The EU Proposal for Insolvency Law Harmonisation: A French perspective

Jean-Luc Vallens gives his view on to what extent French law already complies with the new EU proposal

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The new proposal for a Directive published by the European Commission on 7 December 2022 aims at a thorough harmonisation of insolvency laws. The proposal has broad similarities with current French law.

Avoidance actions

The Commission recommends the establishment of a suspect period of a general duration of three months from the application for the opening of insolvency proceedings, considering insolvency as a factor for the voidability of acts concluded during this period. It also recommends the voidability of certain payments made under normal conditions, where the creditor knew or should have known that the debtor was unable to pay its debts. In addition, creditors with close links to the debtor will be presumed to have knowledge of the debtor's insolvency (close relatives, family members or persons with access to the company's financial information). Also covered would be acts carried out without consideration or with insufficient consideration, as well as legal acts intentionally defrauding creditors (in which case the period would be extended to one year). But Member States are free to adapt their law or to maintain it where it provides better protection for creditors' interests.

French law establishes a suspect period of a significantly longer maximum duration (up to 18 months) and lists two types of acts: on the one hand, those which are voidable by operation of law, such as intentional acts, legal acts at an undervalue without consideration, the payment of debts not yet due and securities established to secure previous debts; on the other hand, acts and payments which are normal, but where the beneficiary was aware that the debtor was unable to pay its debts at the time they were carried out. The French Commercial Code could maintain this longer duration for the suspect period and a more extensive list of detrimental acts or easier conditions for voidability. But the French legislator could be inspired by the proposed Directive to create a presumption against persons with close links to the debtor.

The tracing of foreign assets

The proposed Directive aims to facilitate the recovery of a debtor's assets and rights located abroad. It provides for access to bank accounts and public registers to identify and recover such assets, including those subject to avoidance actions. Public registers (an annex to the proposal lists them) allow for the identification of assets and security interests such as pledges. Mutual legal assistance agreements already exist, but French law and other laws should be supplemented by specific provisions on access, information that can be communicated and rules on confidentiality and data protection. Directive (EU) 2015/849 on beneficial owners should also be available for consultation.

Pre-pack proceedings

The proposal requires Member States to include a pre-pack proceeding in their insolvency regimes, facilitating the disposal of an insolvent company before the opening of any formal insolvency proceedings. Two phases are anticipated: a non-judicial preparation phase, accompanied if applicable by a stay of individual proceedings, and a liquidation phase open to the judicial authority to approve the sale. The sale process should be in line with competition principles, transparency, fairness and market standards. However, this requirement appears to be more wishful thinking, as there is no serious guarantee to limit the risks of the procedure being abused and principles being violated. In the judicial phase, the court should check the prerequisites of transparency and fairness, but could also opt for a public auction.

Current French law is largely compliant: a sale can be prepared in the context of conciliation proceedings, before being authorised after the opening of insolvency proceedings. Moreover, a "private sale" remains possible in the context of a judicial liquidation proceedings. French law would therefore have to be adapted at least to put the sale by mutual agreement and the sale by public auction on the same level. On the other hand, the transfer of a business to relatives is prohibited under French law, subject to exceptional cases, whereas the proposed Directive is more flexible, provided that the offer meets the criterion of the "best interests of

creditors". This approach shows a certain ignorance of the risks of undermining the principles of transparency and integrity of the proceedings by allowing a transfer to the managers of the insolvent company without any payment of the liabilities.

The obligation to apply for Insolvency proceedings

Contrary to the American Bankruptcy Code, the European Commission adopts the obligation (shared by most Member States) for a manager to request the opening of insolvency proceedings as soon as they are aware of this situation and, at the latest, within three months. French law requires the same obligation, but within a shorter period of 45 days from the cessation of payments. The rule is more favourable to the interests of the creditors of the insolvent debtor. The proposal also provides for civil liability in the event of failure to fulfil this obligation. French law complies with this recommendation in the case of mismanagement that contributed to the insufficiency of assets.

Liquidation of micro-enterprises

The European Commission requires the introduction in each Member States of simplified liquidation proceedings with specific provisions to limit their costs and duration (see a Draft UNCITRAL Guide of 4 October 2021). Such proceedings already exist under French law in compliance with the proposed Directive: (1) simplified judicial liquidations for debtors with no real estate, less than five employees and a turnover of less than €750,000, as well as (2) professional recovery proceedings, which are open to natural persons with no employees and assets of less than €15,000. These proceedings are short (6 months for simplified judicial liquidations and 4 months for professional recovery proceedings) and offer debtors a debt discharge unless they are liable.

On the other hand, the Commission recommends avoiding the appointment of an insolvency practitioner, which would only be possible on request and if the costs can be covered by the debtor's assets or by the applicant. French law provides in any case for the appointment of a liquidator, whose costs are financed either out of the assets or by a contribution from all insolvency practitioners. It is doubtful that simplified liquidation proceedings can be carried out in the interests of creditors without the involvement of an insolvency practitioner.

The establishment of creditor committees

Finally, the Commission recommends the establishment of a body representing creditors if the general meeting of creditors so decides or at the request of the creditors' committee provisionally established before the opening of the proceedings. It also makes it possible to waive this possibility if the costs are too high in comparison to the debtor's assets, if the number of creditors does not justify it or in the case of a micro-enterprise. This supervisory body, inspired by German law, would find its place between the court and the practitioner.

However, the Directive proposal establishes a necessary link between the general meeting of creditors and the creditors' committee, which is set up only at its request. French law does not require such a meeting. The forthcoming negotiations should determine whether the proposals should be supplemented by an obligation to set up a general meeting or whether this obligation should be waived in the absence of such a meeting. That being said, the French legislator could avoid any difficulties by making the existing institution of "controllers" into a creditors' committee under the meaning of the proposed Directive within the current limits: no more than five controllers per proceeding. A limited adaptation could also be to make such an institution mandatory. ■

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