

Harmonisation and creditor representation in France: A new opportunity for creditors?

Anja Droege Gagnier and Amélie Dorst discuss the proposed introduction of creditors' committees in France and their positive impact on creditors' rights



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The proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law of 7th December 2022 (“Proposal”), which, at the urging of the financial markets, is intended to give greater respect to creditors’ rights, has not gone unnoticed in France.

In addition to the highly controversial simplified winding-up proceedings of insolvent micro-enterprises, the planned introduction of “pre-pack proceedings” à la française has been perceived with great scepticism in Germany, whereas in France the latter is noted with a certain satisfaction. Indeed, since their introduction in France in 2014, pre-pack proceedings are considered as one of the key restructuring tools for large companies. Nevertheless, in case of transposition into French law of the provisions as they stand now, French administrators may face the challenge of reconciling the principles of competitiveness and transparency required by the Directive for the sale process with the confidentiality that applies in France to the preparatory phase.¹

The limited comments and discussions in Germany on creditors’ committees (Title VII of the Proposal) can probably be explained by the fact that creditors’ committees have been anchored in the German system for many years. In France, it was mainly argued that the interests of creditors were already sufficiently

represented by the *mandataire judiciaire*² and the *contrôleurs*,³ so that the introduction of creditors’ committees will not be necessary. The Proposal now gives France the opportunity to balance its debtor-friendly insolvency law in favour of a more equitable framework that upholds the rights of creditors, without giving-up its primary goal of preserving employment.

Status Quo: Insufficient representation of creditors’ interests in France

The French legal system knows neither creditors’ general meetings nor creditors’ committees. The latter (*comités de créanciers*)⁴ have been recently replaced by “classes of affected parties” (*classes des parties affectées*) as part of the transposition of Directive 2019/1023 of 20 June 2019 into French law.⁵ These “classes of affected parties” are set-up solely in the framework of:

- (i) accelerated safeguard proceedings (*sauvegarde accélérée*); or
- (ii) safeguard and reorganisation proceedings (*sauvegarde et redressement judiciaire*) involving companies with at least 250 employees and a turnover of EUR 20 million (or a turnover of EUR 40 million)⁶ or on debtor’s petition. Their role is strictly limited to voting on restructuring plan.

In French insolvency proceedings,

the rights of creditors are deemed to be represented by the 350 court-appointed *mandataires judiciaires* nationwide. By law,⁷ they have the sole authority to act on behalf of and in the collective interest of the creditors. Among other important functions, the *mandataire judiciaire* is in charge of the claims management and debt collection: He or she assesses the proofs of claims, draws up the list of claims and submits it to the insolvency judge.⁸ In winding-up proceedings,⁹ the *mandataire judiciaire* acting as liquidator is responsible for the disposal of the debtor’s assets and the satisfaction of creditors. Even though the *mandataire judiciaire* is, according to the wording of the law, responsible for creditors’ interests, in practice, he or she is acting, alongside with the administrator, in the interest of the estate.

At the request of individual creditors, the insolvency judge can also appoint up to five ‘controllers’ (*contrôleurs*) having the task of assisting the *mandataire judiciaire* in his or her office. Moreover, the controllers may assist the insolvency judge in supervising the administration of the debtor. Shareholders wishing to defend their rights are however not entitled to be appointed as *contrôleur*, as they are considered in a conflict of interest with the debtor.¹⁰

According to Article L. 621-11 of the Commercial Code, the controller may obtain access to all information and documents



available to the insolvency administrator and the *mandataire judiciaire*. In practice, however, it is often the case that a selection of documents is made. The documents can regularly be inspected on site, i.e., in the office of the insolvency administrator or the *mandataire judiciaire*. The controller must keep all information and documents received confidential,¹¹ including towards other creditors.

The court must hear the controllers before adopting a restructuring plan or awarding a takeover bid, but the judges are not obliged to take the controllers' opinion into account. Even if the controller does not represent the collective interests of the creditors, in certain cases he or she is empowered to act in the general interest of the creditors in place of the *mandataire judiciaire*, if the latter has remained inactive.¹²

At the request of the public prosecutor, who attends all

insolvency proceedings in France, the controller may be dismissed by the insolvency court. The controller has no right of appeal against the judge's decision. The costs related to the mission of the controller, whose role in practice is usually carried out by lawyers, are to be borne by the petitioning creditor himself, which limits the representation of the global creditors' interests.

In practice, the controller has no control over the course of the insolvency proceedings but may influence them marginally. Controllers who are "too active" run the risk of being dismissed.

Will France seize the opportunity to balance debtor and creditor interests? The introduction of creditors' committees

The objective of the Proposal is clearly described in Recital 47:

"It is important to ensure a fair balance between the interests of the debtor and creditors in insolvency proceedings. Creditors' committees allow for better involvement of creditors in insolvency proceedings, in particular when creditors would otherwise be inhibited from doing so individually, due to limited resources, the economic significance of their claims or the lack of geographic proximity. Creditors' committees can especially help cross-border creditors better exercise their rights and ensure their fair treatment."

