The limits of protective measures applicable to insolvency proceedings in France

Marc André discusses the French Petroplus Law

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A relevant national law in the field of insolvency must be effective regarding reorganisation in order to ensure the rescue of companies or the survival of debtors, despite the existence of debts that they are unable to overcome – at least immediately.

In addition, a relevant national insolvency law must offer the insolvency practitioners appointed in insolvency proceedings the means (but no less effective means) to combat fraud which may be caused by directors to the detriment of creditors or to draw the consequences from their incompetence or management failure.

Finding the right balance

The challenge is considerable. Indeed, an appropriate balance is required so as not to frighten entrepreneurs or investors.

A capitalist economy must enshrine entrepreneurial freedom based on profit.

Insolvency must not result automatically in sanction against directors nor the compulsory contribution of the group entities.

And of course, the compliance with the European principle of the right to private property is required!

The French legislature has just adopted new rules in order to combat detrimental acts of some multinational companies, to ensure that actions based on asset recovery are effective, to ensure that measures leading the directors to discharge the liabilities of the company are effective, and to allow the use of sums clawed back to comply with social or environmental duties.

Indeed, the French Parliament hurriedly issued the *Petroplus law n° 2012-346* (which was very criticised by the Doctrine) in reference to the Petroplus and Sodomedical cases on 12 March 2012.

The implementing decree of this law (*n° 2012-1190 of 25 October 2012*) was highly expected.

The task of the drafters was delicate due to important debates.

The drafters seem to have succeeded, at least partly, by allowing the owner of the assets to act when the decision is issued, then by providing him with actions and by mainly containing abuses which may result from the implementation of the provisions of the law.

An overview of the new rules

Is it possible to provide an overview of these new rules?

The law allows the insolvency practitioner appointed in safeguard, reorganisation or liquidation procedure to apply for the protective seizure of the third party's assets owned by the debtor subject to the insolvency procedure. Even better, the law allows the sale of part or the totality of these assets and even to use the sums raised.

The president of the court who opened the proceedings is entitled to allow such measures on the insolvency practitioner petition.

Thus, in case of an action based on confusion of assets between one or more entities, *Article L. 621-2* of the Commercial Code allows to order the seizure of part or the totality of the defendant's assets.

How to ascertain the amount of the sums for which the protective measures are ordered? How to establish the extent of the assets seized?

The answers are supplied by the implementing decree.

The basis will be the one of the liability amount reported in the insolvency procedure for which the measure is ordered.

If the liability amount is not yet known, e.g. if the period allowed to the creditors to lodge their claims has not yet expired, the liability amount will be the

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one of the paid or outstanding wage claim.

The procedure is the same in case of an action relating to the liability of directors based on a fault (negligence) having contributed to the insolvency: *Article L. 631-10-1*.

In this case, the value of the assets seized (*Article R. 631-14-1*) shall not exceed the amount of the damages claimed.

The same procedure will apply in the action leading the directors to discharge the liabilities of the company: *Article L. 651-4*, and the value of the assets seized shall not exceed the amount claimed against the directors: *Article R. 651-5*.

To increase efficiency, beyond seizure which is a simple protective measure, the law allows the sale of part or the totality of the assets concerned.

Article L. 663-1-1 allows the supervisory judge to whom the seizure was allowed, on the insolvency practitioner's request, to order the seizure.

Seizure can be requested and allowed where the conservation of seized assets or simply their detention increase high costs. Seizure can also be ordered if the assets are subject to deterioration.

The supervisory judge delivers his decision based on the comments of the Public Prosecutor after hearing the concerned assets' owners.

The supervisory judge's decision is not enforceable *ipso jure* but the judge is entitled to order the provisional enforcement. Hence, according to *Article R. 662-17*, the owner is entitled to appeal the supervisory judge's decision and if the provisional enforcement was ordered, to request the stay of the decision, but only if the owner proves that the decision of selling would have consequences which are obviously excessive.

If the assets are sold, *Article R. 662-17* provides for the deposit of the sums.

But the supervisory judge is entitled to use part or the totally of the sums (coming from the sale of the assets) following the same procedure.

Summary

Probably effective, these rules have not yet been put in practice.

The practice will have to show caution.

Indeed, these rules allow an enforced sale of third party assets, prior to any conviction and prior to obtaining the sums under some conditions.

Some minds have already raised the question of the compliance of this text with the European principle of the right to private property.

> **THESE RULES ALLOW AN ENFORCED SALE OF THIRD PARTY ASSETS, PRIOR TO ANY CONVICTION**

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