

**March 2011**

## **COUNTRY REPORT**

### **THE FRENCH 'PREPACK' IS NOW AVAILABLE**

**Anja Droege Gagnier**  
Avocat à la Cour, Paris  
anja.droege@marccuspartners.com

Since 1 March 2011, the French 'prepack', inspired by the US chapter 11 proceedings, has been available for debtors of a certain size<sup>1</sup> needing an urgent restructuring of their financial debts, ie, a fast implementation of a pre-negotiated restructuring plan while facing dissenting minority financial creditors.

In a highly practical approach, and right after two major financial restructuring cases,<sup>2</sup> the French legislator has recently introduced in the French insolvency law the so-called 'accelerated financial safeguard procedure' (*Sauvegarde Financière Accélérée* – 'SFA'),<sup>3</sup> thus responding to practitioners asking for a legal framework for 'prepack' restructuring.

This new safeguard procedure concerns financial creditors exclusively (bondholders included) but not suppliers of goods and services.

#### **The context in France**

On the one hand, the success of a restructuring plan within a preventive insolvency procedure like the '*mandat ad hoc*' and the 'conciliation' requires the unanimous consent of all the creditors. On the other hand, in safeguard proceedings<sup>4</sup> the restructuring plan can be imposed on minority creditors by a two-thirds majority of the creditors' committee.

Therefore, practitioners combined both procedures; facing dissenting minority creditors, the debtor in conciliation procedures filed for ordinary safeguard proceedings in order to impose the pre-negotiated restructuring plan. The disadvantages were obvious: an automatic stay for all creditors, including suppliers, as well as a long timeframe which was not compatible with business issues.

The French legislator reacted quickly to the practice and integrated into the French Commercial Code the so-called 'accelerated financial safeguard procedure' which is, however, only available under very narrow conditions and it has specific features.

## **Conditions and scope of the accelerated financial safeguard procedure**

The accelerated financial safeguard procedure (in French, the abbreviation 'SFA' is used) is intended for companies which are heavily indebted to 'financial creditors' but which are considered as still viable from a business point of view.

A commencement of the accelerated financial safeguard procedure requires that the debtor is already in a conciliation procedure,<sup>5</sup> thus facing economic or financial difficulties that he is unable to overcome, but without being in the state of cessation of payment (cash flow insolvency, ie, unable to meet due liabilities with the available assets).

The conciliation procedure will enable the debtor to prepare a restructuring plan for the financial debts 'assuring the permanence of the business' and having a good chance of being approved by both the financial creditors' committees<sup>6</sup> and the bondholders' committee. Only companies of a certain size, namely those which are authorised to set up creditors' committees may file for this new procedure.<sup>7</sup> The court opens the SFA proceedings in the light of a report drafted by the conciliator appointed by the court in the framework of the conciliation procedure.

## **Main features of the accelerated financial safeguard procedure**

The accelerated financial safeguard procedure concerns credit institutions and bondholders exclusively and only these financial creditors form the respective creditors' committee who vote on the restructuring plan.<sup>8</sup> Therefore, no committee of suppliers of goods and services is set up and no supplier is able to vote. Suppliers are paid according to their respective contractual terms, including claims prior to the commencement of the proceedings, and are not party to the accelerated financial safeguard procedure. Thus, the reform states a substantial exception to the legal principle of general and automatic stay of actions in insolvency proceedings, but ensures in practice the continuation of business.

Since the debtor has already prepared a restructuring plan intended to be approved by the creditors while moving from the conciliation procedure to the accelerated financial safeguard procedure, the creditors' committees have to decide on the proposed plan in a very short timeframe, ie, within an eight day period, in contrast to the ordinary safeguard procedure stating a 15 day period.<sup>9</sup>

Like the ordinary safeguard procedure, the plan is deemed to be adopted by a majority of two-thirds of the total amount of the debt held by the members of the respective creditors' committee taking part in the vote (financial creditors' committee and bondholders' committee). It has to be noted that financial creditors or bondholders not affected by the arrangement or that are going to be paid in full are not allowed to vote. This new rule is also applicable within the ordinary safeguard procedure. Since the reform, arrangements voted by the committees have to 'take into account' inter-creditor and subordination agreements entered into before the commencement of the safeguard procedure (ordinary or accelerated).<sup>10</sup> Moreover, the reform clarifies the treatment of in fine loans within restructuring plans. The repayment of the principal can only take place after the agreed term and then in instalments<sup>11</sup> until the term of the loan agreement, even if other creditors start receiving their recoveries according to the plan prior to such term.<sup>12</sup>

Within one month from the commencement of the SFA,<sup>13</sup> the court approves (or does not approve) the restructuring plan voted for by the creditors' committees, thus binding all financial creditors and bondholders including minority dissenting ones. Failing such approval within the legal timeframe, the SFA will be terminated. In this case, the debtor may file for another procedure as appropriate.

The SFA proceedings are supervised by an administrator appointed by the court. In practice, such an administrator is in most cases the conciliator who was already appointed for the conciliation procedure.

This reform is a new improvement of the French insolvency law, but modifies some major principles like the automatic stay applicable to all creditors. Large financial restructuring transactions have now a legal framework. The French legislator has proven its capacity to react quickly to issues faced by practitioners. It is true that French law still does not make any distinction between secured and unsecured creditors within the committees.

It has, moreover, to be mentioned that the accelerated financial safeguard procedure benefits from recognition under EC Regulation No 1346/2000.

---

## Notes

<sup>1</sup> The SFA is only available for debtors having at least 150 employees or an annual turnover of €20 million or more (Article L 626-29 and R 626-52 French Commercial Code). For companies establishing consolidated accounts, these figures will have to be considered on the consolidated level once the law "Warsman" enacted; in the meantime, these figures have to be taken into consideration on the sole level of the company, excluding those of the holding..

<sup>2</sup> Autodis and Technicolor (ex-Thomson).

<sup>3</sup> Banking and financial regulation law as of 22 October 2010, *Loi de régulation bancaire et financière*, No 2010-1249, JORF No 0247, 23 October 2010 (Article 57); Decree No 2011-236 as of 3 March 2011 (the 'reform')

<sup>4</sup> *Procédure de Sauvegarde*, introduced by Law No 2005-845 as of 26 July 2005 and amended by Ordinance No 2008-1345 as of 18 December 2008, now Articles L 620-1 and following, French Commercial Code.

<sup>5</sup> Article L 628-1 French Commercial Code.

<sup>6</sup> *Ibid.*

<sup>7</sup> Article L 626-29 and R 626-52 French Commercial Code; see note 1 above.

<sup>8</sup> Article L 628-1 and L 628-4 French Commercial Code.

<sup>9</sup> Article L 628-4 French Commercial Code.

<sup>10</sup> Article L 626-30-2 French Commercial Code.

<sup>11</sup> In the same percentage as applicable to other creditors, otherwise in equal instalments.

<sup>12</sup> This provision is not limited to the SFA: it concerns in general all restructuring plans (Article L 626-18 French Commercial Code).

<sup>13</sup> Article L 628-6 French Commercial Code; with a possible extension of one more month, however in contrast to the timeframe existing in the ordinary safeguard procedure which is six to a maximum of 18 months.