The provisions of the Proposal on creditors' committees in Title VII are unspectacular from a German point of view. For France, on the contrary, they could mean a paradigm shift. Certainly, the opening clause in Article 59(1) (as well as Recital 49, Sentence 2) of the Proposal might tempt France to provide for the members of



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creditors' committees (like the controllers today) to be appointed by court, instead of by the general meeting of creditors. It is true that a general meeting of creditors does not exist under French law and would first have to be introduced into the French system.

The Proposal makes it clear, in Article 58(1), that the creditors' committee is exclusively established by decision of the general meeting of creditors. It can be read from the English and French versions of the Proposal that the decision-making power to set up a creditors' committee is exclusively conferred to the creditors' general meeting. In any case, according to the Proposal, Member States must introduce in their law the possibility of setting up a creditors' committee, unless the overall costs of the involvement of such a committee are not justified in view of the low economic relevance of the insolvency estate, of the low number of creditors or the circumstance that the debtor is a microenterprise (Article 58(3)).

The creditors' committee should adequately reflect the different interests of creditors and creditor groups, acting in the overall interest of creditors and independently of the insolvency practitioner. The Proposal leaves open whether the Member States want to allow employee representatives or persons who are not creditors themselves¹³ to join the creditors' committee. All this would represent a clear innovation for the French system. Nonetheless, the possibility of challenging the composition of the creditors' committees by "interested parties"¹⁴ introduced in Article 59(5) of the Proposal is not clear and risks in practice jeopardizing the functioning of the creditors' committee.

The Proposal defines in Article 64 which minimum rights, duties and powers must be granted to the creditors' committee. In addition to hearing rights, the creditors' committee should have the duty to supervise the insolvency administrator

(including the *mandataire judiciaire*?) and for this purpose may at any time request relevant and necessary information from the debtor, insolvency administrator or the court. However, it is open whether the latter will be given discretionary power to provide the information. According to the Proposal, the creditors' committee must keep the creditors informed, what is currently not the case in the French system as the creditors' representatives (*mandataire judiciaire* and controller) are not subject to a continued information obligation. At this point, the Proposal gives France a new opportunity to work on its transparency and creditors' representation deficit. In any case, the creditors' committee should be given sufficient rights to fulfil its function efficiently and effectively, according to Recital 55. Member States can even empower the creditors' committee to take decisions, which would again be revolutionary for the French court driven system.

According to the Proposal, Member States are to determine who must bear the costs and the remuneration, if any, of the creditors' committee. A fairer representation of creditors' interests may be ascertained if the costs are borne by the insolvency estate. The limitation of liability for members of the creditors' committee to gross negligence, fraudulent acts and wilful misconduct provided for in Article 66 is to be supported in order to make active participation of all creditor groups more attractive.

Outlook

The Proposal aims at a further balancing of rights in favour of creditors. France now can give creditors greater weight in insolvency proceedings within the framework of creditors' committees, ideally also in the case of a sale process within reorganisation proceedings¹⁵ as in Germany.

It would be desirable for the creditors' committee to be granted some of the decision-making

powers currently enjoyed only by the court. An attempt should be made to overcome the traditional antagonism of the French "creditor vs. debtor" system. This is because creditors may well have an interest in the continuation of the debtor company. Creditors' committees ideally just allow to discuss the best possible way forward for all stakeholders in the long run. This could relieve the French commercial courts of the considerable pressure they face, especially locally, to focus exclusively on saving jobs.

Today, creditors in France are isolated with respect to the representation of their interests. This is even more significant as there are no systematic creditors' protection associations, as this is the case in Austria. Creditors' committees would not only enable creditors to exchange views and find a common interest, but they would also give the creditors' voice a legitimacy which is still lacking in France today. ■

Footnotes:

- 1 i.e., "conciliation" or "mandat ad hoc" proceedings, for which see, by the present authors, their article in (2023) 17(1) *Restructuring and Insolvency International*.
- 2 Known as the creditors' representative. He/she is an insolvency practitioner (independent and regulated profession) systematically appointed by the court, which may also act as judicial liquidator in the frame of liquidation proceedings. See below.
- 3 Supervising creditors appointed by the court. See below.
- 4 The former "comités de créanciers" did not take into consideration the economic reality of claims and was rarely implemented in practice.
- 5 Decree no. 2021-1193 of 15 September 2021.
- 6 It must be noted, however, that the relevant thresholds are relatively high so that the creditors' vote in classes would only be current practice for large companies.
- 7 Article L. 622-20, *Code de commerce* (Commercial Code).
- 8 Known as the "juge-commissaire". Insolvency judges in commercial courts are non-professional judges, having broad and long business experience.
- 9 "Procédure de liquidation judiciaire".
- 10 Article L. 621-10, *Code de commerce*.
- 11 *Ibid.*, Article L. 621-11.
- 12 *Ibid.*, Article L. 622-20.
- 13 As is the case in Germany and Austria.
- 14 Not defined by the Proposal; also very broad wording.
- 15 "Plan de cession en redressement judiciaire".