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Restructuring
Yet another major change in French law and recommendations at EU level

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Great minds think alike. On the same day, March 12, 2014, the French Government and the EU Commission tackled the issue of business failure, both aiming to facilitate recourse to pre-insolvency measures and to accelerate restructuring procedures.

In France, this is not a surprise given the speed at which reforms in different areas of corporate law are being discussed and implemented[2]. Indeed, the French authorities[3] have tried to keep afloat of the changes in practice and the increase in business insolvency through a chain of reforms which have undeniably complexified the landscape. Over time, the input and involvement of the European Commission may eventually favor harmonization of some key aspects of insolvency rules in the EU and consequently, to a certain degree, slow the legislative frenzy down in this area, including in France.

For ease of reading, the plan below sets out the guidelines and key issues of this presentation:

I. Insolvency reform in France, applicable as of July 1, 2014

1. **Pre-insolvency innovations**
2. **A new accelerated safeguard procedure**
3. **Simplified and judicial liquidation procedures**
4. **A simplified judicial procedure for individual debtors**
5. **Readjustment of powers amongst insolvency actors**
6. **Administrative measures**
7. **Provisions amending various Codes**

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[1] This presentation is up to date as of July 4, 2014. The author would like to thank Elsa Haj Houssain for her enthusiastic involvement in the preparation of this presentation.

[2] This includes, for example, discussions concerning the introduction of the 'say on pay' concept into French law, a draft legislation for regulated agreements to be more transparent to shareholders, legislation concerning the obligation to have at least 40% of each gender within the boards of newly listed companies, increased duties for companies to consult Works council on corporate strategy, employees' representation at board level, double voting rights in listed companies and many other issues.

[3] Parliament and Government.

II. Insolvency recommendations from the European Commission

1. A preventive restructuring framework
2. Enabling informal restructuring
3. Facilitating negotiations
4. A second chance for entrepreneurs

I. Insolvency reform in France, applicable as of July 1, 2014

On January 2, 2014, the French Parliament allowed the Government to reform insolvency law and measures preventing financial distress[4] with the aim of simplifying business life. As a result, an extensive reform bill dated March 12, 2014 was published in the Official French Journal on March 14, 2014 and entered into force on July 1, 2014, consisting of 117 articles, thus bringing major change to the current insolvency and pre-insolvency provisions set out in the French Commercial Code.

A report[5] to the French President, published on the same day as the reform bill, sets out the purpose of the main changes to be expected following the entry into force of the reform.

In times of economic distress, this reform is another attempt to help struggling businesses by creating further restructuring tools and encouraging pre-insolvency measures. However, the multiple reforms in these recent years have not simplified but rather added layers to existing legislation, some more pertinent than others.

This reform was complemented by an implementing decree dated June 30, 2014, consisting of 145 articles. It was published on July 1, and came into force on July 2, 2014. According to its provisions, the decree applies only to insolvency procedures opened after its entry into force, with one minor exception[6].

Another order, which is currently in preparation, will address the reorganization of French Commercial Courts and modification of the French receivers' profession ("*administrateurs et mandataires judiciaires*"). This could, similarly to the recent chaotic implementation of the loi Florange[7], impact the current reform and again lead to several major changes in the reform.

However, this order can pride itself for taking into account certain recent customs and codifying their legal status.

Considering the length and complexity of the order and related decree, the objective of our presentation below is not to make an exhaustive description of the combined 262 articles of the reform. We made the

[4] In the form of an "*Ordonnance*" (No.2014-216): statute that is passed by the Council of Ministers (with the Parliament's consent) in an area of law which is normally reserved to legislation passed by the Parliament.
[5] JORF N°0062, March 14, 2014, p. 5243, Texte N°2.
[6] The provisions of the decree relating to the appointment of a "*mandataire*" under article L. 643-9 of the French Commercial Code are applicable to ongoing liquidation procedures. The "*mandataire's*" role in that respect is to continue pending procedures and distribute the subsequent proceeds after closure of the liquidation.
[7] 'The 'Florange Law' Deprived of its Main Significance by the French Conseil Constitutionnel in its Decision of 27 March 2014', Anker Sorensen, International Corporate Rescue Volume II, Issue 3, 2014, p. 141-142.

choice to present and comment on the points of the reform which seem particularly relevant in our opinion.[8]

1. Pre-insolvency innovations:

One of the key objectives of the reform is to facilitate debtors' recourse to amicable negotiations and also encourage creditors to participate in these procedures in order to increase the possibilities of finding upstream solutions. Making these aims compatible is not always easy to achieve.

