

New reform covering financial difficulties and insolvency in France

Marc André outlines some new procedures in France which have recently come into force



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Acting on the wishes of the new political majority, the French Government has issued a Ministerial Order (ordonnance) – a method which reduces parliamentary debate – in order to substantially modify the legislation relating to the treatment of companies in difficulty and insolvency.

The Order of 12 March 2014 (Ordonnance 2014-326 du 12 mars 2014), which came into force on 2 July 2014 (Decree 2014-736 du 30 juin 2014 with 145 articles), comprises 117 articles and introduces some innovative solutions.

Firstly, it introduces two new procedures:

- the Accelerated Safeguard Procedure (*Sauvegarde Accélérée*), which will exist alongside the Accelerated Financial Safeguard Procedure;
- the Professional Recovery procedure (*Rétablissement Professionnel*), designed to help insolvent individuals with no assets.

Building on previous reforms, the Order also aims to improve the treatment of companies in difficulty while proposing a more satisfactory balance between the debtor's rights and his/her creditors' rights.

The new reform prioritises preventive measures in order to avoid wherever possible exacerbating existing problems, which would almost inevitably lead to the company being wound up, and accordingly encourages and facilitates the use of pre-insolvency procedures such as “*ad hoc mandate*” and

conciliation. Creditors are encouraged to take part in negotiations but are prevented from paralysing the negotiations as they can no longer implement clauses designed to terminate a contract, in case of lack of payment, when any such procedures are started.

The Order therefore clearly curtails the law of contract in order to give the debtor a greater chance of recovery. This seems to be counterbalanced by the introduction of stricter rules governing the payment of creditors who inject money or contribute new assets, also known as the “New Money” privilege.

One quite spectacular innovation, intended as another preventative measure, is the introduction of a French “*pre-pack sale*” (article L611-7).

In a conciliation procedure, the conciliator can now be tasked with arranging the sale of all or part of the business. Article L642-2, which also concerns *ad hoc* mandates, provides in addition that the sale can be implemented at a later date within the framework of safeguard, restructuring (*redressement*) or even liquidation proceedings.

As well as these improved preventative measures, the reform also seeks to improve the handling of temporary or permanent insolvency.

Following on from the 2012 Act, which introduced the Accelerated Financial Safeguard Procedure, the 2014 Order introduces the Accelerated Safeguard Procedure, with the previous Accelerated Financial Safeguard Procedure now existing as a sub-category of this

wider procedure.

This is an important change, as a debtor can now benefit from either procedure even when he/she has officially suspended payments (being in cessation des paiements).

The new accelerated procedure extends the solutions available under the earlier procedure from financial institutions to all types of creditors.

As far as safeguard and restructuring procedures are concerned, as a result of the reform the debtor is no longer the only party entitled to apply for the conversion of a safeguard procedure into an restructuring procedure.

Only time will tell whether in practice this modification, which should be considered in conjunction with the creditors' new right to propose an alternative plan to the debtor's recovery plan, will render the safeguard procedure less appealing to debtors. Safeguard was supposed to be giving the debtor the benefit of a court-controlled procedure that suspends actions by its creditors while allowing him/her to retain a certain degree of control over the procedure.

It is important to note that creditors are only entitled to propose an alternative plan in procedures in which a Creditors' Committee has been formed. But the result is less control now by the choice given to the debtor.

The Order also removes the cash payments of current contracts in safeguard procedures.

As regards liquidation procedures, the reform

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introduces a new procedure which will exist alongside court-ordered liquidation: the Professional Recovery procedure (*procédure de rétablissement professionnel*), which is based on a genuine desire to give a second chance to individual debtors who have almost no assets (no more than €5,000). The debtor will not be obliged to use his remaining assets to settle his debts and can keep them. It is an accelerated procedure, following an investigation conducted by a court-appointed insolvency practitioner.

This procedure is initiated by means of a court order following an application by the debtor, who must produce a true statement of assets and liabilities and must confirm that he has no employees.

The Court will appoint a judge and an insolvency practitioner who will verify that the debtor is in good faith, and that his description of his assets and liabilities in the application is

accurate. But the debtor must not have been already involved in a liquidation procedure closed without full repayment of the creditors. If he has not, the procedure will be brought to a close after less than four months, and the debtor's debts will be wiped out.

This new liquidation procedure completes France's already admirable range of solutions for distressed and insolvent businesses.

Legislation now exists for all types of debtors, including business people involved in commercial or agricultural activities, a trade or the service sector, legal entities, the self-employed and also private individuals, within the framework of the personal bankruptcy procedure provided for by the French Consumer Code (*Code de la consommation*). It covers all aspects of insolvency, from prevention through to recovery or liquidation. ■

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