IP regulation in France set for a shake-up!

In the Autumn edition of eurofenix, Professor Jean-Luc Vallens briefly described the newly adopted "Macron Law". Here, Paul Omar provides more detail from across the channel

PAUL OMAR
Professor in International Insolvency Law at the Nottingham Law School

Emmanuel Macron, Minister for the Economy, wants France to take its destiny into its own hands.[1]

An omnibus law bearing his name was enacted in August 2015,[2] in which over 300 provisions set out the Government's ambition of shaking up the regulatory environment in a number of key areas ranging from transport, Sunday trading, employee pensions and savings, inter-company loans, privatisation of State shareholdings to competition in the professional world.

It is in this last area that the law has set out measures addressing a number of regulated professions, including lawyers, notaries, valuers and insolvency practitioners (i.e. both *administrateurs* and *mandataires-liquidateurs*). The law, which was over a year in the preparation, is intended to liberalise access and to strip out some of the over-regulation in the economy, which has been seen as indirectly contributing to France's budget deficit by stifling competition and job creation.

So important was the need for the measure that the Government engaged its responsibility by tying the bill to its own political survival not once, but three times during its Parliamentary passage. That the measure was contentious was proved by the fact that both Socialists and Conservatives united in opposition to its terms and thousands of amendments were tabled aiming to soften its tenor. In fact, a last-ditch attempt to prevent its enactment by a reference to the Constitutional Court only succeeded in having some of its content declared unconstitutional, while the vast majority of the initiative passed into law.

> "THE GOVERNMENT ENGAGED ITS RESPONSIBILITY BY TYING THE BILL TO ITS OWN POLITICAL SURVIVAL NOT ONCE, BUT THREE TIMES"

Remuneration

The first concern of the new law is to regulate tariffs, given the Government's view that current fee structures are insufficiently transparent and do not represent value for money.[3] Insolvency practitioners, as well as other professionals, are to have a tariff for services set by the Ministries of the Economy and Justice, to be the subject of review every 5 years on the basis of returns by the professionals as well as statistics collected by the relevant professional bodies.[4]

These tariffs must be displayed at professional premises and on websites.[5] Failure to display the cost of services or to make the necessary returns is subject to a penalty.[6]

Only in the case of services that are deemed off-tariff, e.g. those provided by insolvency practitioners that would normally be carried out by another professional who is not subject to a regulated tariff, would practitioners be able to charge fees by agreement with the client, based on the client's funds, complexity of the case, level of the practitioner's qualification/ skills as well as the type of services to be provided.[7] Otherwise, the regulated charges are to be based on the "relevant cost of services provided as well as a reasonable remuneration, defined on the basis of objective criteria."

Alternatively, subject to a higher threshold of value, the fee may be levied on the basis of a proportion of the value of the property or transaction in question, a measure that is more targeted to the position of notaries or valuers, who are also the subject of the regulation of tariffs.[8]

Of course, this begs the question of who will set the objective criteria used to determine fee levels. The Government will do so, the new law states, taking into account the advice of the Competition Commission, which will be

publicly available.[9] Tariff change proposals are to be notified to the Competition Commission, which has, in any event, a right of review at any time. In the event of any review, the relevant professional bodies as well as consumer organisations are to be notified.[10] Part of the reforms to the fees structure, and presumably the subject of a premium, will include the creation of a new fund called "The Inter-professional Fund for Access to Law and Justice", which will function as a redistribution mechanism between professionals ensuring that service coverage extends to the whole of the territory and that access to justice is thereby enhanced.