1.1. In that sense, the reform has introduced two sets of innovative provisions in article L. 611-16 of the French Commercial Code:

- Firstly, any contractual provision, which modifies an ongoing agreement by reducing the rights or increasing the obligations of the debtor on the sole basis that the latter has obtained the opening of a conciliation procedure or the appointment of a "*mandataire ad hoc*", is paralyzed.
  Oddly enough, in one instance, the triggering factor of this new provision relates to the appointment of a *"mandataire ad hoc"*, whereas in the other instance it relates to the opening of the conciliation procedure. In the end, the result is identical as the appointment launches the related procedure. Harmonizing the wording of the triggering factors (opening of the procedure or appointment) would, however, have been better and may well be on the agenda of a future reform.
  More importantly, this should render inapplicable in France termination, forfeiture, acceleration, default and penalty clauses that are often included in loan agreements and contracts with foreign companies until different provisions based on other criteria are put in place.

- Secondly, is also paralyzed any contractual provision which, due to the mere appointment of a "*mandataire ad hoc*", or the opening of a conciliation procedure, charges the debtor with creditors' advisory fees incurred in relation to the "*mandat ad hoc*", or conciliation procedure, in excess of an amount set by a resolution ("*arrêté*") of the Minister of Justice, which is currently being prepared, but has not yet been finalized and published[9]. This provision is therefore not applicable at this date despite the reform having entered into force on July 1, 2014.
  It is not clear yet from the wording of this new provision to what extent financial advice (IBRs for example) from specialized firms designated and paid for by the debtor but on the creditors' request will be caught by this prohibition.
  It also remains to be seen whether this amendment, beyond its benefit to debtors, may also unexpectedly trigger market changes, for example in the selection by non-institutional players of their advisors (financial experts, consultants, lawyers proposing lower rates) and through the reinforcement of in-house restructuring teams within French institutions.

[8] Our comments are for information purposes only and under no circumstances intended to be a substitute for professional and individual advice.
[9] As of the date of July 4, 2014.

1.2. The reform adds at article L. 611-8-1 of the French Commercial Code that the debtor must inform the Works council or staff representatives of the content of the conciliation agreement when the debtor asks for its submission to formal approval ("*homologation*")[10] by the court.

In the previous regime, the representatives of the Works council were convened to the hearing during which the agreement was submitted to formal approval. This has not been reformed. As from now, the representatives of the Works council or staff representatives are entitled to be informed of the content of the conciliation agreement - ahead of the hearing - considering the wording of article L. 611-8-1, which imposes this duty on the debtor when it requests the approval.

The new wording clarifies the duty of information, but does not provide that a copy of the agreement be provided, nor submitted to review to the representatives of the Works council or staff representatives; nor does it provide the level of detail to which they are entitled. The previous regime, and that part of it has not changed either, provides that the persons called to the hearing (including the staff representatives and the Works council) may review the conciliation agreement at the court registry. The debtor will therefore need to seriously consider how best to communicate and what he will communicate to the representatives, considering the level of information to which they will have access when they are convened to the hearing.

By analogy, and this may also be an improvement resulting from this new provision, several leading academics[11] consider that this provision - which requires informing the representatives of the employees of the content of the agreement only when the debtor asks for its submission to formal approval - strengthens the fact that no formal information and consultation process of the Works council or staff representatives is prior required, i.e. when conciliators and "*mandataires ad hoc"* are appointed. Before the reform, only the statutory auditor was informed, as provided for by article L. 611-6 section 3 of the French Commercial Code of the appointment of a conciliator. As newly mentioned by article L. 611-3 section 1 of the French Commercial Code the obligation to inform the statutory auditor is now also extended to the appointment of the "*mandataire ad hoc*".

