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Creation of the accelerated financial safeguard procedure

French insolvency and bankruptcy laws keep on being reformed.

As such, the **safeguard procedure**, introduced by the Law n° 2005-845 of July 26, 2005 and reformed by Ordinance n° 2008-1345 of December 18, 2008, has once again been recently amended by the legislator to favor a "*swift*" financial restructuring of companies in difficulty.

On October 11, 2010, the National Assembly adopted the banking and financial regulation bill primarily aimed at increasing the security of the financial system. Articles 57 and 58 of the bill also create the accelerated financial safeguard procedure (the "Procedure") that will be codified in Articles L. 628-1 to L. 628-7 of the French Commercial Code.

The Procedure, largely inspired by the US Chapter 11 mechanisms, is a legal innovation in French insolvency and bankruptcy laws and its objective is to preserve the maximum number of employment positions within companies in difficulty.

It is a hybrid procedure bridging the gap between the conciliation procedure (a private and confidential pre-insolvency procedure) and the standard safeguard procedure (a court-driven and public procedure), available to companies that have initiated an amicable conciliation procedure but failed to obtain the support of all its creditors. To quote the words used in the presentation of the bill, the accelerated financial safeguard procedure will "*not supersede the safeguard procedure but will be a variant, available to companies that have initiated a conciliation procedure that has not been successful because of a persistent disagreement from minority creditors*".

The Procedure is said to be "accelerated" because the timeline allowed to achieve a financial restructuring is set at one month (it can be renewed once in exceptional circumstances), which is particularly short for this type of procedure.

Initiation of the accelerated financial safeguard procedure

According to Articles 628-1 et seq. of the French Commercial Code, the accelerated financial safeguard procedure may be opened at the request of a company conducting a conciliation procedure and that:

(i) is not insolvent but faces difficulties that it will not be able to overcome;

(ii) proves that it has set up a plan to ensure the continuity of its operations and that this plan is likely to obtain a sufficiently large support from its creditors in order to be presumably adopted within one month as from the date of the judgment opening of the Procedure.

The court shall order the commencement of the Procedure on the basis of a report filed by the conciliator on the conduct of the conciliation procedure and the prospects of having the creditors adopt the draft safeguard plan. For the sake of efficiency, the conciliator is automatically appointed as judicial administrator.

Effects of the accelerated financial safeguard procedure

The Procedure applies solely to financial restructurings insofar as its effects are limited to financial creditors only. As such, only financial creditors will be grouped in a committee within the shortened timeline of 8 to 15 days from the communication of the draft safeguard plan.

Employees and suppliers of goods and services will not be impacted by the Procedure. They will continue to be paid pursuant to applicable contractual terms – even for those claims born prior to the date of the judgment opening the Procedure – in order to preserve the company's operational activities.

This protection granted to suppliers of goods and services constitutes an exception to the principle of equality between creditors.

Declaration of claims

The obligation to declare claims continues to be governed by ordinary law. The debtor company shall prepare a list of claims held by each creditor that participated in the conciliation procedure and existing as at the date of the judgment opening the Procedure. The list must be certified by the company's statutory auditor or chartered accountant.

This list shall then be filed with the clerk of the competent commercial court and the judicial administrator shall inform each creditor of the specificities of its claims. Such claims are deemed duly declared even if the creditors do not file a declaration of claims (Article L. 628-5 of the French Commercial Code).

Adoption of the safeguard plan

The court must approve the safeguard plan within one month from the date of the judgment opening the Procedure (unless this timeline is extended for one additional month), failing which, the Procedure will be terminated (Article L. 628-6 of the French Commercial Code).

Based on the adopted provisions, the effects of the reform seem to be overall positive. One must indeed act fast if there is a realistic chance to successfully restructure the banking and financial liabilities of a company in difficulty. The Procedure affords a greater protection to a company in difficulty in its relationship with uncooperative creditors when the majority of the other creditors have accepted to make efforts under the

worked out plan.

The Procedure will only apply to conciliation procedures initiated on or after from March 1, 2011. A subsequent Council of State Decree will set the implementation conditions of these new provisions.