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What Is the Latest News on France's Restructuring and Insolvency Law Reforms?

The reforms, which are the result of the transposition of the EU's Restructuring Directive, should come into force in October.

Key Points:

- The introduction of new "accelerated safeguard" proceedings that satisfies the criteria laid down in the Restructuring Directive will likely result in a fairly limited reform.
- Clarifications have been made regarding creditors' classes.
- Although there should be no surprises regarding the cross-class cram-down mechanism, details have yet to be finalised.
- The French government is willing to create additional distinctions between regular safeguard and reorganisation proceedings.

The latest developments regarding France's forthcoming comprehensive reform of restructuring and insolvency law recently came to light at a 5 July conference for the Droit & Commerce business association. M. Patrick Rossi, deputy-director of the Economic Law department at the Ministry of Justice, who is in charge of the transposition, was among the conference participants. The discussion provided more insight into the timeline for, and impact of, the proposed law — which is the result of the transposition of the EU Directive (EU) 2019/1023 dated 20 June 2019 on Preventative Restructuring Frameworks (the Restructuring Directive).

Current status and expected timetable

The latest version of the draft order has been submitted to the Administrative Supreme Court (*Conseil d'Etat)* for review. The submission follows delays related to the COVID-19 pandemic and political debate involving the ranking of security interests, which will be included in the same order (*ordonnance*) of the French government. On 8 September, the Council of Ministers (*Conseil des Ministres)* will receive the proposed text, with a publication expected very shortly afterwards so that the new law can come into force on 1 October 2021 (and apply to proceedings opened as from such date).

However, the current status of the draft order is far from definitive. The *Conseil d'Etat* could significantly change or even limit the scope of the final order after carrying out its work this summer to ensure compliance with (i) the terms of the Restructuring Directive itself and (ii) the French government's empowerment (*habilitation*) to transpose it (which is governed by article 196-1 of the 2019-486 dated 22 May 2019 (*Loi Pacte*)).

New "accelerated safeguard" proceedings satisfying the criteria laid down in the Restructuring Directive

French insolvency law, through *mandat ad hoc* and *conciliation*, has been a forerunner with respect to restructuring preventive frameworks, which have proven to be efficient tools over the last decades. Therefore, the French government's key objectives were to:

- Maintain France's legal strengths
- Adapt and tailor one specific procedure that includes all the requirements set out in the Restructuring Directive
- Introduce minor amendments to judicial proceedings to ensure consistency with the new specific procedure

The upcoming reform is expected to reinforce creditors' rights (especially those of secured creditors) and achieve increased economic fairness in restructuring transactions, without however the major upheaval that the Restructuring Directive could have allowed. It will also likely entrench certain modifications and improvements enacted as temporary measures during the pandemic for the long term.

In light of the above, rules governing *mandat ad hoc* and *conciliation* proceedings should only be very marginally modified, creditors' classes should only be mandatorily constituted above certain thresholds under regular safeguard and reorganisation proceedings (see below), and such proceedings should likely only see slight modifications.

Essentially, the government will introduce a new version of "accelerated safeguard" proceedings that should last four months. In order to do this, the government will likely merge current accelerated and accelerated financial safeguard proceedings (also known as SFA proceedings), which may be opened at the end of conciliation proceedings to impose a plan on dissenting creditors. This new accelerated framework should in all likelihood become the underlying procedure for the new transposition regime, and creditors' classes should therefore be automatic and mandatory under this framework, notwithstanding thresholds otherwise applicable. This transposition, mostly confined to the newly merged accelerated safeguard procedure, implies that the government intends to maintain the French courts' ability to impose a term-out of pre-petition claims (which is a French specificity) under regular safeguard and reorganisation proceedings.

Creditors' classes

Clarifications have been made regarding the scope and composition of creditors' classes.

Regular vs. fast-track procedures

Based on the information provided during the conference, creditors' classes should be:

- Mandatory and automatic under the new merged accelerated safeguard proceedings
- Subject to certain thresholds under regular safeguard proceedings and reorganisation proceedings, i.e., for a company that either has:
  - At least 250 employees and a turnover at least equal to €20 million
  - A total turnover, together with the entities it controls, equal to at least €40 million

Such thresholds are those retained for the jurisdiction of specialised commercial courts dedicated to significant insolvency cases (*Tribunaux de commerce spécialisés*). Below such thresholds, creditors'

classes should remain optional at the request of the debtor's management or the court-appointed receiver (*administrateur judiciaire*) subject to the supervisory judge's *(juge-commissaire*'s) approval.