This will further encourage debtors to open a conciliation procedure as it will remain discrete and prevent further anxiety within the work force which could add to the existing financial difficulties.

It is also clear from the wording of the provision that the Works council needs not be informed of the conciliation procedure if the debtor simply requests the acknowledgment (*"constatation"*)[12] of the conciliation agreement. However, if the debtor selects this approach, it will not benefit from the advantage of prompting the backdating of the date of suspension of payments ("*cessation des*

[10] "*accord homologué*": after hearing creditors involved in the conciliation and the debtor, the court may formally approve an agreement, in the form of a judgment which will be made public and mention the existence of the agreement and the securities guaranteeing its enforcement, as well as the amounts secured by the guarantees.

[11] La Semaine Juridique, Entreprises et Affaires, Pr.Philippe Pétel, N°18, 1er mai 2014 p. 22 / Also in Bulletin Joly Entreprises en Difficultés, Mars –Avril 2014, Pr. François-Xavier Lucas, p. 112-113.

[12] *"accord constaté":* the President of the court may acknowledge an agreement upon joint request from the creditors involved in the conciliation and the debtor. The acknowledgement, in the form of an order, will be filed with the registry, but its access will be limited only to the parties to the agreement.

paiements")[13] no further than the date of the Court's approval of the conciliation agreement (article L. 631-8 section 2 of the French Commercial Code).

1.3. The reform also enshrines current practices regarding conciliation agreements (whether acknowledged or formally approved) by codifying the appointment of the conciliator (at the end of his mission[14]) as a "*mandataire à l'exécution de l'accord*"[15]. The latter's role will consist in the supervision of the enforcement of the agreement once it has been reached (article L. 611-8 III of the French Commercial Code). The implementing decree adds, what seemed self-evident, that the "*mandataire à l'exécution de l'accord"* must agree to take on this role (article R. 611-40-1 of the French Commercial Code). This is a useful innovation. It reinforces the effectiveness of conciliation agreements. It also creates a logical new mission for the conciliator who helped reach the agreement and eventually enables the parties to the agreement to be informed in a timely manner by the "*mandataire*" of any issue arising during the implementation of the agreement.

1.4. The reform increases the protection of new money creditors by extending the scope of their privileged status from contributions made in the approved conciliation agreement to all contributions made during the course of the conciliation process (article L. 611-11 of the French Commercial Code). In addition, creditors are now given a real incentive to make new money contributions since they will be treated as proper privileged creditors if the debtor is subsequently subject to a safeguard or reorganization procedure: the court cannot impose delays for their reimbursement, only they can accept them (article L. 626-20 I. 3° of the French Commercial Code).

On paper, this is a positive innovation but in practice, national creditors or creditors with a large presence and activity in France[16] may be urged, including by governmental bodies who have recently demonstrated strong state intervention[17], to accept delays.

1.5. Furthermore, the reform introduces a new court-authorized pre-pack sale during conciliation procedures, upon the debtor's request and consultation of the key creditors, for the partial or total transfer of its business, to be subsequently implemented in a safeguard or insolvency procedure (article L. 611-7 section 1 of the French Commercial Code). This further expands the conciliator's role and codifies current practice.

1.6. The judge's faculty to grant moratoriums has also increased through two changes in legislation:

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[13] "*cessation des paiements*": when a debtor is unable to meet his current liabilities with his available funds (article L. 631-1 section 1 of the French Commercial Code).

[14] The conciliator's mission ends at the same time as the conciliation procedure, which is after four months (or five months if extended by the conciliator). If the debtor requests acknowledgment or formal approval of the conciliation agreement, the conciliation procedure and the conciliator's mission end on the date of the Court or President of the Court's decision (article L .611-6 section 2 of the French Commercial Code).

[15] This function must not be confused with that of the "*mandataire ad hoc*".

[16] Recent history in France (and elsewhere, for example American hedge fund Elliot Management) shows that foreign creditors who do not have a large presence in the debtor's country and who may rely on their home courts, for example because of jurisdiction and choice of law clauses, are less pressure-sensitive.