Access to the profession

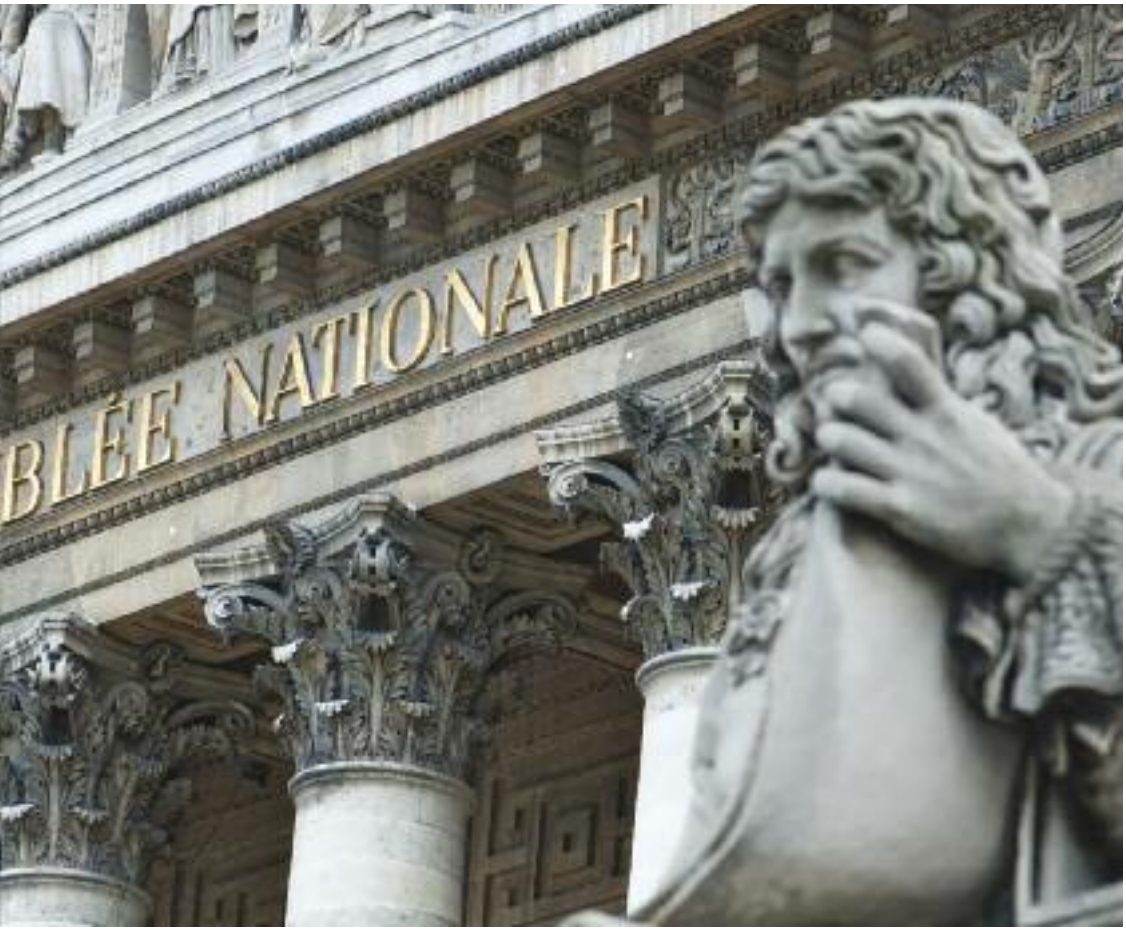
A second, but no less important, concern is improving access to the professions. This appears to reflect a particular statistic highlighted in the official presentation on the law and its main objectives: the fact that 85% of all judicial administrators are aged over 50. The Government's view is that the professions as a whole are too closed off and do not encourage take up by the young, despite an increased working population and rise in the overall demographic of those potentially in need of legal services.[11]

To ease access, an alternative to passing the professional examinations has been provided. Those who meet the other criteria of nationality, good conduct and not being subject to professional sanctions or bankruptcy may instead complete a masters' course on the administration and liquidation of enterprises and join the profession subject to having requisite placement or relevant experience to be set out by decree. The existing category of those who enjoy dispensation from examination and placement requirements on the basis of equivalent experience and/or skills will also be better defined.[12]

In a separate development, the law also gives authority to the Government to further legislate by ordinance to permit courts to appoint court bailiffs (*huissiers*) and valuers to act as liquidators as well as assistants to the *juge commissaire* (commissary judge) in the case of the recently introduced procedure of professional re-establishment, which is a subset of liquidation applicable to debtors with a profession.[13]

The pre-requisites for the new rules to apply are that the relevant debtor has no employees and a turnover of less than €100,000. Subject to the development of appropriate professional norms and fee structures, it is intended that these appointments become the norm once the forthcoming legislation, which must be adopted within 10 months of the *Loi Macron* being promulgated, is in force.[14] As a result, it appears that a not unimportant source of revenue will thus be taken out of

"THE GOVERNMENT'S VIEW IS THAT THE PROFESSIONS AS A WHOLE ARE TOO CLOSED OFF AND DO NOT ENCOURAGE TAKE UP BY THE YOUNG"



> IT IS PERHAPS OF NO SURPRISE THAT THE REFORMS HAVE BEEN THE SUBJECT OF SOME DISQUIET, EVER SINCE THEY WERE ANNOUNCED

the hands of the *mandataires-liquidateurs*, which will be only partially compensated for by the income that may come through new requirements for the appointment of an auxiliary insolvency practitioner (applying to both *administrateurs* and *mandataires-liquidateurs*) in the case of certain group insolvencies where turnover is over a threshold to be determined.[15]

Practice Frameworks

In common with other professions, insolvency practitioners in France have been authorised to practise under the umbrella of civil professional companies, regulated professional companies or partnerships as well as economic interest groupings (domestic or European). The *Loi Macron* introduces a number of alternative possibilities by opening up the option to use any legal form, provided this does not result in the practitioner acquiring the status of a commercial person (*commerçant*).

