

A new status for French sole traders



Since the Civil Code of Napoleon, French law has considered that a debtor's entire assets constituted a pledge to creditors. Though later subject to change influenced by business law, it is not until the Law of 14 February 2022 that the unity principle came to an end.

The new sole trader regime

The French legislator has created two separate sets of assets for individual debtors, namely professional and private. Only the debtor's professional assets are now liable for debts related to activity; the aim clearly being to protect the debtor's personal assets. The law is directly influenced by Directive 2019/1023 of 20 June 2019, which is designed to give a second chance to individual debtors (see Recital 72).

This new regime is not compulsory or of public order: the entrepreneur needs only opt for sole trader status by registering with the Trade and Companies Register and by indicating on business documents his/her name together with 'sole trader' (*entrepreneur individuel/ EI*). The debtor also may waive division of the assets in favour of a creditor by means of an official act. The debtor also may transfer professional assets to a company.

The law protects the debtor's private assets by prohibiting guarantees for professional debt over his personal assets. However, the division of assets cannot be invoked against the tax authorities or social security bodies in the event of fraud or deceit by the debtor.

Apart from these cases, the law limits pledges to professional creditors only over assets considered as 'useful' for the

debtor's professional activity. The assessment of this utility may give rise to difficulties of interpretation and litigation. Similarly, the division of assets by the debtor may be challenged by creditors.

Financial difficulties or insolvency

Debtors must provide the Commercial Court with a detailed list of their professional assets, debts related to professional activity and a list of other claims, so that the court has a complete picture. Insolvency will be assessed only in relation to professional assets. If proceedings are opened, other assets however may be recovered through avoidance actions, if any act by the debtor has impoverished the business assets.

In the event of judicial liquidation, the liquidator may in principle only sell assets that are useful for the debtor's professional activity, other assets remaining subject to the management of the debtor who remains in possession. The debtor's personal liability may be invoked in the event of abuse, in particular if the debtor takes any personal advantage of the distinction between both classes of assets before applying for the opening of insolvency proceedings.

Coordination of the treatment of the individual entrepreneur insolvency and private debts

Special provisions have been introduced to coordinate the insolvency situation of individual entrepreneurs and their financial situation as a natural person for private debts. Some difficulties

may arise from the existence of two competent bodies: the Commercial Court, for professional debts, and an administrative body ('Over-indebtedness Commission'), for private debts, dealing with over-indebted consumers.

The French legislator has instituted a single referral mechanism to the Commercial Court to clarify the debtor's situation by distinguishing professional and personal assets. If necessary, the court can refer the assessment of private debts to the Over-indebtedness Commission, which will then implement an amicable procedure with a settlement of debts or provide for liquidation of the private assets. However, the Commercial Court will rule on any difficulties relating to the division of assets, disputes and the coordination of both proceedings.

The complex mechanism for coordination and cooperation between the two procedures can raise difficulties: (i) the Commercial Code does not require good faith for initiating insolvency proceedings, though this is necessary for over-indebtedness proceedings; (ii) the termination of both proceedings grants a full discharge using different provisions with different exemptions.

The legislator is undoubtedly counting on the courts to adapt the text to specific situations encountered: good luck to the judges!

Let us hope that a forthcoming reform will give the French legislator the opportunity to simplify its law by entrusting the treatment of the professional and private assets of insolvent entrepreneurs to the commercial courts. ■



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