[17] Mr Arnaud Montebourg, Minister of the Economy and Productive Recovery, has been largely involved in recent sales of French companies, such as Ascometal or Alstom, in order for the French government to retain a say in jobs and decision-making in the selection of acquirers of companies in strategic sectors.

- Firstly, during negotiations, the same judge can now grant debtors moratoriums whether they were summoned during the conciliation procedure or not[18] and they can be subject to the conclusion of the conciliation agreement (article L. 611-7 section 5 of the French Commercial Code), which allows for more efficient procedures.

- Secondly, during the enforcement of the conciliation agreement, the judge may impose moratoriums upon creditors, involved in the conciliation process, but whose claim was not addressed in the resulting agreement (article L. 611-10-1 of the French Commercial Code). The maximum delay being of two years, this reform, contrary to its aim, could therefore benefit creditors[19] who have refused to conciliate in an agreement that provides for a longer delay of reimbursement.

1.7. Finally, article L. 611-14 of the French Commercial Code puts an end to a common practice consisting in compensating the conciliator in proportion to the amount of debts waived by creditors, thus detaching gratification from the conciliator's main objective.

2. A new accelerated safeguard procedure:

The introduction of this new procedure (article L. 628-1 and following of the French Commercial Code) follows the recent creation of the safeguard procedure in July 2005 and the Accelerated Financial Safeguard procedure (AFS) in October 2010[20]. As the first AFS procedure was only filed in February 2013[21] and less than 50 such procedures have been implemented as of today, it remains to be seen whether accelerated safeguard procedures will rapidly find their use and how often.

The purpose of this new procedure is that it enables debtors to move from a conciliation procedure to a safeguard procedure, where during a conciliation, an agreement cannot be reached due to the dissent of some creditors involved. It also has the advantage of being faster than the main safeguard procedure (it is concluded within three months from its opening judgment) and its use is only in the hands of the debtor. As for the AFS[22], it can also be used as a pressure tactic during conciliation negotiations in order to reach an agreement.

2.1. Various conditions must be met for a debtor to be eligible to open an accelerated safeguard procedure. Several differ from those required by the two other safeguard procedures (the general safeguard procedure and the AFS), thereby complexifying the Code. Namely, the procedure affects all prior creditors unlike the AFS and most importantly, the debtor may be in suspension of payments when

[18] Prior to the reform, the judge only had the power to grant moratoriums to debtors if they were summoned during the conciliation procedure.
[19] Particularly foreign creditors used to aggressive strategies.
[20] 'La SFA, ou pourquoi faire simple quand on peut faire compliqué', Anker Sorensen, Capital Finance, 23 mai 2011, N°1019, p. 12-13.
[21] 'French Accelerated Financial Safeguard Procedure: The Nanterre Court Gives Green Light to the First Safeguard Plan Presented under the AFS Regime', Anker Sorensen, International Corporate Rescue, Volume 10, Issue 4, 2013, p. 213-215.
[22] 'La Sauvegarde Financière Accélérée : une arme de dissuasion passive ?', Anker Sorensen, Capital Finance, 14 mars 2011, N°1009, p. 8-9 and 'La SFA : patience et longueur de temps', Anker Sorensen, Capital Finance 1er octobre 2012, N° 1078 , p. 10.

it applies for it (not exceeding 45 days), which is not the case for the two other safeguard procedures. Safeguard procedures are thus no longer simply used as upstream measures, but may help debtors at almost all stages of financial difficulties. In that regard, the reform has missed an opportunity to simplify the current law: it seems that enabling general safeguard procedures to be opened in suspension of payments would have allowed the same result as introducing a third procedure. Nevertheless, the condition requiring that the debtor be engaged in a conciliation procedure and establishes a plan proposal *("projet de plan")*, sufficiently backed by enough creditors, that ensures sustainability of the company is welcome. Indeed, this requirement brings efficiency to the process by assuring creditors are incited to be collaborative, particularly in the conciliation phase.

The implementing decree has set the thresholds to attain in order to be eligible to open an accelerated safeguard procedure, which differ from those applicable to the AFS:

(i) more than twenty employees;
(ii) an annual turnover of at least a 3 M€; and
(iii) total assets in the balance sheet of at least 1.5 M€ (R. 628-2 of the French Commercial Code).