Where the legal form chosen is that of a company, the new rules provide that the capital and voting rights may be held by any person, whether an individual or legal entity, who/which is a member of a legal or law-related profession. In the case of any such persons who are established in another Member state of the European Union, within the European Economic Area, or in Switzerland, that person must be a member of a regulated profession or carry out an activity subject to the pre-requisite of possessing a national or international qualification.

This facility is subject only to the requirement that at least one duly-qualified insolvency practitioner must be a partner in/director of the entity and be on the management or supervisory boards. A decree will outline the conditions for registration of such companies with the relevant professional body.[16]

Also in the law, with the perspective of opening up competition, is the commitment to permit the establishment of multi-disciplinary entities (MDEs) (companies/partnerships). The Government will be authorised to legislate by way of ordinance within 8 months from the promulgation of the law for the creation of such MDEs, within which insolvency practitioners will be authorised to practise alongside lawyers, valuers, court bailiffs, notaries, IP attorneys and/or accountants.

The accountancy profession is also to be the subject of rules updating the exercise of that profession. Some limits have been set out as to the scope of any such MDEs. While capital and voting rights may be held by any person who is also competent to hold these rights in the case of insolvency professional legal forms, such MDEs may only operate if at least one person representing each regulated profession is a partner in or director of the MDE and is appointed to either the management or supervisory boards. Furthermore, the relevant professional ethical rules continue to apply to all professionals practising as part of an MDE and its operations must take into account the risk of conflicts and any professional restrictions that may exist.[17]

Conclusion

It is perhaps of no surprise that the reforms have been the subject of some disquiet, ever since they were announced. Concerns about professional independence and impartiality to undertake their mission featured in the many representations made by the CNAJMJ (The National Council of Judicial Administrators and Liquidators) to the Government.

A strong contrast was drawn between the market for services that is the norm elsewhere (albeit conferring the advantage of open and healthy competition for the advantage of consumers) and the French position, in which strong supervision is stated as permitting the insolvency practitioner the ability to avoid a conflict of interests in an environment where his/her independent status assures the impartiality that is required with the view to achieving the right result. This, the CNAJMJ says, throws into relief the oddity of the Government's choice to allow court bailiffs to function as liquidators, particularly as the French regulation model is held up as a prime model for emulation at the European level.[18]

Obviously, the Government did not share these concerns, basing its legislative project on its goals of improving access and competition. Though some aspects of the programme have yet to appear, it is evident that the insolvency profession in France is about to undergo a period of radical change, for which one can have some sympathy.

However, the reforms to insolvency practice in 2003, which brought practice conditions forward into the modern age and which were equally resisted, did make changes that in hindsight were seen as being necessary and vital for the continuity of the profession. Perhaps in 10 or 20 years' time, the same will be said of the Loi Macron and the changes it makes, which will undoubtedly bring challenges to which practice will have to find responses. It is certain that, for the short- to medium-term, French insolvency practitioners will be living in interesting times! ■

Footnotes:

1 E. Macron, Speech to the National Assembly (26 January 2015).
2 Law no. 2015-990 of 6 August 2015 on growth, activity and equality of economic opportunities ("*Loi Macron*").
3 See: www.gouvernment.fr/action/le-projet-de-loi-pour-la-croissance-l-activite-et-l-egalite-des-chances-economiques, at p.7.
4 New Articles L. 444-3 and 444-5, Commercial Code.
5 Ibid., new Article L. 444-4. This obligation to inform consumers of fees and tariffs is also subject to the publicity requirements in Article L. 113-3, Consumers' Code.
6 Ibid., new Article L. 444-6.
7 Ibid., new Article L. 444-1.
8 Ibid., new Article L. 444-2.
9 Ibid., new Article L. 444-7.
10 Ibid., new Article L. 462-2-1.
11 See above note 3.
12 Revised Articles L. 811-5 and 812-3, Commercial Code.
13 Introduced in Ordinance no. 2014-326 of 12 March 2014.
14 Article 64, *Loi Macron*.
15 New Article L. 621-4-1, Commercial Code.
16 Ibid., revised Articles L. 811-7 and 812-5.
17 Article 65, *Loi Macron*.
18 See comments by X. Huertas, President of the National Council of the CNAJMJ: www.cnajmj.fr/upload/File/En%20Bref/Les-Petites-Affiches-du-16-juin-2015.pdf.

Share your views!