Nature of creditors' classes

Only impaired creditors (*créanciers affectés*) will be entitled to vote in classes. The constitution of classes will be made under the responsibility of the court-appointed receiver, and creditors gathered in the same class will have to share a sufficient community of interest (*communauté d'intérêts suffisante*) and benefit from an equality of treatment.

Recent developments suggest that:

- The minimum requirement should be two classes: one of secured creditors benefiting from "*rights in rem*" security interests (*sûretés réelles*) and other creditors.
- Public creditors could be gathered in their own class. As a consequence, they may see themselves imposed to a restructuring plan, which would be a new feature.
- Shareholders (when relevant) could be part of a class.
- The court-appointed receiver should retain the ability and the flexibility to create "ad hoc" classes; for instance, for strategic suppliers.
- Claims arising from employment contracts, pension rights, and maintenance claims cannot be affected by a restructuring plan, nor can creditors benefiting from a *fiducie*.

Cross-class cram-down mechanism

The key principles that have been public for months will likely be maintained regarding:

- The adoption of the absolute priority rule, subject to specific derogations and exceptions
- The ability for French courts to adopt a restructuring plan against one or several dissenting classes, and therefore implement a cross-class cram-down if one the following two conditions are met:
  - A majority of the voting classes has voted in favor of the plan, provided that at least one of those classes is a secured creditors' class or is senior to the ordinary unsecured creditors' class (*créanciers chirographaires)*
  - At least one of the voting classes has voted favorably and is in the money, i.e. such voting class should not be an equity holders' class or any other class that is reasonably expected, after determining the value of the debtor as a going concern, not to be entitled to any payment in the event of a judicial liquidation, an asset sale plan (*plan de cession*) or a more favorable alternative arrangement

Finally, French courts will have to verify, in accordance with the best interest test, that none of the dissenting creditors is in a less favorable situation than it would have been in the event of a judicial liquidation or a better alternative solution. This approach is consistent with that for any restructuring plan (notwithstanding the existence of a cross-class cram-down).

Specific derogations to the absolute priority rule have not yet been disclosed; however, they could have significant implications for the ability to cram-down shareholders. Similarly, whether or not the implementation of a cross-class cram-down will require the debtor's approval remains unclear.

A new version of article L. 643-8 of the French commercial code is expected to detail and further specify the ranking of creditors' claims under judicial liquidation proceedings. This version, combined with the reform in French security law (*droit des sûretés*), will be enacted in the same order (*ordonnance*) from the

French government. The ranking is of critical importance to both the best interest test and the cross-class cram-down.

Additional distinctions between regular safeguard and reorganisation proceedings

The regimes applicable to these two proceedings are currently very similar. However, safeguard is opened to solvent debtors and reorganisation to insolvent ones. In effect, this distinction leads to the application of comparable regimes to companies in very different situations. As mentioned previously, these proceedings should not be completely reorganised by the transposition of the Restructuring Directive since the government would rather use the new four-month merged accelerated safeguard process as the main vessel for the transposition.

However, safeguard proceedings are in practice often used defensively to protect a stressed company (or as a threat in negotiations). Because of this fact, as well as the difference in nature between these two judicial proceedings, the French government is expected to introduce additional distinctions. In particular, the government is expected to:

- Reduce the maximum length of regular safeguard proceedings from 18 months to 12 months (as opposed to reorganisation proceedings, which should still have a maximum length of 18 months)
- Only allow creditors the ability to propose competitive draft restructuring plans in reorganisation proceedings (rather than in both regular safeguard proceedings and reorganisation proceedings)

The French government will likely maintain French courts' ability to impose a term-out (i.e., a rescheduling of the indebtedness over a maximum period of 10 years, imposed to dissenting creditors) for both regular safeguard and reorganisation proceedings. (However, this ability will not be available under the new accelerated safeguard procedure.) Further, the minimum 5% annual instalment beginning in year three of the restructuring plan should now be coupled with a minimum 10% annual instalment beginning in year six.

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