2.2. Concerning the filing of claims in the accelerated safeguard procedure, a list of creditors is established by the debtor and is sent to each one to improve transparency (article L. 628-7 section 2 of the French Commercial Code). Furthermore, in order to speed up the process, the reform introduces the ability for the debtor to file the list with the court registry on behalf of creditors if they have not done so individually (article L. 628-7 section 3 of the French Commercial Code). This should encourage claims to be filed in a timely manner.

2.3. However, it must be pointed out that the effect and outcome of accelerated safeguard procedures is limited, unlike the general safeguard procedure, to creditors who were members of a committee during a conciliation procedure (article L. 628-8 section 3 of the French Commercial Code). As a result, this new procedure is still consensual vis a vis the creditors who are not members of the committees since the court cannot impose moratoriums under the accelerated safeguard plan upon these creditors. The end result is probably that they will be entitled to payment and may request it as soon as the plan is adopted by the court.

3. Simplified and judicial liquidation procedures:

27 articles are dedicated to amending these two procedures. Their content mainly concerns technical adjustments, such as setting the date of the dissolution of a company in liquidation at the closure of its liquidation procedure instead of the judgment ordering the liquidation procedure.

4. A simplified judicial procedure for individual debtors:

4.1. This is an innovation, known as the "*rétablissement professionnel*", applicable to individuals who operate a commercial activity.

The procedure consists in the court appointment and enquiry of a "*mandataire judiciaire*" (article L. 645-4 of the French Commercial Code) into the debts and assets of the individual debtor and results in the

complete discharge of his debts, born prior to the judgment opening the procedure. To be eligible to this regime, the individual debtor must meet the following conditions (article L. 645-1 and following of the French Commercial Code):

- The debtor (i) is in suspension of payments, (ii) is not involved in an insolvency procedure, (iii) has not employed any employees during the last six months prior to their application for this procedure, (iv) owns assets the value of which is below 5000 € (as set by the implementing decree - article R. 645-1 of the French Commercial Code), (v) has not been subject to a liquidation procedure or to a "*rétablissement professionnel"* in the last five years, and (vi) his business assets are separate from his personal estate.
  The "*mandataire judiciaire*" must inform the guarantors of the opening of the procedure (article R. 645-11 of the French Commercial Code put in place by the implementing decree).

- The benefit of this regime may be reconsidered if (i) the requirements for professional recovery are not met, (ii) the debtor may incur professional or criminal sanctions, or (iii) the debtor did not act in good faith (article L. 645-9 of the French Commercial Code).

4.2. The procedure only lasts four months and, as a result, the court orders the complete discharge of debts, with the exception of those owed to employees and specific debts, for example linked to those originating from an offence committed by the debtor for which he is found guilty (articles L. 645-4, L. 645-11 and L. 643-11 of the French Commercial Code). It is expected to have the effect of greatly limiting the amount of recourse to insolvency procedures in France by excluding impecunious individual debtors from statistics. As a result, the procedure allows for individual debtors to bounce back from their financial difficulties.

4.3. The debtor may request the opening of a liquidation procedure and a *"rétablissement professionnel"* at the same time. The decree, which entered into force on July 2, 2014, states that the court must first try to implement the latter, and only when the conditions are not met can the court open a liquidation procedure, confirming the reform's objective to reduce insolvency procedures (article R. 645-2 and R. 645-3 of the French Commercial Code).

4.4. At the closure of the procedure, the decree also adds that the judgment will be published in the BODACC[23] to be made public.

5. Readjustment of powers amongst insolvency actors:

Another reason and objective behind the reform is that French insolvency law is truly viewed as very favorable to the debtor and its shareholder(s). Obviously, the authorities have started acting in response to this criticism and the reform timidly tackles this issue by giving creditors more say in the various insolvency procedures.

5.1. Creditors involved in a safeguard or reorganization procedure[24], subject to being members of a committee, may now submit an alternative restructuring plan to the court (article L. 626-30-2 of the

[23] Bulletin Officiel des Annonces Civiles et Commerciales.
[24] The new article L .631-19 of the French Commercial Code, which addresses reorganization procedures, refers to article L 626-30-2 which deals with safeguard.

