creditors. In this case, classes of creditors will be constituted: these accelerated safeguard proceedings constitute the preventive restructuring procedure as prescribed by the Directive: the claims will be established on the basis of the debtor's declaration subject to the updates possibly made by creditors; all companies, regardless of their size, will be able to access such proceedings. If the state of indebtedness allows it, the effects of the proceedings may finally be limited to financial creditors only.

Safeguard and reorganisation proceedings

The duration of the observation period in safeguard proceedings is limited to 12 months, except for SMEs, for which the preparation of a plan may take longer. Special provisions are provided for insolvency proceedings: creditors will have to lodge their claims as well as their securities, failing which those claims and securities will not be enforceable against the insolvent debtor.

Constitution of classes

To take into account the provisions of the Directive, the ordinance provides for a division of creditors and other stakeholders (such as shareholders) into classes. The 'class formation' will concern only those whose rights may be affected by the plan. The distribution will be made by the court-appointed administrator ('*administrateur judiciaire*') and concerns the creditors with sufficient commonality of interest in a same class. This distribution will have to take into account subordination

agreements prior to the proceedings. Creditors with security interests and equity holders will be allocated to different classes, as long as their rights are affected. The plan may not affect employees' claims, pension rights or maintenance claims. Shareholders will be in a specific or several specific classes.

As employees' claims will not be affected by the plan, the same rule applies to the claims of the Wage Guarantee Fund (AGS), which is subrogated to their rights. Affected parties will be able to challenge the 'class formation' before the supervisory judge ('juge-commissaire'). The adoption of a plan will be possible only if it achieves a majority of two-thirds of the amount of the claims in each class. The vote could be replaced by an agreement between the creditors, in the same proportions.

The sanction of the plan by the Court will take into account the principles prescribed by the Directive: the 'best-interest-of-creditors' test and a sufficient protection of all affected parties. The absolute priority rule will also apply, in order to allow the approval of a restructuring plan in the event that it is not approved according to these majority principles (according to the cross-class cram-down mechanism). In the event of a dispute, an expert opinion could be ordered by the court, to determine the value of the company. Affected parties will be entitled to challenge its judgment.

According to the Decree of 23 September 2021, classes will be mandatory either for companies with more than 250 employees and a turnover of more than €20 million, or for companies with a turnover of more than €40 million, or for the mother company of a group whose members all fulfill these thresholds.

Liquidation proceedings

The provisions introduced by the ordinance now include a detailed ranking of claims for the distribution of the proceeds of the assets, integrating the various liens and privileges established by the Civil Code, the Labour Code, the Tax Code or the Customs Code, for giving creditors and investors a better legal certainty. For disputed claims, as well as for the remuneration of company directors and legal costs, a corresponding amount will be placed in reserve.

With regard to the full discharge of insolvent entrepreneurs, the current mechanism whereby creditors do not recover their right to sue is preserved: the French Commercial code actually does not need any modification, for it already provides rules of discharge and exemptions consistent with the EU Directive

In parallel, current simplified liquidation proceedings will apply to individual debtors without any assets.

Lastly, another Ordinance of 15 September 2021 introduces a reform and a clarification of rules relating to privileges, personal guarantees and securities.

These new principles are due to come into force in October 2021, subject to future regulations. ■

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