French Commercial Code) in competition with, and independently from the plan prepared and submitted by the debtor; debtors are thus no longer the only players entitled to submit a plan, as was previously the case.

According to the reform, the administrator prepares a report on each plan proposal and the court then decides, following the vote by the committees and bond holders if any, which of the plans is the most appropriate in its view[25]. This may incentivize debtors to consider the demands of creditors when submitting a plan, as failure to do so could lead activist creditors in the committees to try to rally other creditors with better conditions behind their plan and the court choosing in favor of it.

5.2. As another example, the reform introduces a rather unique recapitalization mechanism within reorganization procedures. This mechanism deprives shareholders who have opposed a decision to restore the equity, of their right to vote, if a recapitalization is provided under the plan proposal by other shareholders or third parties who support and commit to the plan.

According to article L. 626-3 section 2 of the French Commercial Code which remains unchanged, if the debtor's equity has fallen below half of the share capital, an extraordinary shareholders' meeting is first required to restore it up to the amount proposed by the court appointed administrator and which may not be lower than half of the company's share capital.

To do so, the reform offers shareholders the possibility to convert their claims[26] into shares:

(i) up to the amount admitted by the creditors' representative ("*mandataire judiciaire*") or supervising judge ("*juge commissaire*"); and
(ii) within the limit of their remaining portion after the reduction of their claims provided by the plan proposal (section 4 of the new article).

In the event the resolution in relation to the restoration of the equity cannot be adopted by the shareholders with the requisite majority pursuant to article L. 626-3, because of the opposition of some of them, the reform provides that the court appointed administrator may request that a "*mandataire*" be appointed by the court to:

(i) convene another shareholders' meeting in order to decide on the restoration of the equity as per article L. 626-3 section 2; and
(ii) vote on this restoration, on behalf of the opposing shareholders (article L. 631-9-1 of the French Commercial Code). The implementing decree notes that the administrator's request is made to the President of the court by summoning the company (R. 631-34-6 of the French Commercial Code).

The wording of this section is unclear and the cross references to other articles and sections of the Code worsen its understanding.

[25] 'Premiers regards sur l'ordonnance du 12 mars 2014 réformant le droit des entreprises en difficulté', Pr. Pierre-Michel Le Corre, Recueil Dalloz, 27 mars 2014, N°12, p. 739.
[26] No distinction is made, in this article, as to the nature of such claims which may be current account claims or receivables.

This part of the reform raises several questions:

- This new mechanism conflicts with article L. 225-248 of the French Commercial Code[27] which relieves public limited liability companies from restoring the equity if it falls below half of the share capital when they are involved in a safeguard or reorganization procedure;

- It is not clear whether it is the court appointed "*mandataire*" who prepares the draft resolutions sent to the shareholders together with the letters convening them to the meeting and whether he decides on the restoration mode to use. It is not clear either whether the "*mandataire*" is entitled to restore the equity as per article L. 626-3[28] of the Code, i.e. by choosing to first reduce the share capital and subsequently increase it to the benefit of existing shareholders and/or third parties. In that event, the opposing shareholders may be ousted from the company if they are either : (i) not financially able to subscribe to new shares after a share capital reduction, or (ii) prevented from subscribing;

- The meaning of "opposing" shareholders is unclear. Indeed, it is not stated whether a broad sense of the term must be used, i.e. whether a shareholder is deemed to have "opposed" the restoration by his absence at the meeting resulting in the lack of quorum, and therefore preventing the restoration of equity.

6. Administrative measures:

The reform also took the opportunity to do some necessary grooming of the French Commercial Code.

6.1. This involved updating several provisions to comply with recent decisions of the French "*Conseil Constitutionnel*". Two decisions[29] ruled unconstitutional the ability for the Commercial Court to act upon its own motion to open a reorganization or a liquidation procedure. The reform removed these provisions (articles L. 631-3 and L. 640-5 of the French Commercial Code) and deleted the faculty for the court, on its motion, to extend the safeguard procedure to other entities in the event their assets and debts are intermingled[30] with those of the debtor (article L. 621-2 of the French Commercial Code).

6.2. Within safeguard procedures, the supervising judge may now also request notaries to provide information on the debtor's financial, economic and social situation (article L. 623-2 of the French Commercial Code).

7. Provisions amending various Codes:

14 articles in the reform bill amend the French Civil Code, Rural Code, Tax Code and Labor Code and make minor changes to current legislation such as inserting an obligation, in a liquidation procedure

[27] This is not in the insolvency section, but in the corporations section of the Code.
[28] To which article L 631-9-1 expressly refers and which provides for a reduction of the share capital followed by an increase.
[29] QPC N°2012-282, Société Pyrénées services et autres, December 7, 2012 and QPC N°2013-368, March 7, 2014.
[30] In a situation known under French insolvency law as "*confusion des patrimoines*".

which does not maintain the activity of the company, for the liquidator to inform an apprentice of the termination of his contract of apprenticeship, and to give him compensation that meets, at least, the remuneration he would have obtained until the term of his contract.

II. Insolvency recommendations from the European Commission

An EU Recommendation[31] for a new approach to business failure and insolvency was signed by Viviane Reding, Luxembourgish Vice-president of the European Commission, on March 12, 2014 (i.e. the same date as the French reform bill).

Although non-binding, this Recommendation exposes detailed objectives through 36 articles and resembles the wording of the Regulation concerning cross border insolvency procedures[32] which was directly binding. The Recommendation mentions that Member States are invited to comply with its text by March 14, 2015 and that the Commission will be evaluating the amendments made to national laws on September 14, 2015. This all contributes to the Commission's desire to rapidly unify the main insolvency law principles in the European Union, and could therefore, if it sees fit, decide to draft a binding Directive putting Member States under an obligation to transpose the Directive into national law through implementing measures.

In its lengthy introduction, the Recommendation sets out to ensure that viable European companies experiencing financial difficulties have access to pre-insolvency measures at an early stage in order to prevent insolvency and affecting creditors and employees, as well as helping honest debtors recover rapidly from insolvency. In that sense, the Recommendation suggests that several essential guidelines be complied with by Member States, including the following points.

1. A preventive restructuring framework:

The Commission firstly requires Member States to facilitate the restructuring of businesses in financial difficulties at an early stage and during that time, debtors are able keep control of their business. A majority approval of a restructuring plan must suffice to bind all creditors and the restructuring procedure must not be lengthy or costly.

These conditions are largely covered by the three different variations of safeguard procedures existing in France, which are anticipated and voluntary procedures. Following the March 2014 reform bill and its introduction of the accelerated safeguard procedure, it is now possible, depending on the circumstances, to swiftly bind the main creditors (and not only the financial creditors), who were prior involved in the conciliation procedure, by a restructuring plan.

[31] Commission Recommendation (2014/135/EU) of 12 March 2014 on a new approach to business failure and insolvency.

[32] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency procedures, which came into force on 31 May 2002. The EU Commission issued a proposal for amending this Regulation on December 12, 2012, which was approved by the EU's Justice Council on June 9, 2014.

2. Enabling informal restructuring:

Member States must also allow debtors to enter a process for restructuring their business without formally opening court procedures. Interestingly, this requirement is satisfied under French law by conciliation procedures and the possible appointment of a "*mandataire ad hoc*" which were both amended by the reform bill dated March 12, 2014.

3. Facilitating negotiations:

In addition, Member States must allow debtors to request a temporary stay of individual enforcement actions of up to four months and renewable up to a maximum of twelve months to restructure their business before creditors can file individual claims. Current French insolvency law does not comply with this requirement since creditors may always file individual claims as long as no judgment has opened insolvency procedures.

4. A second chance for entrepreneurs:

Member States must finally ensure debtors are fully discharged of their debts within three years of the date of the opening of an insolvency procedure. To this date, French law does not meet this condition even though the safeguard procedure moves in that direction, and it seems very ambitious to expect all Member States to soon be in a position to comply with this short period of time.

Overall, French law complies with some of the main objectives set out by the Recommendation by its strong desire to encourage pre-insolvency measures. However, certain conditions would require amending current provisions. This assures that a number of reforms are still in perspective.